



This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

Usage guidelines

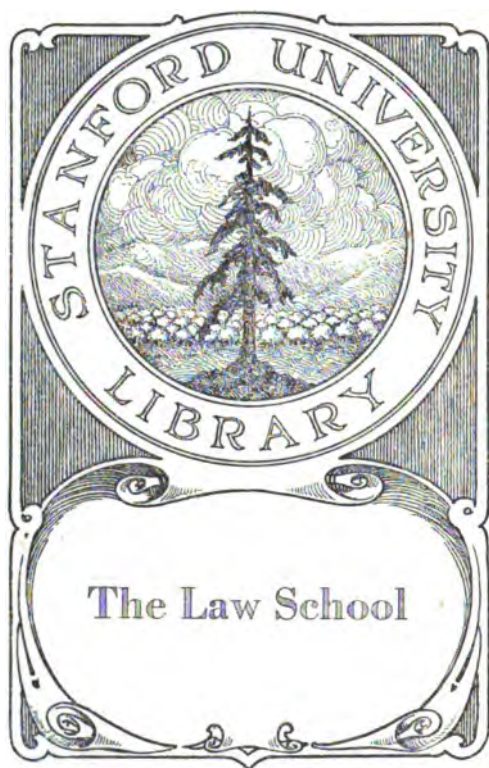
Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

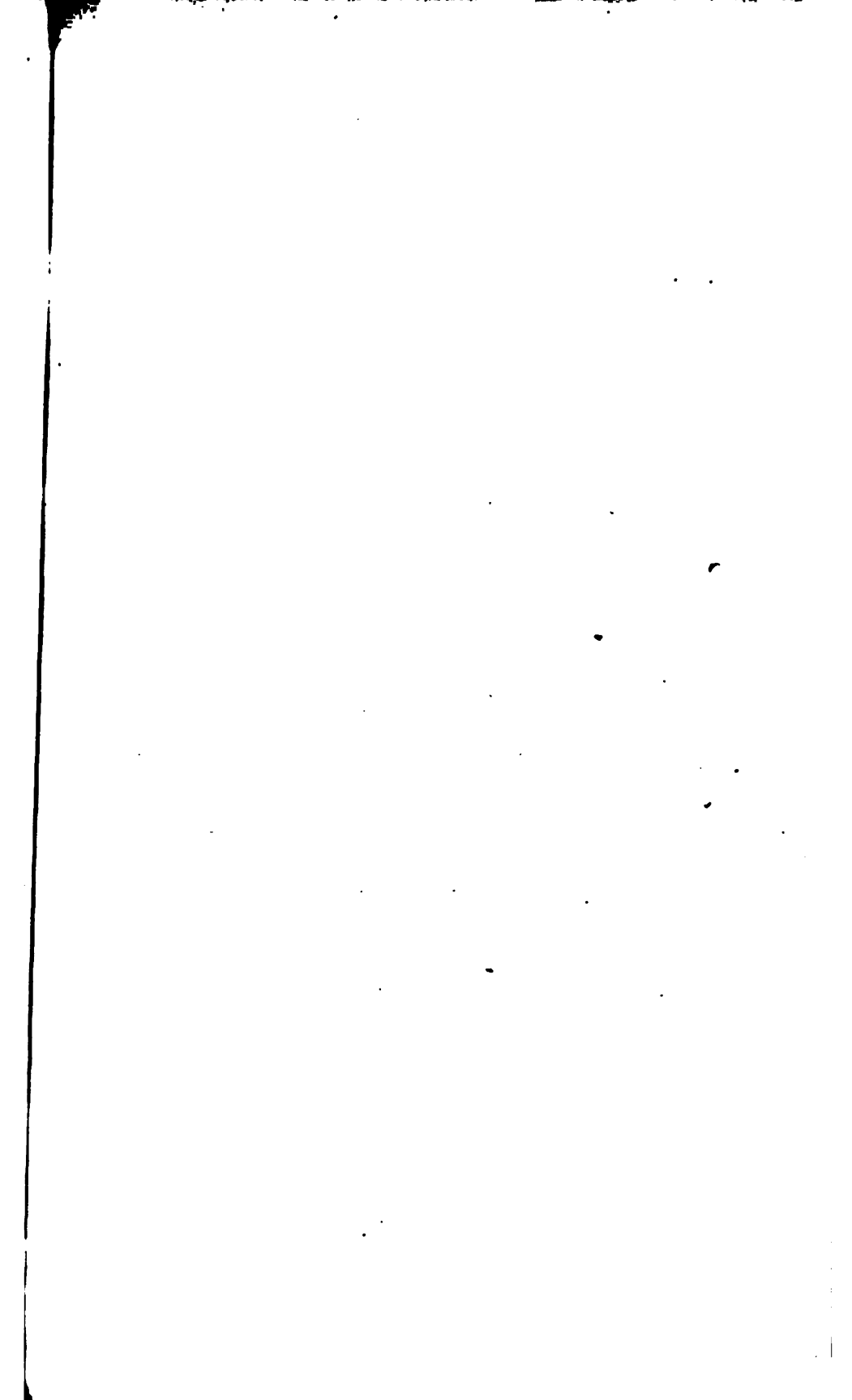
- + *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.
- + *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.
- + *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.
- + *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

About Google Book Search

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at <http://books.google.com/>







REPORTS
OF
CASES DECIDED
BY THE
ENGLISH COURTS,
WITH
NOTES AND REFERENCES TO KINDRED CASES
AND AUTHORITIES.

BY
NATHANIEL C. MOAK,
Counsellor at Law.

VOLUME XXVIII.

CONTAINING

- 14 COX'S CRIMINAL CASES, pp. 85-565.
3 QUEEN'S BENCH DIVISION, pp. 1-673.
4 QUEEN'S BENCH DIVISION, pp. 1-433.

NEW YORK LIBRARY

ALBANY, N. Y.:
WILLIAM GOULD & SON,
LAW PUBLISHERS AND BOOKSELLERS.
1881.

Entered according to Act of Congress in the year eighteen hundred and eighty-one,
By WILLIAM GOULD & SON,
in the office of the Librarian of Congress, at Washington.

359783

REARL 0907MAT2

JUDGES.

LORD HIGH CHANCELLOR.

Right Hon. LORD CAIRNS,¹ appointed 1874.

Right Hon. LORD SELBORNE,² " 1880.

LORDS OF APPEAL IN ORDINARY.

Right Hon. LORD BLACKBURN, appointed 1876.

Right Hon. LORD GORDON,³ " "

Right Hon. WILLIAM WATSON,⁴ " 1880.

PRIVY COUNCIL, JUDICIAL COMMITTEE.

Right Hon. Sir JAMES W. COLVILLE.

Right Hon. Sir BARNES PEACOCK.

Right Hon. Sir MONTAGUE E. SMITH.

Right Hon. Sir ROBERT P. COLLIER.

*Appointed under
34 & 35 Vict.
ch. 91: usu-
ally sitting.*

SUPREME COURT OF JUDICATURE.

COURT OF APPEAL—*Ex officio Members.*

The Right Hon. the LORD HIGH CHANCELLOR (President).

The Right Hon. the LORD CHIEF JUSTICE of England.

The Right Hon. the MASTER OF THE ROLLS.

The Right Hon. the LORD CHIEF JUSTICE of the Common Pleas.

The Right Hon. the LORD CHIEF BARON of the Exchequer.

Ordinary Members.

Right Hon. Sir WILLIAM MILBOURNE JAMES,⁵ appointed 1870.

Right Hon. Sir GEORGE MELLISH,⁶ " "

Right Hon. Sir RICHARD BAGGALLAY, " 1875.

Right Hon. Sir GEORGE WM. W. BRAMWELL,⁷ " 1876.

Right Hon. Sir WILLIAM BALIOL BRETT, " "

Right Hon. Sir RICHARD PAUL AMPHLETT,⁸ " "

Right Hon. Sir HENRY COTTON,⁹ " 1877.

Right Hon. Sir ALFRED HENRY THESIGER,¹⁰ " "

Right Hon. Sir GEORGE JESSEL,¹¹ " 1881.

Right Hon. Sir NATHANIEL LINDLEY,¹² " "

HIGH COURT OF JUSTICE.

CHANCERY DIVISION.

Right Hon. the LORD HIGH CHANCELLOR (President).

Right Hon. Sir GEORGE JESSEL,¹¹ Master of the Rolls, appointed 1873.

Hon. Sir RICHARD MALINS,¹³ Vice-Chancellor, " 1866.

Hon. Sir JAMES BACON, " " 1870.

Hon. Sir CHARLES HALL, " " 1873.

Hon. Sir EDWARD E. KAY,¹⁴ " " 1881.

Hon. Sir EDWARD FRY,¹⁵ Justice of the High Court, " 1877.

Hon. Sir JOSEPH W. CHITTY,¹⁶ Justice of the High Court, " 1881.

¹ Retired with Earl of Beaconsfield's administration, April, 1880: 15 L. J., 227.

² Appointed under Gladstone's administration, April, 1880: 15 L. J., 227.

³ Died August 21, 1879: 15 L. J., 115.

⁴ Appointed to fill vacancy of Lord Gordon, April, 1880: 15 L. J., 115, 234.

⁵ Died June 7, 1881: 16 Law Jour., 258; 71 Law Times, 106.

⁶ Died June 16, 1877: 12 Law Jour., 372.

⁷ Retired September 1, 1881: 71 L. T., 333; 16 L. J., 411.

⁸ Retired on account of ill health, October, 1877: 63 L. T., 417.

⁹ Appointed June, 1877, in place of Lord Justice MELLISH: 12 Law Jour., 386.

¹⁰ Appointed November, 1877, in place of Lord Justice AMPHLETT: 12 L. J., 631. Died Oc-

tober 29, 1880: 15 L. J., 507, 508, 518, 527; 69 L. T., 419, 433.

¹¹ Promoted to Court of Appeal, September 10, 1881: 16 L. J., 397.

¹² Promoted from Court of Common Pleas, October 28, 1881: 71 L. T., 409. Sworn in No-

vember 1, 1881: 72 L. T., 12.

¹³ Retired March 19, 1881: 16 L. J., 137, 146.

¹⁴ Appointed March 30, 1881: 16 L. J., 147.

¹⁵ Appointed April 30, under the act of April 24, 1877: 12 Law Jour., 251.

¹⁶ Appointed September 6, 1881: 71 L. T., 321, 328; 16 L. J., 397.

NAMES OF THE JUDGES.

QUEEN'S BENCH DIVISION.

Right Hon. Sir ALEXANDER JAMES EDMUND COCKBURN, ¹ Bart., G.C.B., Lord Chief Justice of England, appointed 1859.	
Right Hon. Sir JOHN DUKE COLERIDGE, ² Lord Chief Justice of England, appointed Dec. 1, 1880.	
Hon. Sir JOHN MELLOR, ³	appointed 1861.
Hon. Sir ROBERT LUSH,	" 1865.
Hon. Sir WILLIAM FIELD,	" 1875.
Hon. Sir HENRY MANISTY,	" 1876.
Hon. Sir CHARLES SYNGE CHRISTOPHER BOWEN, ⁴	" 1879.
Hon. Sir FORD NORTH, ⁵	" 1881.

COMMON PLEAS DIVISION.

Right Hon. LORD COLERIDGE, ⁶ Lord Chief Justice of the Common Pleas, appointed 1873.	
Hon. Sir WILLIAM ROBERT GROVE, appointed 1871.	
Hon. GEORGE DENMAN,	" 1872.
Hon. Sir NATHANIEL LINDLEY, ⁷	" 1875.
Hon. Sir HENRY CHARLES LOPES,	" 1876.
Hon. Sir J. C. MATHEW, ⁸	" 1881.
Hon. Sir HENRY MATHER JACKSON, ⁹	" "
Hon. Sir LEWIS CAVE, ¹⁰	" "

EXCHEQUER DIVISION.

Right Hon. Sir FITZ-ROY KELLY, ¹¹ Lord Chief Baron, appointed 1866.	
Hon. Sir ANTHONY CLEASBY, ¹²	appointed 1868.
Hon. Sir CHARLES EDWARD POLLOCK,	" 1873.
Hon. Sir JOHN WALTER HUDDLESTON,	" 1875.
Hon. Sir HENRY HAWKINS,	" 1876.
Hon. Sir JAMES FITZ-JAMES STEPHEN, ¹³	" 1879.

COURT OF APPEAL IN BANKRUPTCY.

The Ordinary Judges of the Court of Appeal.

PROBATE, MATRIMONIAL, DIVORCE AND ADMIRALTY DIVISION.

Right Hon. Sir JAMES HANNEN (President), appointed 1872.	
Right Hon. Sir ROBERT J. PHILLIMORE,	" 1876.

CHIEF JUDGE IN BANKRUPTCY.

Hon. Sir JAMES BACON, Vice-Chancellor.

JUDGE OF THE COURT OF ARCHES.

LORD PENZANCE, appointed 1875.

1 Died November 20, 1880: 15 L. J., 576, 589; 15 Am. L. Rev., 184.
2 Appointed to fill vacancy occasioned by death of Lord COCKBURN.
3 Resigned June 11, 1879: 14 Law Jour., 365; 67 Law Times, 127.
4 Appointed June 11, 1879: 14 Law Jour., 365; 67 Law Times, 127.
5 Appointed in place of Mr. Justice LINDLEY, promoted to Court of Appeal. Sworn in November 1, 1881: 72 L. T., 1, 12.
6 Promoted to Court of Appeal, October 29, 1881: 71 L. T., 409.
7 Appointed March 1, 1881: 16 Law Jour., 103.
8 Appointed March 1, 1881: 16 L. J., 103. Died March 12, 1881: 16 L. J., 113.
9 Appointed March 23, 1881, to fill vacancy occasioned by death of Mr. Justice JACKSON: 16 Law Journal, 123.
10 Died September 18, 1880: 15 Law Jour., 459; 66 Law Times, 359, 367.
11 Resigned January, 1879: 14 Law Jour., 15; 66 Law Times, 191.
12 Appointed January, 1879, in place of Baron CLEASBY: 14 L. Jour., 34; 66 Law Times, 191.

TABLE OF CASES

REPORTED IN THIS VOLUME.

A.		PAGE.		PAGE.	
Accrington Local, etc., ads. Nut-				Brown, matter of,.....	452
ter,	817			Brownlow ads. Regina,.....	566
Adams ads. Regina,	565			Brunskill ads. Holme,.....	401
Allhusen vs. Labouchere,.....	527			Buhl ads. Welply,.....	76, 231
Angus vs. Dalton,.....	80, 706			Bullock vs. Corry,.....	311
Ardsley ads. Queen,.....	233			Bullock ads. Tomlinson,.....	751
Atwood vs. Sellar,.....	794			Burchell ads. Eastland,.....	362
B.				C.	
Babcock vs. Lawson,	831			Carey ads. Regina,.....	564
Bailey ads. London Tramways Co.,	199			Chambers ads. Clark,.....	295
Bannister ads. Brice,	459			Charlton ads. Coverdale,.....	331, 705
Barnett ads. Watt,.....	169, 318			City of London, etc., ads. Hunt,..	7
Barton Regis, etc., vs. Overseers				Clark vs. Chambers,.....	295
of Liverpool,	277			Clark vs. Molyneux,.....	217
Battersby ads. Bishop of St. Al-				Clarke vs. Roche,	157
bans,	314			Cohen vs. Hale,.....	325
Baxendale vs. Bennett,.....	434			Collingridge vs. Royal Exchange,	
Bedingfield ads. Regina,.....	587			etc.,.....	158
Bedminster Union ads. Keynsham				Corry ads. Bullock,.....	311
Bennett ads. Baxendale,.....	434			Coverdale vs. Charlton,.....	331, 705
Union,	311			Cox ads. Rabbits,.....	285
Bentham vs. Hoyle,	263			Cramp ads. Regina,.....	616
Bew vs. Harston,.....	385			D.	
Bidder vs. North Staffordshire, etc.,	848			Dalton ads. Angus,.....	80, 706
Bishop of St. Albans vs. Battersby,	314			Davis ads. Regina,	657
Bishopwearmouth ads. Laing,....	278			Downer ads. Regina,.....	629
Bourne ads. Hooper,.....	236			Doyle vs. Kaufman,.....	307
Bradlaugh, matter of,.....	419			Drage ads. Regina,.....	534
Bradlaugh vs. Queen,.....	482			E.	
Bradley vs. Greenwich, etc.,.....	331			Eastland vs. Burchell,.....	362
Bradnum ads. Winterfield,.....	293			Evershed vs. London & North	
Bramley-Moore ads. Griffiths,....	700			Western, etc.,	128
Brampton Union ads. The Queen,	388				
Brannon ads. Regina,.....	620				
Brass ads. Lewis,.....	528				
Brice vs. Bannister,.....	459				
Bristol & North Somerset Railway					
Co., matter of,.....	2				

F.

	PAGE.
Fitzpatrick ads. Leslie,	211
Flatman ads. Regina,	622
Fletcher ads. Schuster,	349
Florence ads. Mulliner,	390
Fowler vs. Knoop,	766
Francis vs. Maus,	308
French ads. Regina,	172, 582
Fullagar ads. Regina,	605

G.

Garden, etc., ads. Rose,.....	217
Goodfellow ads. Regina,.....	578
Goodwin ads. Taylor,.....	748
Government Stock, etc., ads. The Queen,.....	377
Governors of the College of Christ, etc., matter of,.....	6
Greathead ads. Regina,.....	542
Great Western, etc., ads. Lewis,..	173
Great Yarmouth vs. City of London,.....	214
Greenwich, etc., ads. Bradley,....	831
Griffiths vs. Bramley-Moore,....	700

H.

Hall ads. Moore,	164
Hall vs. Pritchett,	194
Halsam ads. Hindley,	390
Hancock ads. Whistler,	79
Hancock and Baker ads. Regina,	554
Harrington vs. Victoria, etc.,	453
Harston vs. Bew,	885
Hermann ads. The Queen,	762
Hindley vs. Halsam,	390
Hitchman ads. Hoyle,	755
Hobbs ads. Ward,	142
Hogarth vs. Latham & Co.,	517
Holbrook ads. Queen,	58, 681
Hollway ads. Laing,	372
Holme vs. Brunsell,	401
Hooper vs. Bourne,	236
Horne vs. Rouquette,	424
Howells ads. Langdon,	792
Hoyle ads. Bentham,	263
Hoyle vs. Hitchman,	755
Hubbard ads. Regina,	662
Hudson vs. Tooth,	40
Hughes ads. Regina,	573
Hunt vs. City of London, etc.,	7
Hutchins and Romer, matter of, ..	705

J.

Jacobson ads. Regina, 648

K.

	PAGE
Jarman ads. Regina,.....	545
Jones, ads. Regina,.....	656
K.	
Kaufman ads. Doyle,.....	307
Keynsham Union vs. Bedminster Union,	811
Kidd ads. Straker,.....	206
Knoop ads. Fowler,.....	766

L.

Labouchere ads. Allhusen,.....	527
Laing vs. Bishopwearmouth,.....	278
Laing vs. Holloway,.....	372
Lamb vs. Walker,.....	332
Langdon vs. Howells,.....	792
Larner ads. Regina,.....	639
Latham & Co. ads. Hogarth,.....	517
Lawson ads. Babcock,.....	831
Leslie vs. Fitzpatrick,.....	211
Lewis vs. Brass,.....	528
Lewis vs. Great Western, etc.,...	173
London, City of, etc., ads. Huut,...	7
London, City of, ads. Great Yar- mouth,.....	214
London & North Western, etc., ads. Evershed,.....	128
London Supply, etc., ads. Pharma- ceutical, etc.,.....	775
London Tramways Co. vs. Bailey,...	199

M.

Maas ads. Francis,.....	308
Marks ads. Stallard,.....	349
Michell ads. Regina,.....	634
Midland Railway Co. ads. Pontifex, ..	11
Milledge ads Queen,.....	784
Miller ads. Regina,.....	603
Molyneux ads. Clark,.....	217
Moore vs. Hall,.....	164
Morgan ads. Regina,.....	583
Moyce vs. Newtoning,.....	674
Mulliner vs. Florence,.....	390

N.

Newington ads. Moyce,	674
North Staffordshire, etc., ads. Bid- der,	848
Nutter vs. Accrington Local, etc.,.	817

O.

O'Callaghan ads. Regina,..... 641

TABLE OF CASES.

vii

	PAGE.
Orman ads. Regina,	610
Orton ads. Regina,	576
Overseers of Liverpool ads. Barton Regis, etc.,	277

P.

Paul vs. Summerhayes,	604
Petch ads. Regina,	551
Pharmaceutical Society vs. Lon- don, etc.,	775
Phillips vs. South Western Rail- way Co.,	844
Pickup vs. Thames Insurance Co.,	471
Pontifex vs. Midland Railway Co.,	11
Pontifex vs. Severn,	277
Porteus vs. Watney,	206, 443
Postmaster-General ads. Queen,...	359
Pritchett ads. Hall,	194

Q.

Queen vs. Ardsley,	233
“ ads. Bradlaugh,	492
“ vs. Bampton Union,	388
“ vs. Government Stock, etc.,	877
“ vs. Hermann,	702
“ vs. Holbrook,	53, 681
“ vs. Milledge,	784
“ vs. Postmaster-General, ...	359
“ vs. Read,	123
“ vs. Rogers,	16
“ vs. Sankey,	331
“ vs. Swindon,	772
“ vs. Walsall, Overseers of, ..	387
“ vs. Wellings,	356
“ vs. Wilson,	29
See Regina.	
Quick ads. Southwark Water Co.,	285

R.

Rabbitts vs. Cox,	285
Rayner, matter of,	380
Read ads. Queen,	123
Regents Canal Co. vs. St. Pancras, etc.,	69
Regina vs. Adams,	565
“ vs. Beddingfield,	587
“ vs. Brannon,	620
“ vs. Brownlow,	566
“ vs. Carey,	564
“ vs. Cramp,	616
“ vs. Davis,	657
“ vs. Downer,	629
“ vs. Drage,	534
“ vs. Flatman,	622

	PAGE.
Regina vs. French,	172, 583
“ vs. Fullagar,	605
“ vs. Goodfellow,	578
“ vs. Greatehead,	542
“ vs. Hancock & Baker, ...	554
“ vs. Holbrook,	53
“ vs. Hubbard,	662
“ vs. Hughes,	573
“ vs. Jacobson,	648
“ vs. Jarman,	545
“ vs. Jones,	656
“ vs. Lerner,	639
“ vs. Michell,	634
“ vs. Miller,	603
“ vs. Morgan,	583
“ vs. O'Callaghan,	641
“ vs. Orman,	610
“ vs. Orton,	576
“ vs. Petch,	551
“ vs. Read,	123
“ vs. Roadley,	627
“ vs. Roberts,	536
“ vs. Rogers,	16
“ vs. Saunders,	562
“ vs. Smith,	624
“ vs. Titley,	645
“ vs. Treadgold,	570
“ vs. Twose,	579
“ vs. Weston,	595
“ vs. Wilson,	29
“ vs. Woodman,	561
“ vs. Young,	548

See Queen.

Richards, matter of,	322
Roadley ads. Regina,	627
Roberts ads. Regina,	536
Roche ads. Clarke,	157
Rogers ads. Queen,	16
Rose vs. Gardden, etc.,	217
Rouquette ads. Horne,	424
Royal Exchange, etc., ads. Col- lingridge,	158

S.

Sandback Charity Trustees, etc., matter of,	1
Sandys vs. Small,	380
Sankey ads. Queen,	331
Saunders ads. Regina,	562
Schuster vs. Fletcher,	349
Sellar ads. Atwood,	794
Severn ads. Pontifex,	277
Slater ads. Spencer,	669
Small ads. Sandys,	380
Smith, matter of,	329
Smith ads. Regina,	624
Southwark Water Co. vs. Quick,...	285
South Western, etc., ads. Phillips,	844

	PAGE.
Spencer vs. Slater,.....	669
Stallard vs. Marks,.....	849
Story, matter of,.....	157
St. Albans, Bishop of, vs. Bat- tersby,.....	314
St. Pancras, etc., ads. Regents Canal Co.,.....	69
Straker vs. Kidd,	206
Summerhayes ads. Paul,.....	664
Swindon ads. Queen,	772

T.

Taylor vs. Goodwin,.....	748
Thames Insurance Co. ads. Pickup,	471
Titley ads. Regina,.....	645
Todd, matter of,.....	848
Tomlinson vs. Bullock,.....	751
Tooth ads. Hudson,.....	40
Treadgold ads. Regina,.....	570
Twose ads. Regina,.....	579

V.

	PAGE.
Victoria, etc., ads. Harrington,....	453

W.

Walker ads. Lamb,.....	832
Walsall, Overseers of, ads. Queen,	387
Ward vs. Hobbs,.....	142
Watney ads. Porteus,.....	208, 443
Watt vs. Barnett,.....	169, 318
Wellings ads. Queen,.....	856
Welply vs. Buhl,.....	76, 231
Weston ads. Regina,.....	595
Whistler vs. Hancock,.....	79
Wilson ads. Queen,.....	29
Winterfield vs. Bradnum,.....	293
Woodman ads. Regina,.....	561

Y.

Young ads. Regina,	548
--------------------------	-----

UNIVERSITY OF TORONTO LIBRARY

C A S E S
DETERMINED BY THE
QUEEN'S BENCH DIVISION
OF THE
HIGH COURT OF JUSTICE,
AND BY THE
COURT OF APPEAL
ON APPEAL FROM THE QUEEN'S BENCH DIVISION
AND BY THE
COURT FOR CROWN CASES RESERVED,
X L I V I C T O R I A .

[3 Queen's Bench Division, 1.]

Nov. 7, 1877.

[IN THE COURT OF APPEAL.]

***In the matter of an Arbitration between the SAND- [1
BACK CHARITY TRUSTEES and the NORTH STAFFORDSHIRE
RAILWAY COMPANY.**

*Inquiry as to Compensation under Lands Clauses Consolidation Act, 1845 (8 Vict. c. 18)
—Taxation of Costs by Master under 32 & 33 Vict. c. 18, s. 1—Jurisdiction of Court
to review Taxation.*

Where costs of an inquiry before arbitrators under the Lands Clauses Consolidation Act, 1845, "are taxed and settled as between the parties by one of the taxing masters of the superior courts of law" under s. 1 of 32 & 33 Vict. c. 18, the court has no jurisdiction over the master's taxation on a motion to review.

Owen v. London and North Western Ry. Co. (Law Rep., 3 Q. B., 54), approved.

1877

Re the Bristol and North Somerset Railway Co.

[8 Queen's Bench Division, 10.]

Nov. 29, 1877.

10] *Re* THE BRISTOL AND NORTH SOMERSET RAILWAY COMPANY.*Mandamus, Rule for—Impossibility of performing Statutory Duty—Want of Funds.*

The court will not issue a writ of mandamus against a public body when it is clearly shown that the performance of the duty sought to be enforced is impossible, by reason of want of funds not involving any default on the part of such body.

An order was issued by the Board of Trade, under the 7th section of the Railway Clauses Act, 1863 (26 & 27 Vict. c. 92), directing a railway company to make a bridge for the purpose of carrying a turnpike road over their line instead of crossing the same on the level.

Previously to the making of this order, the company had exhausted all their powers of raising money in making the line, and, the undertaking proving a failure, they had leased their line in perpetuity to another company, and such lease was confirmed by a special act of Parliament. The lessees took all the profits of the line, paying a portion of the interest due to the company's debenture stockholders. The company consequently had no funds for the construction of the bridge.

On an application for a mandamus to compel the company to comply with the order of the Board of Trade, the above facts being shown, the court discharged the rule for the mandamus.

In this case an order had been made by the Board of Trade upon the Bristol and North Somerset Railway Company, under s. 7 of the Railways Clauses Act, 1863 (26 & 27 Vict. c. 92), requiring the company, within eighteen months of the date of the order, to carry a certain turnpike road at Radstock over their railway, by means of a bridge, instead of crossing the same on the level, on the ground that the existing level crossing was dangerous to the public.

It appeared, upon affidavit, that the Bristol and North Somerset Railway Company had, soon after obtaining its original act in 1863, fallen into difficulties. An Arrangement Act had to be obtained in 1869, under which its creditors became stockholders, and not only were the whole of the company's capital and borrowing powers exhausted in partly completing the line, but the line could never have been finished if it had not been for the co-operation of the Earl of Warwick, a landowner interested in the completion of the undertaking, who guaranteed and carried out the completion of the line, and the company still owed him upwards of £90,000. It further appeared that the company was entirely without funds, and that their line was worked in perpetuity by the Great Western Railway Company, under agreements confirmed by the Great Western Railway Various Powers Act, 1867, and the Great Western Railway Additional Powers Act, 1871. By virtue of these agreements

the Great Western Railway Company had the exclusive use and management of the property of the Bristol and North Somerset Railway Company. The Great Western Railway Company had worked the line from the date of its opening to the present time, and under a guarantee given by them, they paid the interest on a portion of the debenture stock of the Bristol and North Somerset Railway Company. They had received certain small amounts over and above what they had paid for the above mentioned purpose; but under the terms of the said agreements they claimed to retain all such amounts, and the Bristol and North Somerset Railway Company had not, from the date of the opening of their line, received any money whatever from the traffic thereof.

The Bristol and North Somerset Railway Company not having complied with the order of the Board of Trade, a rule *nisi* had been obtained for a mandamus to compel them to do so.

Little, Q.C., showed cause: He contended, *inter alia*, that the *court would not make the rule absolute for [12 a mandamus, when it was practically impossible for the railway company to comply with the writ for want of funds, such want of funds not being brought about by any default on the part of those managing the company.

Sir J. Holker, Q.C., A.G., and *Bowen*, supported the rule: The absence of funds is not an answer to the application for the writ to enforce performance of a statutory duty. The company cannot, by using up their funds for other purposes, discharge themselves from the liability to carry out a duty which is imposed upon them for the public safety: *Reg. v. Eastern Counties Ry. Co.* (').

[*Cockburn*, C.J.: The justice of the case would seem to be that the Great Western Railway Company should perform this duty.]

It is very doubtful whether there is any remedy against them. The 112th and 113th sections of the Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), throw upon the lessees all the obligations imposed by that act or the special act upon the company. This would not render the lessees liable to the obligation imposed by the Railways Clauses Act of 1863. It is frequently the case that the special act imposes on the lessees all the liabilities of the company, but there are not any such provisions in this case.

Cockburn, C.J.: It would be idle to make this rule absolute if in the end there would be no possibility of enforcing obedience to the mandamus. The Bristol and North Som-

(') 10 A. & E., 531.

1877

Re the Bristol and North Somerset Railway Co.

set Railway Company is virtually defunct. It has no power of raising money. Its share capital is spent, and its borrowing powers are exhausted. It has parted with the possession and use of the railway in perpetuity to the Great Western Railway Company. The affair was bankrupt, and it was only by the Great Western Railway Company's taking it in as part of their system that the line could continue to exist. Under these circumstances, if the rule were made absolute, how could the mandamus be enforced? The company has no funds or property except that airy nothing, the reversion after a perpetuity. This court cannot put people in prison for not complying with an order when they have [13] no means of doing so. The *Board of Trade have thought that it was essential to the public safety that this bridge should be made. That was a question which it was for them to decide. It is unfortunate that the machinery of the law would seem to fail with regard to the carrying out of their decision. It was contended that the Great Western Railway Company cannot be ordered to make the bridge under the 112th & 113th sections of 8 & 9 Vict. c. 20. As that company has taken upon itself the maintenance and management of the Bristol and North Somerset Company's line, and receives all the benefits arising therefrom, in reason and justice they ought to bear all the liabilities that would otherwise be imposed upon the Bristol and North Somerset Company. If they cannot be made so liable under the existing state of the law, we can only regret that it is so, but to enforce by mandamus an order which imposes on a virtually defunct company a duty which it is impossible for them to discharge, would be contrary to the elementary principles of justice. The rule must be discharged.

MELLOR, J., concurred.

Rule discharged.

Solicitors for appellant: *Solicitors to the Board of Trade.*

Solicitors for the Bristol and North Somerset Railway Company: *Frere, Foster & Frere.*

As to mandamus to compel a railroad to build a bridge, etc., see 13 Eng. R., 691 note; 15 Eng. R., 253 note; 21 Eng. R., 47 note; 23 Eng. R., 345 note.

A mandamus will not be granted where it would be fruitless and ineffectual to relieve the relator. Nor, when the object is impossible of attainment, should the court compel a single step towards it: *People v. Tremain*, 29 Barb., 96, 17 How. Pr., 142, reversing

17 id., 10; *People v. Supervisors*, 12 Barb., 217.

So where, on an appeal from an order denying an application for a mandamus to compel the common council of a city to appoint certain officers, it appeared that the official term, over which the controversy arose, had already expired; held that the appeal should be dismissed: *People v. Com. Council*, 82 N. Y., 575.

Where, upon an application for a mandamus to compel the comptroller to draw his warrant upon the treasurer of the state for the payment of a claim upon the treasury, the comptroller sets up the defence that no appropriation has ever been made by law for the payment of the claim as required by sec. 8, art. 7 of the constitution, this is a conclusive answer to the application: *People v. Burrows*, 27 Barb., 89, approved; *Hayne v. Hood*, 1 South Car. (N.S.), 16.

See *Raleigh, etc., v. Jenkins*, 68 N.C., 502.

A mandamus will not lie against the financial officer of a municipal corporation to compel the payment of a claim against the corporation, unless it clearly appears that there is money in the treasury applicable to the payment: *People v. Connolly*, 2 Abb. Pr. (N.S.), 815.

So on an application for a mandamus to compel the attorney-general to give a certificate which would entitle the party to payment from the treasury: *People v. Tremain*, 29 Barb., 96, 17 How. Pr., 142, reversing *Id.*, 10.

A board of officers having the power of appointment to an office cannot reduce the amount fixed by law as the salary of said office, or make a binding contract with their appointee to perform the duties of the office at a less sum.

Also held, that it was the duty of the board to draw a requisition for the amount, the performance of which could be compelled by mandamus; that the treasurer of the police department was not authorized to act independent of the board, but as its officer and under its control, and the requisition must be made by its order; and that it was no excuse for a refusal to perform this duty that there were no funds in the hands of the comptroller subject to the requisition of the board, as the relator had the legal right to compel a full performance of its duty by the board.

It seems that, in order to maintain an action against the city upon a claim of this character, the corporation must be first put in default, and the person seeking payment must adopt the lawful remedy to put the police board in motion as preliminary to an action: *People v. Board of Police*, 75 N. Y., 38, reversing 12 Hun, 658, distinguishing *People v. Tremain*, 17 How. Pr., 142.

In Michigan, the board of state audi-

tors are made by the constitution an independent tribunal, over which the courts have no supervisory control; and the Supreme Court has no jurisdiction by mandamus to coerce or direct their action: *People v. Board*, 32 Mich., 191.

Where, by statute, the comptroller is required to pay a specific sum to a designated person, the comptroller cannot set up fraud in procuring the act, or that the legislature was imposed upon, as grounds for withholding his official action requisite to obtain payment from the treasurer: *Angle v. Runyon*, 38 N. J. Law, 408.

Where a claim has been properly audited and allowed by the board of supervisors, and it appears that there is an unpaid balance in the treasury appropriated for such expenses, a mandamus will issue against the auditor, and also one against the comptroller of the city of New York, requiring them to audit the voucher and pay the account thereof to the relator for services rendered by him for the county: *People v. Earle*, 47 How. Pr., 458; *State v. Hastings*, 15 Wisc., 75; *People v. Edmunds*, 19 Barb., 468.

Where officers neglect to levy money by tax which they are required to raise for public creditors, they may be compelled by mandamus to do so. They may be compelled to raise it, leaving the judicial determination to be had before payment: *People v. Supervisors*, 8 Abb. Dec., 566, affirming 11 Abb. Pr., 114.

A railroad company owes a duty to the public to exercise the franchise granted to it, and cannot abandon a portion of its road and refuse to operate it: *People v. Albany, etc.*, 24 N. Y., 261, affirming on this point 19 How., 523, 37 Barb., 216; *Rex v. Severn*, 2 Barn. & Ald., 646; *Kenton v. Bank, etc.*, 10 Bush (Ky.), 529; *Attorney-General v. West, etc.*, 36 Wisc., 466; *Farmers, etc., v. Henning*, 17 Amer. Law Reg. (N.S.), 266.

See *Montell v. Consolidation*, 45 Md., 16.

And may be restrained by a stockholder from building only a small portion of the route: *Cohen v. Wilkinson*, 1 Mac N. & Gord., 481.

See *Graham v. Birkenhead, etc.*, 1 Mac N. & Gord., 146; *York, etc., v. Regina*, 7 Eng. Railway and Canal Cases, 459.

1877 In the matter of the Governors of the College of Christ, &c.

The court will restrain taking up a track connecting one railroad with another: *Hoyt v. Chicago, etc.*, 94 Ills., 601.

Mandamus lies to compel a railroad company to perform the public duties imposed upon it by its charter—as to operate the road: *Railroad Commissioners v. Portland, etc.*, 63 Maine, 269; *People v. Albany, etc.*, 24 N. Y., 261, reversing on this point 19 How., 523, 37 Barb., 216; note to *Fish v. Weatherwax*, 2 Johns. Cas. (2d ed.), 217-52 *et seq.*, Id., 217-61; *U. S. v. Union Pacific R. R. Co.*, 3 Dillon, 515, 9 Western Jur., 356, 7 Chicago Leg. News, 282, U. S. Circuit Court, Iowa Dist., affirmed 91 U. S. R., 343; *State v. Hartford, etc.*, 29 Conn., 538; *Rex v. Severn*, 2 Barn. v. Ald., 646; *Farmers, etc., v. Henning*, 17 Amer. Law Reg. (N.S.), 266; *People v. R. & S., etc.*, 76 N. Y., 294.

Where a county is liable to repair a bridge, the proper remedy is indictment, not mandamus: *Jamieson v. Lanark*, 38 U. C. Q. B., 647.

The commissioner of public works of the city of New York, in pursuance of a resolution and ordinance of the common council, advertised for proposals for a street improvement. The relator was the lowest bidder and his proposal was accepted. In proceedings by mandamus to compel the commissioner to enter into a contract, held, that if the relator established a clear legal right to the contract, he had a remedy at law by action against the city to recover damages, and so was not entitled as of right to a mandamus; that if the right was not clear, the

writ was properly denied on that ground; that under the circumstances, the granting or refusal of the writ was a matter of discretion in the court below, with the exercise of which the Court of Appeals could not interfere: *People v. Campbell*, 72 N. Y., 496.

Where a city organized and acting under our general law makes a contract for the improvement of a street at the expense of the property-holders, and the contractor does the work in whole or in part, and the engineer refuses to make an estimate, and the council refuses to issue precepts upon the proper application against the property-holders, a suit cannot be maintained by the contractor against the city for damages. The remedy in such case is by mandate to compel the engineer and council to perform their duties: *Greencastle v. Allen*, 43 Ind., 347.

Where an express company refuses to carry fragile goods, such as glass, offered to it for transportation, unless the shipper will accept a receipt containing a contract limiting the company's liability for breakage, etc., a mandamus will not issue, commanding the express company to carry the goods subject to all the common law liabilities of a common carrier: *People v. Babcock*, 16 Hun, 313.

If a ministerial officer intentionally, in order to avoid doing his duty, puts it beyond his power to obey the law or a mandamus, he will be punished for contempt: *People v. Salomon*, 54 Ills., 39, 44-8.

See *People v. R. & S., etc.*, 76 N. Y., 294.

[3 Queen's Bench Division, 16.]

May 29, 1877.

[IN THE COURT OF APPEAL.]

16] *In the matter of an Arbitration between THE GOVERNORS OF THE COLLEGE OF CHRIST, BRECKNOCK, and MARTIN.

Practice—Award, Time for setting aside—9 & 10 Wm. 3, c. 15, s. 2—Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 26.

By 9 & 10 Wm. 3, s. 2, an application to set aside an award must be made before the last day of the term after the arbitration.

By 36 & 37 Vict. c. 66, s. 26, "terms" are abolished, but they may continue to be

Hunt v. City of London Real Property Co.

1877

referred to in all cases in which they were used as a measure for determining the time within which an act is required to be done.

An award was made on the 28th of March, 1877. An application to set it aside, under 9 & 10 Wm. 3, c. 15, s. 2, was made in the Easter sittings on a day after the 8th of May. Easter Term in 1877, under the former procedure, would have begun on the 15th of April and ended on the 8th of May:

Held, affirming the judgment of the Queen's Bench Division, that the application ought to have been made on a day before the 8th of May, for "terms" still exist as a measure for determining the time within which an award should be set aside under 9 & 10 Wm. 3, c. 15, s. 2.

[3 Queen's Bench Division, 19.]

Nov. 7, 1877.

[IN THE COURT OF APPEAL.]

***HUNT V. THE CITY OF LONDON REAL PROPERTY [19
COMPANY.**

Practice—Application for New Trial—Action commenced in Chancery Division—Divisional Court—Rules of Court, Order xxxvi, Rule 29a (Dec. 1876)—Order xxxix, Rule 1 (Dec. 1876)—Order by Chancery Judge directing trial in Middlesex.

Where an action attached to the Chancery Division has been tried by a jury before a judge of one of the common law divisions, application for a new trial must be made to a divisional court.

Where an action attached to the Chancery Division is to be tried by a jury, and, no place of trial being named in the statement of claim, the action is set down to be tried in the county of Middlesex, no special order of the judge of the Chancery Division, stating the reason why it should be so tried, is necessary.

THIS action, which related to the title to a strip of land, and a wall round it, situate in the city of London, was commenced in the Chancery Division, and was attached to the court of Hall, V.C.

The defendants gave notice to have the action tried before a judge and jury, and, no place of trial having been named in the statement of claim, it was set down for trial in the general list of actions for trial at the Middlesex sittings. It came on for trial before Cockburn, C.J., on the 13th of July, 1877. His Lordship refused to try it, on the ground that no order had been made by the Vice-Chancellor under the Rules of Court, Order xxxvi, Rule 29a (Dec. 1876), stating the reason why it was expedient that it should not be tried in the Chancery Division.

Application was then made to Hall, V.C., who, on the same day, made an order that the action should be tried before a jury in a common law division "on the ground that it was a proper case for a jury, and that his Lordship had not the power to summon one." The case was then mentioned again to Cockburn, C.J., on the 14th of July. His Lordship was of opinion that the reason stated by the Vice-Chan-

1877

Hunt v. City of London Real Property Co.

cellor in his order did not show a sufficient ground for sending the case to be tried out of the Chancery Division, as he thought that the Vice-Chancellor had himself power to summon a jury. But out of respect to the Vice-Chancellor, his Lordship, after consulting with Field, J., consented, 20] under *protest, to try the action. Ultimately, the case was tried before Field, J., with a jury, and a verdict was found for the plaintiff, but no judgment had yet been delivered by the judge.

On the 2d of August, 1877, the defendants moved before a divisional court, consisting of Kelly, C.B., and Field, J., for an order *nisi* for a new trial, on the ground of misdirection by the judge, and of the verdict being against the weight of the evidence. The court refused to hear the application, on the ground of want of jurisdiction (').

The defendants appealed from this decision, and the Court of Appeal adjourned the hearing of the appeal till after the long vacation.

B. B. Rogers, for the defendants: The divisional court refused the application of the defendants on the ground that they had no jurisdiction to entertain it, and that the defendants ought to apply to the judge who tried the action. But that decision was based upon an erroneous interpretation of the rules of court. The original rule in the Rules of the Supreme Court, 1875, regulating the practice, was Order xxxix, Rule 1, which was as follows: "A party desirous of obtaining a new trial of any cause *tried in* the Queen's Bench, Common Pleas, or Exchequer Divisions, on which a verdict has been found by a jury, or by a judge without a jury, must apply for the same to a divisional court," &c. This order applied equally to actions attached to the Chancery Division as to those commenced in the three common law divisions; because all actions attached to the Chancery Division which are to be tried by a jury have to be *tried in* one of the three common law divisions: *Warner v. Murdoch* ('). In cases where a special order is necessary for that purpose under Order xxxvi, Rule 29a (Dec. 1876), the chancery judge has to state the reason why it is desirable that it should not be tried in the Chancery Division; but, according to a dictum of Bramwell, L.J., in *Warner v. Murdoch* ('), in ordinary cases, where no place of trial is named by the plaintiff in his statement of claim, and the judge does not desire the action 21] to be tried at a particular place, but "the action *goes of its own accord, so to speak, to be tried at the Middlesex

(') 2 Q. B. D., 605.

(*) 4 Ch. D., 750; 21 Eng. R., 687.

(*) 4 Ch. D., at p. 756; 21 Eng. R., 692.

sittings," no special order from the chancery judge is necessary. That was the case in the present instance.

[JESSEL, M.R.: As you refer to what was said by Bramwell, L.J., as a mere dictum, I think it right now to say that we are all of opinion, and now decide, that in this case no such order of the Vice-Chancellor was necessary.]

By the new rule of December, 1876, which is substituted for Rule 1 of Order xxxix, it is provided that "where in an action in the Queen's Bench, Common Pleas, or Exchequer Divisions there has been a trial by jury, any application for a new trial shall be to a divisional court. And where the trial has been by a judge without a jury the application for a new trial shall be to the Court of Appeal." In this rule the words "tried in" are left out; but it is clear that it must have been intended to be coextensive with the rule for which it was substituted, and to include actions commenced in the Chancery Divisions. The object of the new rule was to make a difference between jury trials and trials without a jury, and not between actions attached to the Chancery Divisions and those attached to the other divisions. If this construction is not correct there is no provision for applications for a new trial in the case of chancery actions.

JESSEL, M.R.: I think that the divisional court was the proper court to hear this application. It is quite true there has been a change in the language of the Order xxxix, Rule 1. I have no right to import any personal knowledge of my own, but it appears obviously on the face of the order that the variation was a mere accidental change in language on the part of the draughtsman. The original order was this: "A party desirous of obtaining a new trial of any cause tried in the Queen's Bench, Common Pleas, or Exchequer Divisions on which a verdict has been found by a jury or by a judge without a jury, must apply for the same to a divisional court." Then the substance of the new order was to make a distinction between the two cases of a trial before a jury and a trial before a judge without a jury. That was the extent of the alteration, and it is carried out by the altered order. Unluckily—I use the word because it has led to a difference *of opinion between this court and [22 the divisional court—the words "tried in" were left out, I suppose, for the sake of supposed conciseness, and it now stands "an action in." Now, what does "an action in" mean? It may mean one of two things; it may mean "tried in," or it may mean an action "attached to" the division. In the original rule the former was meant. There is no rea-

1877

Hunt v. City of London Real Property Co.

son to be suggested why the expression in the new rule should mean anything else ; and I am of opinion that it still means "tried in," and consequently this action being tried in the Queen's Bench Division, that is, before a judge of that division, though not attached to the division by actual transfer, the proper court to go to was the divisional court.

There is only one other reason which I think I ought to add, and that is the reason of convenience. It would be manifestly most inconvenient to have different modes of obtaining new trials, depending upon the name of the division to which the action happened to be attached. There can be no grounds that I know of for any such distinction, and I do not think that a fair interpretation of the rules leads to such a distinction.

I am, therefore, of opinion that the divisional court ought to have entertained this application. With this intimation of opinion, the applicants may apply again to the divisional court, and if the divisional court should consider that they cannot now entertain the application by reason of the prior refusal, then they may apply to the appeal court on the merits for an order *nisi* for a new trial.

BAGGALLAY, L.J.: I am of the same opinion. I think it not an immaterial circumstance that unless the construction of this rule is that which has been put upon it by the Master of the Rolls, there is no provision in the rules whatever for obtaining a new trial of an action from the Chancery Division tried by one of the judges of the common law division.

THESIGER, L.J.: I am of the same opinion. One can see plainly the main object which the judges had in view in the change of the original rule, namely, that where there had been a trial before a judge without a jury—where the judge was the person who had the whole cause of action before 23] him—it was thought inconvenient *that there should be an appeal from him to the divisional court and then a further appeal to the appeal court. On the other hand it is difficult to see any object for the passing of a rule, that when the action had been commenced in the Queen's Bench, Common Pleas, or Exchequer Division, the motion for a new trial should be made in the divisional court ; but that where the action had been commenced in the Chancery Division, although tried in the same manner as an action in the common law division, the motion should be made in a different way. I also concur with what Lord Justice Baggallay has said, that unless we adopt this construction of the present rules one cannot find any provision under which there could

be a new trial of an action commenced in the Chancery Division. (')

Appeal allowed.

Solicitors: *Tathams & Pym.*

(') Nov. 22, 1877. On this day the defendants renewed the application before the divisional court, consisting of Cock-

burn, C.J., Mellor and Lush, JJ. The court granted an order nisi.

See 27 Eng. R., 3 note; Ruston v. Tobin, 27 Eng. R., 110.

Where issues are tried before a jury in an equity suit a motion for a new trial on a case and exceptions, founded upon irregularities committed on the trial by the jury, must be made before the entry of judgment in the action, otherwise the findings of the jury will be deemed to have been acquiesced in, and questions of fact involved therein cannot be reviewed on an appeal from the judgment: *Chapin v. Thompson*, 23 Hun, 12.

Ordinarily the verdict of a jury, on a feigned issue with respect to some con-

troverted fact arising in the case, is not conclusive upon the question submitted, but merely advisory in its character, and the chancellor may, when satisfied that truth and justice require it, render a decree contrary to the verdict.

The verdict of a jury in a case contesting a will in chancery, under the statute, is to have the same force and effect as is given to a verdict in a case at law under the like state of facts; and when not manifestly against the weight of evidence, the court is bound by it in the same manner and to the same extent as if it were a case at law: *Calvert v. Carpenter*, 96 Ills., 63.

[3 Queen's Bench Division, 23.]

Nov. 22, 1877.

PONTIFEX V. THE MIDLAND RAILWAY COMPANY.

Costs—County Courts Act, 1867 (30 & 31 Vict. c. 142), s. 5—"Action founded on Contract or on Tort."

The statement of claim alleged that the plaintiff, as vendor of goods, delivered them to the defendants, a railway company, as carriers for reward, the goods being consigned to the intending purchasers: that afterwards, and before the goods had been delivered to the consignees or claimed by them from the defendants, the plaintiff discovered that the consignees were insolvent, and, as unpaid vendor, gave notice to the defendants not to deliver the goods to the consignees, but to hold them to the plaintiff's order, and before the goods were delivered to the consignees the plaintiff required the defendants to re-deliver them to him: that the defendants refused to do so, and delivered them to the consignees, who absconded without paying for the goods. The plaintiff claimed their value, viz., £12 18s. 6d. as damages. The defendants paid that sum into court, and the plaintiff took it out in satisfaction:

Held, that the action was "founded on tort," and not "on contract" within s. 5 of the County Courts Act, 1867 (30 & 31 Vict. c. 142), and that the plaintiff having recovered a sum exceeding £10 was not deprived of costs by that section.

THE statement of claim contained the following allegations:—

1. The plaintiff is at merchant carrying on business in London.

*2. On the 27th of October, 1875, the plaintiff de- [24

1877

Pontifex v. Midland Railway Co.

livered to the defendants, and the defendants received from the plaintiff as the vendor, certain goods, namely, three casks of composition pipe, as carriers thereof, for reward to them in that behalf, consigned by the plaintiff to Henry Winfield & Co., Birmingham, the intending purchasers.

3. The plaintiff subsequently, and before any of the goods had been delivered to Winfield & Co. pursuant to the said consignment, and before they had claimed delivery of the same from the defendants, discovered that Winfield & Co. were in insolvent circumstances, and thereupon, on the 22d of November, 1875, none of the goods having been then paid for, he, as unpaid vendor, gave notice to the defendants not to deliver any part of the goods to Winfield & Co., but to hold them to the plaintiff's order, and before any of them were delivered to Winfield & Co., the plaintiff required the defendants to re-deliver the same to him, but they refused and neglected to do so, and contrary to and after they had received the plaintiff's notice and order, they, on the 17th of December, 1875, delivered them to Winfield & Co.

4. Shortly after Winfield & Co. had so got possession of the goods, they closed their house of business at Birmingham and absconded, and the plaintiff does not know where they are now to be found.

5. The plaintiff has never been paid for any part of the goods, and by reason of the defendants' default in delivering them to Winfield & Co., notwithstanding the notice and order given to them by the plaintiff, he has wholly lost the goods and the price and value thereof, namely, £12 16s. 6d.

The plaintiff claimed £12 16s. 6d. damages.

The defendants having paid into court the amount claimed, the plaintiff took it out in satisfaction. The master having taxed the plaintiff's costs, the taxation was set aside by Lopes, J., at chambers, on the ground that the plaintiff had recovered a sum not exceeding £20 in an action "founded on contract," within 30 & 31 Vict. c. 142, s. 5, the County Courts Act, 1867.

July 9. *Crumph*, for the plaintiff, moved to rescind the order of Lopes, J.: The action is founded on tort. The 25] stoppage in *transitu* and the notice to the defendants not to deliver to Winfield & Co., re-vested the property in the goods in the plaintiff, and after that any act of interference with the plaintiff's right to the goods is a conversion, for which an action of trover lay under the old system. The plaintiff had the right of immediate possession. The

possession of the defendants was the possession of the plaintiff. After the notice had been given the contract of carrying was ended, and the defendants refused to enter into any other contract. An action against common carriers, for not safely delivering goods intrusted to them as common carriers, always was an action founded on the breach of their common law duty, independently of contract, within the meaning of the County Court Acts: *Tattan v. Great Western Ry. Co.* (*). *Baylis v. Lintott* (*) is not in point, for the action was for breach of contract, and was expressly so framed, and no action on the case would have lain.

W. G. Harrison, Q.C., for the defendants: *Tattan v. Great Western Ry. Co.* (*) was a decision upon 19 & 20 Vict. c. 108, where the words were "where an action of contract is brought." It was to remedy the anomalous state of things pointed out in that case by Cockburn, C.J., that in framing the statute now in question, the County Courts Act, 1867, 30 & 31 Vict. c. 142, s. 5, the larger words were used—"an action founded on contract"—so as to include actions which arise out of contract. In the present case there is an express contract to deliver to Winfield & Co., and, in case a right to stop in transitu occurs, there is a further implied contract to deliver to any other person whom the consignor may name. This is the real right claimed, and it is based on contract. No relations arose between the plaintiff and defendants independently of contract. In *Tattan v. Great Western Ry. Co.* (*) the declaration was framed as an action on the case, and the decision went on that ground. That case was reflected on in *Baylis v. Lintott* (*), where the court preferred to follow *Legge v. Tucker* (*), which was an action against a livery stable-keeper for negligence in the case of a horse delivered to him, and the court held it was an action of assumpsit, and not on the case, within 13 & [26 14 Vict. c. 61, s. 11, there being no duty independently of the contract. That case governs the present.

Crump, in reply: The contract of carriage was made by the plaintiff only as an agent for the purchaser, and there was no contract between the plaintiff in his own right and the defendants. "A bailee is liable in trover if he delivers to the wrong person:" Benjamin on Sales (2d ed.), p. 719.

Cur. adv. vult.

(*) 2 E. & E., 844; 29 L. J. (Q.B.), 184. (*) Law Rep., 8 C. P., 845; 5 Eng. R., 819.

(*) 1 H. & N., 500; 26 L. J. (Ex.), 71.

1877

Pontifex v. Midland Railway Co.

Nov. 22. The judgment of the Court (Cockburn, C.J., and Cleasby, B.) was read by

COCKBURN, C.J.: In this case there was a statement of claim by which the plaintiff claimed £12 16s. 6d. The defendant paid that sum into court, and the plaintiff took it out in satisfaction.

The question is, whether the plaintiff is entitled to recover his costs. His right to them is regulated by 30 & 31 Vict. c. 142, s. 5, by which it is enacted that if the plaintiff in an action in the superior courts "shall recover a sum not exceeding £20 if the action is founded on contract, or £10 if founded on tort," he shall not be entitled to any costs unless he has a certificate of the judge, or an order of the court.

The amount recovered in this case being £12 16s. 6d. it follows that if the action is founded on tort the plaintiff is entitled to costs, if on contract he is not so entitled. Formerly, when there were forms of action, there would have been little difficulty in determining whether an action was founded on contract or tort, but now that the claim is made by a narration of facts, it does not always clearly appear to which class, contract or tort, the case properly belongs. Effect, however, must be given to the distinction made by the act of Parliament.

If there is an express contract, and the act complained of is a breach of it, the action is clearly founded on contract; if there is no contract at all, but the act is an unauthorized intermeddling with property, it is clearly founded on tort; but the difficulty arises in a case like the present, where there is undoubtedly an unauthorized intermeddling with property, but the act is connected with a contract originally entered into, and there is ground for *regarding it as founded on that contract, or some new contract implied from the circumstances.

The facts of the present case are that the plaintiff had agreed to sell a quantity of composition pipe to H. Winfield & Co., and had delivered them to the defendants as carriers, consigned to the purchasers. This appears from the statement in paragraph 2 to be the ordinary case of delivery to a carrier for a purchaser, and when that is the case, unless other circumstances appear, it is regarded as a contract made on behalf of the consignee by the consignor as his agent. (See what is said by the judges in *Cork Distilleries Co. v. Great Southern and Western Ry. Co. (Ireland)* (1), and by the Lord Chancellor (2).)

It further appears by paragraph 3 that Winfield & Co.

(1) Law Rep., 7 H. L., at p. 277; 10 Eng. R., 25.

(2) At p. 278; 10 Eng. R., 26.

becoming insolvent, the plaintiffs stopped the goods in transitu. The effect of this was, no doubt, to put an end to the contract of carriage, and to revest the property in the plaintiff. The plaintiff afterwards gave notice to the defendants to hold the goods to his order, but the defendants notwithstanding delivered the same afterwards to Winfield (paragraph 3). Under these circumstances, it may no doubt be said that the claim of the plaintiff arose out of the original contract of carriage, and was in that way founded on contract. But it appears to us that the words "founded on contract" mean directly founded on contract, and not remotely, as in the present case. In reality what the defendants did was to perform the original contract of carrying, which they had no right to do after the stopping in transitu. The contract was put a stop to by an unusual and unexpected event, the stopping in transitu, and the question really becomes whether that event placed the plaintiff and the defendants in the relation of parties contracting with each other, or in the relation which exists where one person is, without any intention to be so, in the possession of the property of another.

In the present case the plaintiff gave notice to the defendants to hold the goods to his order. If they had agreed to do so there would have been a contract; but they refuse to do so, and deliver the goods to the purchaser. It appears to us that the claim of the plaintiff is not founded on any existing contract between him and the defendants, but on the wrongful act of the defendants in *delivering the goods [28 as they did. The contract of the defendants was to carry and deliver. But under the circumstances which arose, the law gave the plaintiff the right to put an end to that contract and to demand back the possession of the goods, and he did so. From that time the retention of the goods and the dealing with them by the defendants became tortious.

And this agrees with the view which was always taken of such a case when the action of trover existed. For such a misdelivery after notice was always treated as a wrongful conversion. The statute in using the words "founded on tort" may be fairly regarded as having reference to such cases as were at the time always treated as cases of tort.

Order absolute.

Solicitors for plaintiff: *J. & M. Pontifex.*

Solicitors for defendants: *Beale, Marigold & Beale.*

1877

The Queen v. Rogers.

[3 Queen's Bench Division, 28.]

Nov. 17, 1877.

[CROWN CASE RESERVED.]

THE QUEEN V. ROGERS.

Embezzlement—Venus.

A clerk whose duty it was to remit at once to his employers in Middlesex all moneys collected by him as their clerk, collected at York, on the 18th of April, a sum of money as such clerk, but never remitted any portion of it. On the 19th and 20th of April he wrote and posted from places in Yorkshire to his employers in Middlesex letters making no mention of the money so collected, and on the 21st of April he wrote and posted at Doncaster in Yorkshire to his employers in Middlesex a letter which was intended to make them believe that he had not then in fact collected the money in question. These letters were duly received by the employers in Middlesex:

Held, by Kelly, C.B., Field, Lindley, and Manisty, JJ., that the receipt of the letter of the 21st of April in Middlesex was sufficient to give jurisdiction to try the prisoner in Middlesex.

Held, by Huddleston, B., *contra*, that no part of the crime was committed in Middlesex, and that the prisoner was wrongly indicted in that county.

CASE stated by the assistant judge of the Middlesex Sessions.

The prisoner was tried on an indictment which charged him with having, when he was employed in the capacity of 29] clerk or *servant to Middleton, Chapman, and another, embezzled the sum of £10 17s. 6d. received by him on their account.

The prisoner was employed by the prosecutors, who carry on business under the style of Chapman, Son & Co., at Charterhouse Buildings, London, as their country traveller. It was part of his duty to collect outstanding accounts, and as to all moneys he might receive, to remit them at once to his employers in London, either by post office orders, or bankers' drafts.

On the 12th of April, 1877, when he was starting on his first journey, a list, of which the following is a copy, was handed to him, and he was requested to collect the accounts therein specified:—

List of accounts received from customers on account of Chapman, Son & Co., for week ending April 14th, 1877, by Mr. E. G. Rogers.

	£	s.	d.
(1) James Wood & Co., York, . . .	2	7	6
(2) T. & H. Chapman, York, . . .	11	3	6
(3) Thomas Kidd, Hull, . . .	6	16	0
(4) T. W. Carr, Scarboro', . . .	1	3	6

At the foot of this list there was a printed note as follows:—

“All moneys received as above must be remitted to the firm at once, and this list returned with the balance in hand at the end of each week.”

Mr. M. Chapman, one of the prosecutors, drew the prisoner's attention to this note, and desired him under no circumstances to mix up moneys collected from customers with his expenses. £10 was then paid him in advance for his travelling expenses.

On Wednesday, the 18th of April, the prisoner, being then at York, received there from Messrs. T. & H. Chapman £10 17s. 6d. cash in discharge of the account No. 2 in the above list. He never accounted to his employers for this money, or informed them that he had received it, and under the present indictment he was charged with having embezzled it. It appeared that on the same day that he was paid this account he received from the prosecutors a second sum of £10 towards his travelling expenses, and a third sum of £10 was remitted to him for these purposes on the [30 24th of April. On the 19th and 20th of April he was at Hull, and while there he wrote three letters to them, but he remitted no money, and in neither of these letters is there any reference to the account which had been paid to him by Messrs. Chapman of York. On Saturday, the 21st of April, the prisoner was at Doncaster, and there he wrote again to the prosecutors. All these letters were addressed to them at Charterhouse Buildings, in the county of Middlesex, and were there received by them through the post office. In his letter from Doncaster of the 21st of April, after referring to Kidd's account (No. 3 in the above list), as to which he said Kidd had promised to remit the amount, the prisoner wrote as follows, “I have only two other accounts with which I have been furnished with statements to collect, before I arrived in Scarborough, which, as I shall have to go through York, will attend to and remit you in due course.”

The above list of accounts being the only statement that had been furnished to him, and the account due from Kidd having been specially mentioned in a former part of this letter, it is obvious that one of “the only two other accounts” to which the prisoner here referred was T. & H. Chapman's account (No. 2), which, in point of fact, he had already received. Other letters and telegrams passed between the prisoner and the prosecutors, to which it is unnecessary for

1877

The Queen v. Rogers.

the present purpose to advert. On the 2d of May the prisoner was arrested at Newcastle. He was brought thence to London, and committed at Bow Street for trial upon the present charge at the Middlesex Sessions. When arrested he had only £4 6s. 7d. in money in his possession.

Upon the above facts it was contended on behalf of the prisoner that the indictment failed of proof, the embezzlement, if embezzlement there was, having been committed in the county of York, where the money was received, and appropriated by him, and not in the county of Middlesex, it having been the prisoner's duty to account and remit the amount "at once." On the other hand, the counsel for the Crown contended that the venue was well laid in Middlesex, inasmuch as the prisoner's letter of the 21st of April, amounted virtually to a denial in this county of the receipt of the money, that letter having been addressed by him to Charterhouse Buildings, London, and there received by his 31] employers *through the post office. Having doubts upon the question thus raised I refused to direct an acquittal, and said I would reserve the question of venue for the the Court of Appeal. I therefore left the question of embezzlement to the jury, irrespective of venue, but with regard to the alleged denial in Middlesex, I requested them to say whether in their opinion the prisoner intended that the prosecutor should understand from the aforesaid statements contained in his said letter of the 21st of April, that he had not yet received the amount due from Chapmans of York, and had thus in effect rendered a wilfully false account. The jury found the prisoner guilty, and answered these questions in the affirmative. I postponed sentence pending the decision of this case. The question reserved is, whether under the circumstances above disclosed, the venue was well laid in Middlesex. If the court should be of opinion that it was, the conviction to stand; if of the contrary opinion, to be quashed.

The learned assistant judge also referred to the cases of *Reg. v. Murdock* (*) and *Reg. v. Davison* (*).

No counsel appeared for the prisoner.

Besley, for the prosecution: The receipt of the letter of the 21st of April by the prisoner's masters in the county of Middlesex, gave jurisdiction to try the prisoner in Middlesex. That letter has been found to amount to a false accounting by the jury, and it completes the crime of embezzlement. Embezzlement is a crime which is not com-

(*) 2 Den. C. C., 298; 21 L. J. (M.C.), 22; 5 Cox's C. C., 360; 16 Jur., 19.

(*) 7 Cox's C. C., 158.

plete until the servant has failed to remit and account to the master. The completion, then, of the crime took place in Middlesex. The case of *Reg. v. Leech* (') shows that, in the case of the crime of obtaining money by false pretences, the receipt of a letter containing the false pretences in the county where the trial takes place is enough to give jurisdiction, though the prisoner wrote and posted it in another county. *Rex v. Hobson* (') is an authority to show that the prisoner in the present case could have been legally tried either in Middlesex or in Yorkshire. In *Reg. v. Murdock* (') Parke, B., says that * "the prisoner's not returning [32 and accounting to his master in Nottingham," as it was in that case his duty to do, "was equivalent to embezzlement in Nottingham."

[HUDDLESTON, B., referred to the judgment of Maule, J., in *Reg. v. Murdock* (').]

Reg. v. Davison (') was not a case of master and servant, but of an offence under the Bankruptcy Acts then in force. In that case there was no overt act done in England; nothing took place in England except the failure by the prisoners to account, and that is not an act. There was no false accounting, whilst in the present case the letters were sent into Middlesex by the prisoner, who thereby completed the crime. *Rex v. Taylor* (') is also an authority in favor of the prosecution in this case.

KELLY, C.B.: I am clearly of opinion that this conviction should be affirmed. The prisoner is charged with having, when employed in the capacity of clerk or servant to Messrs. Chapman, Son & Co., embezzled the sum of £10 17s. 6d., received by him on their account. Upon the evidence, as set out in the case stated for the opinion of this court, it was the duty of the prisoner to collect outstanding accounts, and as to all moneys he might receive to remit them at once to his employers in Middlesex, either by post office order or bankers' drafts. He received in York, on account of his employers, the sum of money, with the embezzlement of which he was charged, and it might, if there were no further evidence in the case, be said that in not remitting the money from that place, and at once, he afforded evidence fit for the consideration of a jury of an embezzlement in the county of York. The case, however,

(') 7 Cox's C. C., 100; 25 L. J. (N.S.), 77; 1 Dears. C. C., 642; 4 W. R., 482.

(') Russ. & Ry., 56; 1 East, P. C., Add. xxiv; cited in 2 Leach, 975.

(') 2 Den. C. C., 298; 21 L. J. (M.C.), 22; 5 Cox's C. C., 360; 16 Jur., 19.

(') 7 Cox's C. C., 158.

(') 3 B. & P., 596; Russ. & Ry., 63; 2 Leach, 974.

1877

The Queen v. Rogers.

did not rest there, and it does not appear whether he received the money at York in cash, or by check, or whether it was possible for him to remit it from York, and before leaving York or not. It does, however, appear that shortly after he was at Hull, and that from that place, as also from Doncaster, to which place he seems to have gone on leaving Hull, he wrote to his employers in Middlesex. In these 33] letters *he incloses no remittance; on the contrary, he indirectly or inferentially states by and through them that he has not received the money. In the letter mainly relied upon by counsel the prisoner makes a statement, from which he intends his employers to understand that he had not, in fact, received the amount in question. This letter, as well as the other letters, was sent by post to Middlesex. It may be asked, was the offence complete by the mere writing of the letter? I am not prepared to say that it might not be, and I am not prepared to say that the prisoner could not have been tried in Yorkshire. I can, however, say that I am clearly of opinion upon the authority of the cases cited, and upon that of *Rex v. Burdett* (*), that the offence was in this case completed in Middlesex, and that the prisoner was well indicted, and well tried in that county. The case of *Rex v. Taylor* (**) and the case of *Reg. v. Murdock* (†) affirm in reality the same proposition, and support the view which we take in this case.

FIELD, J.: I am of the same opinion. I think that a material part of the offence charged in the indictment was committed in Middlesex. In order to ascertain what offence the prisoner has in fact committed, and where he has committed such offence, we must first ascertain what it was his duty as a servant to do, and when and where it is shown that he violated it so as to have committed the crime of embezzlement.

Now it was not his duty to hand over to his employers the specific money he received, but he was "at once" (which means, within a reasonable time) to remit the amount of all moneys he received, and to send with it a list; and this remitting and list were to be forwarded or handed to his employers in Middlesex. In point of fact, he received the money, of which he is charged with the embezzlement, at York on the 18th of April; he then went on to Hull, and from thence he wrote two letters to his employers in Middlesex, in neither of which does he say anything about the

(*) 4 B. & Ald., 95.

(**) 2 Den. C. C., 298; 21 L. J. (M.C.),

(†) 3 B. & P., 596; Russ. & Ry., 63; 22; 5 Cox's C. C., 860; 16 Jur., 19.

2 Leach, 974.

money which he had in fact collected at York. Then, on the 21st of April, he wrote a letter which the jury find was *written with intent that the prosecutors should un- [34] derstand that he had not collected the amount which he had so collected, and which letter was intended by him should be received by his employers, and was in fact received by them in Middlesex.

Now, it may be, under these circumstances, that he might have been well tried in Yorkshire, but that is not the question before us. The question before us is, whether there was jurisdiction to try him in Middlesex; in other words, was a material part of the crime committed in Middlesex? Upon this it is to be observed, that the law presumes innocence until guilt is proved. If a complete embezzlement had been proved in Yorkshire, no part of which was committed in Middlesex, a different question would have arisen, but here there is no proof or indication of a complete embezzlement prior to the letter of the 21st of April, in which he gives a false account, showing that he had at that time committed the embezzlement. The evidence of embezzlement in Yorkshire would have been the writing and posting there of the letters, and the letter of the 21st of April (for it is not necessary to consider the effect of the others) which contained the first evidence of the embezzlement was not only written and posted in Yorkshire, but was addressed to the prisoner's employers in Middlesex, and there received by them, and opened and read, which was intended by the prisoner.

Now, there is a strong authority to be found, as to the effect to be given to the sending of the letter to Middlesex. In the case of *Evans v. Nicholson* ⁽¹⁾, the court regarded a letter as speaking continuously from the moment of its being posted until its receipt by the addressee for the purpose of giving jurisdiction, and the reasoning is in this way: A letter is intended to act on the mind of the recipient, its action upon his mind takes place when it is received. It is like the case of the firing of a shot, or the throwing of a spear. If a shot is fired, or a spear thrown, from a place outside the boundary of a county into another county with intent to injure a person in that county, the offence is committed in the county within which the blow is given. So with a letter. There may in this case have been evidence on which a Yorkshire jury might have convicted the prisoner, but I think there was also *clearly evidence which [35] justified his conviction by a Middlesex jury. I arrive at

(1) 32 L. T. (N.S.), 778, cited in *Taylor v. Jones*, 1 C. P. D., 87.

1877

The Queen v. Rogers.

this upon principle, and I do not find that the authorities compel me to come to any other conclusion.

No doubt there is a distinction between that which is mere evidence of a crime, and that which is the crime or is part of the crime itself. I quite agree that it is not sufficient that there should be nothing more than evidence of the crime in the county in order to give jurisdiction. Lord Alvanley in the case of *Rex v. Taylor* (*) says, "In the present case there can be no doubt. The prisoner being sent over Blackfriars Bridge into the county of Surrey, there received 10s. for his master. The receipt of that money was perfectly legal, and there was no evidence that he ever came to the determination of appropriating the money to his own use until after he had returned into the county of Middlesex. In cases of this sort the nature of the thing embezzled ought not to be laid out of the question. . . . With respect to money, it is not necessary that the servant should deliver over to his master the identical pieces of money which he receives, if he should have lawful occasion to pay them away. In such a case as this, therefore, even if there had been evidence of the prisoner having spent the money on the other side of Blackfriars Bridge, it would not necessarily confine the trial of the offence to the county of Surrey. But here there is no evidence of any act to bring the prisoner within the statute until he is called upon by his master to account. When called upon by his master to account for the money, the prisoner denied that he had ever received it. This was the first act from which the jury could with certainty say that the prisoner intended to embezzle the money. To apply this case before us: Here a letter amounting to a false accounting is the first act from which, as the case is presented to us, it is possible to say with certainty that the prisoner intended to embezzle the money. That letter was a continuing act until its receipt, and was received in the county of Middlesex. In the case of *Reg. v. Murdock* (*), Maule, J., though differing from certain expressions of Baron Parke, does, in truth, look at the matter in the same 36] light. Mr. Justice Maule called *in question the accuracy merely of the statement that the omission to return to Nottingham (as it was the prisoner's duty to do, and there account) was sufficient evidence of embezzlement in Nottingham, without anything more. Mr. Justice Maule, as there appears, thought that some false accounting, or some actual refusal to account, in the county was requisite,

(*) 3 B. & P., 596; Russ. & Ry., 63; (*) 2 Den. C. C., 298; 21 L. J. (M.C.), 2 Leach, C. C., 976. 22; 5 Cox's C. C., 360; 16 Jur., 19.

and that is furnished in the present case by the letter. The case cited by the Lord Chief Baron, of *Rex v. Burdett* (¹), is also, to some extent, an authority in favor of our view. 'I therefore hold that the offence was completed when the prisoner by letter made the false statement to his employers as to the receipt of the money, and that he was rightly tried in Middlesex.

HUDDLESTON, B.: I have the misfortune to differ in this case from the rest of the court. I am unable to persuade myself that I am wrong, and consequently I feel it to be my duty to give my opinion, and to state my reasons for forming that opinion. It can hardly be that my opinion, being in opposition to my learned brethren, is correct; but it is my opinion, and I feel bound to give utterance to it. Embezzlement was not larceny at common law, and it was well laid down in East's Pleas of the Crown, vol. 2, ch. xvi, s. 16, that if "the servant have done no act to determine his original lawful and exclusive possession, as by depositing the goods in his master's house or the like; although to many purposes and as against third persons this is in law a receipt by the master, yet it has been ruled otherwise in respect of the servant himself upon a charge of larceny at common law in converting such goods to his own use; because as to him there was no tortious taking in the first instance, and consequently no trespass;" for without a trespass there could be no larceny. In the second volume of Russell on Crimes and Misdemeanors, 5th ed., p. 134, the same principle is laid down. The offence of embezzlement was created a felony by statute. In the last of these, 24 & 25 Vict. c. 96, s. 68, the offence is thus defined: "Whosoever being a clerk or servant, or being employed for the purpose or in the capacity of a clerk or servant, shall fraudulently embezzle any chattel, money, or valuable security which shall be delivered to, or received, *or taken into possession [37 by him for, or in the name, or on the account of his master or employer, or any part payment thereof, shall be deemed to have feloniously stolen the same from his master or employer, although such chattel, money, or security was not received into the possession of such master or employer, otherwise than by the actual possession of his clerk, servant, or other person so employed, and being convicted thereof shall be liable at the discretion of the court," &c. What then is the act of embezzlement? It is the stealing by the clerk or servant, or person employed as defined by the section, of the money, &c., of the master. The act of

(¹) 4 B. & Ald., 95.

1877

The Queen v. Rogers.

stealing is the crime. The fraudulent omission to account, or false statement, is the evidence from which a jury may infer that the prisoner has stolen the money received by him, and has committed the crime. The duty of the servant is found by the case to be to remit the money collected "at once" to his employers; not, as I read the case, to remit in the course of a week, but to remit at once, although the list given to him was to be returned with the balance in hand at the end of the week. This the prisoner did not do, but appropriated the money before his arrest at Newcastle, as appears from the case with tolerable clearness. On the 18th the prisoner receives the money in question. Then on the 19th, and again on the 20th, he writes to his employers without accounting and without remitting. He ought in these letters, he ought in the first even of these letters, to have accounted and remitted to his employers. There was then on the 19th and on the 20th good evidence that the prisoner had embezzled the money. As to the letter of the 21st, there is an express finding of the jury that he intended by that letter that his employers should understand that he had not then received the amount in question at York. There was, therefore, conclusive evidence to show that before he posted the letter of the 21st of April he had embezzled the money. Whether he had, as I think, embezzled it before sending the letter of the 19th, is not material in my view of the case, though there was, I think, evidence of it. But the evidence of an embezzlement before the posting of the letter of the 21st to his employers in Middlesex was of the strongest, and proved an embezzlement not in Middlesex but in Yorkshire. The false statement intended to act on 38] his employers' minds was complete when he posted the letter containing it in Yorkshire. Suppose the letter had never reached its destination, the prisoner's crime would not have been less; he still would have embezzled, though some of the evidence of his crime would then have been lost. So, too, if the letter had been returned to the prisoner, and found upon him some days after, the evidence would have been complete of an embezzlement before the 21st. I am, I think, supported by the reported cases in the conclusion at which I have arrived. First, as to the cases of libel and false pretences, I dismiss them as not being in point. I distinguish the case of libel from the case of embezzlement, because a libel is no offence till published; there is no crime until the defamatory writing is made public. Publication is part of the offence, consequently the charge may be dealt with in the county or place where publication takes place. Simi-

larly as to the crime of obtaining money or property by false pretences, the offence is not complete till the pretence is made to some one. In the case of a false pretence contained in a letter, the offence is not complete until the letter is received by the person to whom the false pretence is intended to be made. The case of *Reg. v. Leech* (*) supports this view, as to false pretences. It has no reference to the offence of embezzlement at all. *Rex v. Burdett* (*) again was a case of libel. In the case of *Rex v. Hobson* (*), the prisoner came into Staffordshire, and there denied that he had received money in the county of Salop, and the question was, whether the denial so made to his master in the county of Stafford prevented him from being legally convicted in Salop, and the decision was that it did not. The majority of the judges held that the indictment might be in Salop, where the prisoner received the money, and where he might, as appeared from the evidence, have embezzled it. In *Rex v. Taylor* (*) Lord Alvanley, in giving judgment, speaking of *Rex v. Hobson* (*), says that there was in that case sufficient evidence of a beginning to embezzle in Salop to make the offence triable in that county, as well as in Staffordshire, [39 where the prisoner was when the fraudulent non-accounting occurred. The statute having made receiving money and embezzling it a larceny, made the offence a felony where the property was first taken, and permitted, therefore, that the offender might be indicted in that, or in any other county, into which he carried the property. In *Rex v. Taylor* (*) the receipt of the money was in Surrey, but there was nothing to show any wrongful misappropriation of it in that county. Lord Alvanley says, in that case, that the receipt of the money was perfectly legal, and that there was no evidence that the prisoner ever came to the determination of appropriating the money to his own use until he came into Middlesex, and denied that he had received the money. Here, the first act was the writing and posting of a letter containing in effect a fraudulent denial of the receipt of the money, and that was in the county of York. The case of *Reg. v. Murdock* (*) supports my view strongly; Lord Campbell, C.J., there points out that the jury may have believed that the prisoner in that case brought the money into

(*) 7 Cox's C. C., 100; 25 L. J. (M.C.), 77; 1 Dears. C. C., 642; 4 W. R., 482. (*) 3 B. & P., 596; Russ. & Ry., 63; 2 Leach, 974.

(*) 4 B. & Ald., 95.

(*) 2 Den. C. C., 298; 21 L. J. (M.C.),

(*) Russ. & Ry., 56; 1 East, P. C., 22; 5 Cox's C. C., 360; 16 Jur., 19. Add. xxiv.

1877

The Queen v. Rogers.

Nottingham, and even spent the money in Nottingham, the county where he was tried; and Maule, J., says that, in the cases where non-accounting has been held to be sufficient evidence of embezzlement, the prisoner was actually in the county where it was his duty to account, and there completed the offence of embezzlement by omitting, or refusing, to account. "The mere omission to account," says that learned judge (1), "if the prisoner had never returned to Nottingham, would not have rendered him liable to be tried in Nottingham. Suppose that he had gone to Derbyshire, and stayed there six months, and never returned to Nottingham, he would, according to my Brother Parke's view, if apprehended in Derbyshire, have been indictable in Nottingham. I cannot think that that can be so. Some of the cases say that non-accounting is sufficient evidence of embezzlement; but in all these cases the prisoner is in the county where he breaks his duty, and completes the offence of embezzlement by omitting or refusing to account." The case of *Reg. v. 40] Davison* (2) is an *authority which certainly seems almost decisive of the present case. It is there said by Alderson, B., "If the non-accounting was the offence, no doubt the omission took place in England; but the question is, whether the non-accounting is embezzlement;" and the decision shows that the court there held that, though non-accounting was in many cases evidence of embezzlement, it was merely evidence of the crime, and not the crime itself. Where there is no evidence of fraudulent embezzlement except the non-accounting, the venue may be laid in the place where the non-accounting occurred (that is, of course, if the prisoner was there at the time of the non-accounting), because the jury may presume that there the fraudulent misappropriation was made, but this cannot apply where there is distinct evidence of the misappropriation elsewhere. In *Rex v. Hobson* (3) the prisoner denied the receipt of the money which he had received and spent. There was no evidence, however, of where the spending took place, and it might therefore be presumed to be where the receipt was claimed and denied. Coleridge, J., in *Reg. v. Davison* (4) says, "Where the act is incomplete, or indifferent in itself, it may be necessary afterwards to make up the deficiency by showing a non-accounting, but where the misappropriation is once clearly established, the non-accounting could not in any way strengthen the charge." The stealing is the crime,

(1) 2 Den. C. C., at p. 301.

(2) Russ. & Ry., 56; 1 East, P. C., App. xxiv.

(3) 7 Cox's C. C., 159, at p. 162.

(4) 7 Cox's C. C., 159.

the non-accounting the evidence of it, and as the evidence in the present case shows that the stealing was in Yorkshire, and that the prisoner never was in Middlesex until after he was arrested, I am of opinion that he was not rightly tried in Middlesex.

LINDLEY, J.: I am of opinion that this conviction ought to be affirmed. A material part of the offence was committed or took place in Middlesex. I do not mean to say that the prisoner could not have been indicted in Yorkshire, on the contrary, I think he could have been there indicted. The letter of the 21st of April was meant to reach the masters in London. It was a fraudulent failure to account when posted, and it operated as a fraudulent *failure to account when received. The case of *Evans* [41 v. *Nicholson* (')] cited by my Brother Field, is an authority in this matter, to show that the false statement contained in the letter was a continuing act, operating until it reached its destination in Middlesex.

MANISTY, J.: I am of the same opinion. The consequences might be most serious if we held the contrary. It would always be a question where the offence took place, where it was completed, whether, when the false statement as to the receipt of the money was made, the money had been squandered. Is it to be allowed for a prisoner to say in defence, "I made a false accounting in Middlesex, but I actually spent the money, I actually misappropriated it elsewhere and long before," or that "I conceived the intention of misappropriating it elsewhere?" In this case there was a fraudulent non-accounting in Middlesex. He was well indicted in that county, although he might also, I think, have been indicted in the county of York. Even the crime of larceny itself can be tried elsewhere than where the actual taking of the goods out of the owner's possession happened, the crime is ambulatory, the continuance of the asportation is a new caption, and a prisoner charged with larceny may be indicted in any county into which he has carried the stolen property.

Conviction affirmed.

Solicitor for prosecution: *W. T. Ricketts.*

(¹) 32 L. T. (N.S.), 778; cited in *Taylor v. Jones*, 1 C. P. D., 87.

See 1 Crim. Law Mag., 689-716; 1 740 note; 19 Eng. R., 538 note; Inglee Wells on Jur., §§ 312-322; 14 Eng. R., v. Jones, 16 Eng. R., 437.
440 note; Id., 640 note; 15 Eng. R., As to where principal and where ac-

cessary may be indicted, see 9 Cent. L. J., 182, 202.

An indictment for a larceny on board a vessel belonging to British subjects, and then being upon the sea and within the admiralty of England, is sufficient without saying on the *high seas*: Reg. v. Sprangli, 4 Quebec L. R., 110, setting out the English statute upon the subject.

See also to same effect, The Queen v. Dillon, 6 Allen (N.B.), 61.

Where an action, local in its nature, is founded on two things done in several counties, and both are material and traversable, and neither will alone support the action, it may be brought in either county.

Where a dam built in one county, causes an overflow of land in another, the owner of the land may bring his action in either county at his election: Pilgrim v. Mellor, 1 Bradw., 448, 17 Am. Law Reg. (N.S.), 729.

Otherwise, by statute, as to an indictment in Wisconsin: Matter of Eldred, 16 Wisc., 530.

If a servant receive money for his master in the county of A., and being called upon to account for it in the county of B., there deny the receipt of it, he may be indicted for the embezzlement in the latter county: Rex v. Taylor, 3 Bos. & P., 596; Rex v. Hobson, Russ. & Ryan, 56.

Where an agent is prosecuted for the embezzlement of his employer's money, in a certain county, wherein he at one time had possession of the money, and in which it was his duty to account to his employer upon demand being made, it is no defence to show that he had expended the money for his own use in another county, provided he formed an intent to convert the money in the county where he is indicted and carried it into the other county with intent to convert: Campbell v. State, 35 Ohio St., 70, 75.

Where one having forged bonds in one county sends one who knows the fact into another county to utter them, the person sending the other cannot be convicted in the latter county. An accessory can only be tried in the county where his offence was committed, although the principal offence was committed in another: People v. Hall, 57 How. Pr., 342; S. P., 31 N. J. L., 65.

The crime of an accessory before the

fact, though inchoate in the act of counselling, hiring, or commanding, is not consummate until the deed is actually done. It is the doing of the deed and not the hiring or commanding merely that makes the crime complete, and it is for the deed—the result of the counselling or procuring—and not for the counselling or procuring itself, that the accessory is indicted. Therefore the *locus in quo* of the offence of an accessory before the fact to the crime of murder, is in the county in which the murder is done. The crime is only complete when the murder is done, and the jurisdiction for the trial of the criminal is where the murder is done: The State v. Ayers, 8 Baxter (Tenn.), 96.

Admitting the facts to be, as claimed by Laurie, that a plan was arranged between Laurie and others to rob the treasure of Wells, Fargo & Co., on the road between Eureka and some point in Nye county; that Laurie was to ascertain when the treasure left Eureka, and signal his confederates by building a fire on the top of a mountain in Eureka county, which could be seen by them in Nye county, thirty or forty miles distant; that the signals were given by him, and his confederates attacked the stage and attempted to rob the treasure: Held that Laurie would be not only an accessory before the fact, but a principal, at least in the second degree.

Where several confederates act in pursuance of a common plan, in the commission of an offence, all are held to be present where the offence is committed, and all are principals: State v. Hamilton, 13 Nev., 386, 8 Reporter, 19.

A thief who steals personal property—i.e. bonds—in another state, and sends them into this Commonwealth by an agent, not an accomplice in the theft, may be indicted for larceny here: Com. v. White, 128 Mass., 430, 433—6, and cases cited.

Section 5 of the act of July 28, 1876, "to provide for the detection and conviction of all forgers of land titles," enacts that persons out of this state may commit and be held amenable in the courts of this state for violations of the act, and may be indicted therefor either in the county of Travis, the county wherein the offence was committed, or the county in which is situated the land involved in the forgery. Held, that nothing in these provisions

The Queen v. Wilson.

1877

contravenes the constitution of the United States, or that of this state, nor transcends the powers of the legislature of this state. Held further, that this section is germane to the title of the act, and is not a special or local law: *Ham v. The State*, 4 Tex. App. Rep., 645, 18 Am. Law Rev., 587.

Where the indictment in U. county charged a larceny in that county, but the proof showed the larceny to have been in W. county, and that the accused was found in the possession of it in U. county: Held that in view of the provision of the code which, in such a

case, authorized a prosecution in either county, that the proof objected to was properly admitted: *Allen v. State*, 4 Tex. App. R., 581.

Where one employs another, not engaged in the business of collecting for others as an independent employment, to collect accounts or notes for him, the relation of principal and agent is created, and the agent may be guilty of embezzlement, although he was to receive for his services a percentage of the moneys collected: *Campbell v. State*, 35 Ohio St. R., 70.

[3 Queen's Bench Division, 42.]

Nov. 2, 1877.

*THE QUEEN V. WILSON.

[42

Extradition Act, 1870 (33 & 34 Vict. c. 52) ss. 2, 6—Treaty incorporated with and limiting Operation of Act—No British subject to be surrendered—Treaty with Switzerland.

By the Extradition Act, 1870 (33 & 34 Vict. c. 52), s. 2, where an arrangement has been made with any foreign state with respect to the surrender to such state of any fugitive criminals, Her Majesty may by Order in Council direct that this act shall apply in the case of such foreign state, and may, by the same or any subsequent order, limit the operation of the order—and render the operation thereof subject to such conditions, exceptions, and qualifications, as may be deemed expedient.

By s. 6, where the act applies in the case of any foreign state, every fugitive criminal of that state who is in, or is suspected of being in, any part of Her Majesty's dominions,—shall be liable to be apprehended and surrendered in manner provided by this act.

A treaty having been made between this country and the Swiss government under the above act, which provided that no Swiss should be delivered up by Switzerland to the government of the United Kingdom, and no subject of the United Kingdom should be delivered up by the government thereof to Switzerland; and an Order in Council having been made, which directed that the act should apply in the case of the treaty:

Held, that the treaty must be taken to be incorporated with, and to limit the operation of, the act, and that no British subject in this country could be surrendered to the Swiss government.

ON the return to a writ of habeas corpus to bring up the body of Alfred Thomas Wilson, it appeared that he had been committed to the Middlesex house of detention, under a warrant of the chief magistrate at Bow Street police office, to show cause why he should not be surrendered in pursuance of the Extradition Act, 1870, on the ground of his being accused of certain offences within the jurisdiction of the Swiss Confederation, and no sufficient cause having been shown why he should not be surrendered, he was ordered to be delivered into the custody of the keeper of the house of detention,

1877

The Queen v. Wilson.

there to be kept by him until he should be thence delivered pursuant to the provisions of the act.

It appeared from the affidavits that the prisoner was arrested and examined before the magistrate, with a view to his extradition to the Swiss government, under the provisions of the Extradition Act, 1870.

By the Extradition Act, 1870 (33 & 34 Vict. c. 52), s. 2, 43] "where *an arrangement has been made with any foreign state with respect to the surrender to such state of any fugitive criminals, Her Majesty may, by Order in Council, direct that this act shall apply in the case of such foreign state.

"Her Majesty may, by the same or any subsequent order, limit the operation of the order, and restrict the same to fugitive criminals who are in, or suspected of being in, the part of Her Majesty's dominions specified in the order, and render the operation thereof subject to such conditions, exceptions, and qualifications as may be deemed expedient. Every such order shall recite or embody the terms of the arrangement, and shall not remain in force for any longer period than the arrangement."

By s. 6, "where the act applies in the case of any foreign state, every fugitive criminal who is in, or is suspected of being in, any part of Her Majesty's dominions,—shall be liable to be apprehended and surrendered in manner provided by this act."

By treaty between Her Majesty and the Swiss Confederation, dated March, 1874, the contracting parties engage to deliver up to each other those persons who, being accused or convicted of a crime committed in the territory of the one party, shall be found within the territory of the other party under the circumstances and conditions stated in the present treaty. By Article 3, no Swiss shall be delivered up by Switzerland to the government of the United Kingdom, and no subject of the United Kingdom shall be delivered up by the government thereof to Switzerland.

By Order in Council, made February 19, 1875, reciting the Extradition Act, 1870, s. 2, and the above treaty, it was ordered that the act should apply in the case of the treaty.

At the hearing before the magistrate it was not disputed that the offence with which the prisoner was charged was within the provisions of the treaty, but it was proved that he was a British subject. The magistrate was of opinion that this fact was immaterial, as he was not entitled to consider the terms of the treaty, but only the Extradition Act, 1870, which contained no such limitation as in the treaty,

and that the evidence having established a *prima facie* case of the prisoner's guilt, he must be committed.

**E. Clarke* moved the discharge of the prisoner: The [44 Extradition Act, 1870, must be read in connection with the Order in Council, and the treaty embodied in it. The third article of the treaty, "that no subject of the United Kingdom shall be delivered up by the government thereof to Switzerland," is an exception from the terms of the 2d section of the act. [He was then stopped.]

C. Bowen (*H. D. Greene* with him), in support of the warrant of commitment: The Order in Council does not limit the operation of the Extradition Act. It merely recites the treaty in compliance with the provision in s. 2, but the object of this treaty was only to protect the country upon which a demand for the extradition of one of its subjects is made from being compelled to accede to it.

[*COCKBURN, C.J.*: The treaty does not give a discretion. It says no British subject shall be delivered up.]

The language of the treaty ought not to be construed as imperative, and it is most improbable that the Legislature meant that it should be the duty of a magistrate to ascertain the law from the text of diplomatic papers. It was only meant that the refusal to deliver up a British subject should not be deemed a breach of the treaty. In making the treaties the two countries contract with each other, they do not legislate for their own subjects.

[*FIELD, J.*: The Crown has power to direct the act to apply where an arrangement has been made with a foreign state. This must mean an arrangement by treaty.]

It can only mean where an arrangement has been made, without any regard to the terms of the arrangement. The Order in Council applying the act does not limit its operation. Conditions in a treaty not required by the Extradition Act cannot be taken into account in considering the validity of proceedings under the act: *Ex parte Courthage*(¹).

COCKBURN, C.J.: I am not sorry that this argument has taken place, for I am chairman of the commission on the subject of extradition, and I will take care that, if possible, this blot upon the law shall be removed, so as to prevent an Englishman who commits *an offence in a foreign [45 country from escaping with impunity. But I cannot entertain a shadow of doubt that in accordance with the special provision in the Extradition Act of 1870, by which Her Majesty may make the treaty, and the application of the

(¹) *Law Rep.*, 8 Q. B., 410; 6 *Eng. Rep.*, 131.

1877

The Queen v. Wilson.

act subject to any terms and conditions that she may think proper: the Order in Council must be coextensive with, and limited by, the treaty, for otherwise our municipal Legislature might be at variance with the terms which the two countries arranged between themselves—a proposition absurd upon the very face of it. I must therefore take it that the Order in Council has embodied the terms of the treaty, and that the act of Parliament is only applicable so far as it can be applied consistently with the terms and conditions therein contained. Then I find a positive provision that no English subject shall be delivered up under the terms of that Extradition Act. It is not disputed in the present case that the alleged defendant, whose extradition is demanded, is an English subject, and he is therefore clearly within the terms of the treaty, and of the Order in Council which limits the operation of the act. However much I regret it, the extradition cannot take place, and the prisoner must be discharged.

MELLOR, J.: I am of the same opinion. It is a matter of positive bargain between the two countries, and the words of the treaty are free from ambiguity.

FIELD, J.: I am of the same opinion. The appellant is in custody, and the person who keeps him returns for cause that he has him in custody under the provisions of the Extradition Act, for the purpose of delivering him up to the Swiss Confederation, to be tried in Switzerland for a crime committed there, and against the law of the Confederation. I fully participate in the regret expressed by my Lord and by Brother Mellor that we should have to put this construction upon the act and the Order in Council, but it is, of course, better that one criminal should escape from punishment than that a court of law should wrongly construe documents submitted to its decision.

Now assuming that this man is a fugitive criminal, does he come within the terms of the act which entitle the Secretary of State to deliver such a person to the Swiss government? Does the act apply to him. In one sense it does; but does it apply absolutely to him? In the first place, the act proceeds upon the fact that there has been some arrangement between this country and a foreign state; and accordingly we find that in this particular case a previous arrangement had been made which is stated in the Order in Council, and yet Mr. Bowen asks us to disregard this arrangement altogether, and to hold that the act applies in its entirety, although the arrangement itself contains an exception and condition. The act declares that

certain crimes shall or shall not be the subject of extradition. Suppose that by the treaty certain crimes were omitted, could it be contended that, although the Order in Council recited the treaty in terms, yet still the act applied? But look at the words of s. 2: "Where an arrangement has been made, Her Majesty may direct that the act shall apply in the case of such foreign state." Then "Her Majesty may, by the same or any subsequent order, limit the operation of the order, and render the operation thereof subject to such conditions, exceptions, and qualifications as may be deemed expedient." Here not only "condition" but the very word "exception" is used. Is there not in this very treaty an exception? It is not that one country shall not be bound to deliver up, but that no subject shall be delivered up to the other country.

Solicitors for prosecution: *Freshfields & Williams.*

Solicitors for defendant: *Wontner & Sons.*

See 6 Eng. Rep., 138 note; 20 Alb. L. J., 425; 7 Am. Law Rec., 713-734; 1 Rob. Prac., 8-48; 1 Bish. Cr. Law, § 135 *et seq.*; 1 Bish. Cr. Proc., § 219 *et seq.*; Whart. Crim. Pl. and Pr., 8th ed., § 28 *et seq.*; 1 Western Jur., 137; 1 Penn. Law Jour. (N.S.), 412-429; 13 Am. Law Rev., 181-243; 13 Western Jur., 97.

The law of extradition from Canada cited in the note in 6 Eng. Rep., p. 138, was repealed and a new statute enacted in 1877 (Laws of Canada, Dominion, 40 Vict., chap. 25, p. 147.)

By this statute, a criminal in Canada may be extradited to the United States for a large number of offences enumerated in the second schedule (pp. 154-6) in the manner pointed out by the act. The forms of warrants of apprehension, committal and surrender are given by the act.

See matter of Warner, 27 Law Reporter (17 N.S.), 45; 1 Can. Law Jour. (N.S.), 16; Matter of Worms, 22 Lower Can. Jur., 109; Matter of Rosenbaum, 20 Lower Can. Jur., 165; Matter of Anderson, 20 U. C. Q. B., 124 and note, p. 192, 20 U. C. Com. Pl., 9; Matter of Brown, 2 L. C. L. Jour., 23; Matter of Burley, 27 Law Reporter (17 N.S.), 92.

In extradition cases, the forms and technicalities with which the statute surrounds the production of affidavit evidence must be strictly complied with, and therefore held, that deposi-

tions taken in the United States cannot be read unless certified under the hand of the magistrate who issued the original warrant that they are copies of the depositions upon which such warrant issued, although attested by the party producing them to be such true copies; but *semble*, the prisoner might be remanded to enable properly certified copies to be produced. The prisoner was charged with assault with intent to commit murder, in that he had opened a railway switch with intent to cause a collision, causing a severe injury to a person on one of them.

Held, that this was not an assault within the statute: In re Lewis, 6 U. C. Prac. Rep., 236.

A prisoner charged with forgery in Canada, having been arrested in and surrendered by the government of the United States, under the Ashburton Treaty, upon application for bail, on the ground that there was no evidence of the *corpus delicti*: Held, that the surrender of the prisoner by the United States government was sufficient evidence: Regina v. Van Arrman, 4 U. C. C. Pl., 288.

In the very recent case of Regina v. Browne (17 Canada Law Jour., 288), it was held:

1. That an indictment found in the United States was inadmissible.

2. That under the Canadian act copies of the depositions upon which

the original warrant was granted in the United States, certified and proved as required by the act, were admissible.

3. That under the *Imperial Statute* the *original depositions* were admissible. The original depositions were proven by the coroner who held the inquest to be the original depositions taken upon the inquest before him. The case states the warrant to have been a bench warrant issued by the district attorney on an indictment, but there must have been some misunderstanding, as the bench warrant could not have been issued or based upon the depositions before the coroner. It was also held that an accessory before the fact is extraditable, but that an accessory after the fact is not.

As to proceedings for extraditing one charged with a crime under the treaty with

Bavaria: Matter of Thomas, 12 Blatchf., 370.

Belgium: Matter of Stupp, 12 Blatchf., 501; Matter of Van Hoven, 4 Dillon, 411; Id., 415.

Great Britain: Matter of McDonnell, 11 Blatchf., 79; Id., 170; Matter of Kelly, 9 Am. Law Rev., 167, 2 Lowell, 339; Matter of Dugan, 2 Lowell, 367; Matter of Lawrence, 13 Blatchf., 295.

Italy: Matter of Giacomo, 12 Blatchford, 391.

Prussia: Matter of Stupp, 11 Blatchford, 124; 12 id., 501.

The extradition treaty between the United States and Belgium (18 U. S. Stat. at Large, 804), declares that its provisions shall not apply to any crime committed prior to the date of the treaty, except murder and arson. The date of the signing of the treaty was March 19, 1874. It was not to take effect until twenty days after the date of the exchange of ratifications. They were exchanged April 30, 1874. Held, that a crime committed in Belgium on the 1st of May, 1874, was covered by the treaty.

Where an extradition case under a treaty is brought before a United States commissioner, it is his judicial duty to judge of the effect of the evidence, and no other judicial officer has any power to review his action thereon: In re Vandervelpen on Habeas Corpus, 14 Blatchford's Cir. Ct., 187; Matter of Weigund, 14 Blatchf., 370.

Where there is an application for extradition, sustained by complaint on oath, it is not for the judge to consider whether or not a foreign government has authorized the application; he has only to examine the evidence of criminality; and, if he deems it sufficient to sustain the charge, to certify the same to the secretary of state.

The treaty of extradition with Great Britain does not give the accused the right to be confronted with the witness against him; the evidence may be in the form authorized in the country whence it comes, and in substance sufficient to warrant action in the country whose action is invoked.

The testimony of the accused is not admissible in the case of extradition, tried by a judge of the United States, though he is sitting in a state where such evidence would be received: Re Dugan, 2 Lowell's Dec., 367.

There is much conflict in the cases as to whether a man can be extradited for one crime and tried for another and different crime. That he cannot be, is held in

Kentucky: State v. Hawes, 4 American Law Times Rep. (N.S.), 524, and cases cited; Com. v. Hawes, 13 Bush, 697.

New York: See *Adrian v. Lagrave*, 59 N. Y., 110, reversing 1 Hun, 689, 15 Abb. (N.S.), 272, 47 Howard., 285, 4 Thomp. & Cook, 215.

United States, Circuit and District: Matter of Noyes, 17 Alb. L. J., 407, Dist. N. J.

An extradited person may be arrested upon a civil order of arrest: *Adrian v. Lagrave*, 59 N. Y., 110, reversing 1 Hun, 689, 15 Abb. (N.S.), 272, 47 How., 385, 4 Thompson & Cook, 215; *Slade v. Joseph*, 5 Daly, 187.

Even by the party who caused his extradition, if no bad faith: *Browning v. Abrams*, 51 How. Pr., 173.

In the absence of positive stipulation by treaty, there can be no extradition: *State v. Hawes*, 4 American Law Times Reports (N.S.), 524, 526, and cases cited.

The act as to extradition of fugitives of justice by the governor of one state, on demand of the executive of the state from which he fled, is constitutional: Matter of Briscoe, 51 How. Pr., 422; Com. v. Dennison, 24 How. U. S., 66; *Prigg v. Com.*, 16 id.,

539; *Matter of Ammons*, 34 Ohio St. Rep., 518.

In the rendition of fugitives from justice under the United States laws, the executives of the jurisdiction demanded the fugitive, and that where he is found stand coequal and are to exercise their authority in the protection of the laws of their respective jurisdiction and of the citizens thereof: *State of North Carolina v. Perry*, 22 Albany Law Jour., 513, 2 Crim. Law Mag., 84, 89 note.

See *Matter of Swearingen*, 13 S. C. Rep., 74.

Where a party is detained in one state because the laws of that state have claims upon him, he cannot be extradited and taken to another state before the justice of the state which holds him has first been satisfied, and this though he be held under a civil order of arrest: *Matter of Briscoe*, 51 How. Pr., 422.

Contrà: *Matter of Rosenblatt*, 51 Cal., 235.

As to whether the governor of a territory can make a requisition upon the governor of a state for the extradition of a criminal, see *Matter of Edwards*, 2 Labatt (Cal.), 192.

Though one charged with crime may be sent to the District of Columbia by the Federal courts: *Matter of Buell*, 3 Dillon, 116.

A misdemeanor is a "crime" within the meaning of § 2, art. 4 of the constitution of the United States: *Morton v. Skinner*, 48 Ind., 123; *Brown's Case*, 112 Mass., 409.

The Federal statute in relation to extradition proceedings embraces every criminal offence, and every act forbidden and made punishable by the law of the state where the crime is committed, whether by common law or express legislative enactment: *People v. Donohue*, 12 N. Y. W. Dig., 178.

It must be regarded as settled, that the word "crime," in the provisions of the constitution for inter-state extradition, embraces every species of offence made punishable as a crime by the law of the state making the demand, though the law be passed subsequent to the constitution and the act of Congress, and the act be not criminal by the common law or the laws of other states: *Leary's Case*, 6 Abb. N. C., 43.

See *People v. Donohue*, 12 Weekly Dig., 178.

Where it appears by the recitals in the warrant that the governor had before him a duly authenticated copy of an indictment against a party for an offence, the commission of which necessarily implies the presence of the party at the time and place of the alleged offence, this is sufficient *prima facie* evidence that the party is a fugitive from justice. Whether it is *conclusive* evidence on *habeas corpus*, *query*: *Leary's Case*, 6 Abb. N. C., 44.

See *People v. Donohue*, 12 N. Y. Weekly Dig., 173; *Matter of Swearingen*, 13 S. C. R., 74.

The term "flee from justice" in art. 4, sec. 2 of the constitution of the United States, includes cases where a citizen of one state commits a crime in another state and then returns to his home: *Matter of Swearingen*, 13 S. C. R., 74.

A citizen and resident of Iowa, who is charged with having been *constructively* guilty of an offence in another state, upon which a requisition is based, but who never in fact has fled from such other state, is not a fugitive from justice within the meaning of the constitution: *Jones v. Leonard*, 50 Iowa, 106; *Hartman v. Aveline*, 13 West. Jur., 208; *Wilcox v. Nolze*, Id., 209, 3 Cin. Weekly L. Bull., 192, affirmed 34 Ohio St. R., 520; *Hartman v. Aveline*, 63 Ind., 344; *Matter of McKean*, 3 Hughes (U.S.), 23.

And proof that the party demanded fled from the state, when he is asked to be returned, must be made: *Hartman v. Aveline*, 13 West. Jur., 208, 63 Ind., 344.

See *Matter of Sheldon*, 34 Ohio St. R., 319.

To constitute a fugitive from the justice of a state, within the meaning of the constitution and act of Congress providing for the surrender of such fugitives, it is not required that the person should have fled secretly or suddenly with the consciousness of having committed the offence, or hurriedly for the purpose of avoiding apprehended process of the law. It is sufficient that, being within the jurisdiction at the alleged time of the commission of the offence, he has subsequently departed before a reasonable time for

prosecution shall have elapsed : *Johnson v. Ammons*, 7 Am. L. Rec., 662, U. S. Cir. Ct., South. Dist., Ohio.

See *Hartman v. Aveline*, 18 West. Jur., 208, 63 Ind., 344.

The fact that the party has been indicted for an offence which, in its own nature, implies the actual presence of the offender, within the jurisdiction of the demanding state, is sufficient *prima facie* evidence of his having fled from justice when found in the other state: *Leary's Case*, 6 Abb. N. C., 44.

See *People v. Donohue*, 12 N. Y. Weekly Dig., 178.

The delivering up a fugitive by an executive from whom he is demanded, is a discretionary duty to be exercised within authority and right, and to be governed by law : *State of North Carolina v. Perry*, 22 Alb. L. J., 513.

See *Matter of Swearingen*, 18 S. C. R., 74.

An executive from whom a fugitive is demanded can, in determining whether such fugitive shall be delivered up, go no further than to examine whether in the affidavit or indictment transmitted by the demanding executive as a part of the record, a crime is substantially charged : *State of North Carolina v. Perry*, 22 Alb. L. J., 513.

If the governor of one state make a requisition on the governor of another state for the surrender of a fugitive from justice, and the case is shown to be within the provisions of the constitution of the United States, and the act of Congress on the subject, no discretion is vested in the latter governor, but it is his imperative duty to issue his warrant of extradition : *Work v. Corrington*, 34 Ohio St. R., 64 ; S. C., 32 Am. R., 355 n.

The right to demand the extradition is not an imperfect right resting in comity or matter of discretion, but a legal right having fixed and well ascertained conditions : *Leary's Case*, 6 Abb. N. C., 43 ; *Matter of Swearingen*, 18 S. C. R., 74 ; *Com. v. Dennison*, 24 How. U. S. R., 66.

See *People v. Donohue*, 12 Weekly Dig., 173 ; *Matter of Manchester*, 5 Cal., 237.

If a warrant for the surrender of a fugitive from justice is obtained in a case in which it should not have been issued, the governor may revoke it,

whether issued by himself or his predecessor : *Work v. Corrington*, 34 Ohio St., 64 ; S. C., 32 Am. R., 355 n.

Where such warrant has been revoked by the governor, no inquiry will be made in a proceeding on *habeas corpus* on behalf of the alleged fugitive as to the grounds of such revocation, although at the time of the revocation the fugitive may have been in custody of the agent of the demanding state : *Work v. Corrington*, 34 Ohio St., 64 ; S. C., 32 Am. R., 355 n.

When an indictment against a person arrested on a warrant issued by the governor of this Commonwealth under the Gen. Sts., c. 177, § 3, for his surrender as a fugitive from justice, appears to have been returned by a grand jury, is certified as authentic by the governor of the other state, and substantially charges a crime, this court cannot on *habeas corpus* discharge the prisoner because of formal defects in the indictment, but its sufficiency as a matter of technical pleading is to be tried and determined in the state in which it was found : *Davis's Case*, 122 Mass., 324.

Under the constitution of the United States, the obligation of a state to deliver up a fugitive from justice on demand of the executive authority of another state, arises when the fugitive is charged with crime within the state demanding the surrender and having jurisdiction of the offence. The question of his guilt or innocence is wholly immaterial ; but there must be a charge of a violation of the criminal law of the demanding state : *People v. Brady*, 56 N. Y., 182.

See *Leary's Case*, 6 Abb. N. C., 44 ; *Matter of Sheldon*, 34 Ohio St. R., 319.

The courts have jurisdiction to interfere by writ of *habeas corpus* and to examine the grounds upon which the executive warrant for the apprehension of an alleged fugitive from justice from another state is issued ; and in case the papers are defective and insufficient, to discharge the prisoner : *People v. Brady*, 56 N. Y., 183 ; *Matter of White*, 4 Cal., 432 ; *Matter of Cuthbert*, 49 Cal., 435 ; *Matter of Manchester*, 5 Cal., 237 ; *Hartman v. Aveline*, 63 Ind., 344, 13 West. Jur., 208 ; *Wilcox v. Nolze*, 34 Ohio St. R., 520.

See *Tullis v. Fleming*, 69 Ind., 15 ; *Matter of Swearingen*, 13 S. C. R., 74.

On *habeas corpus* issued from a court of the United States to inquire into the detention of a prisoner held under a governor's warrant in inter-state extradition, notice to the attorney-general of the state is not necessary: *Leary's Case*, 6 Abb. N. C., 43.

See *People v. Donohue*, 12 Week. Dig., 173.

The Federal courts may issue an *habeas corpus* in such a case: *Matter of Smith*, 3 McLean, 121, 6 Law Reporter, 57; *Matter of Titus*, 8 Benedict, 411, 8 Chicago Leg. News, 284; *Matter of McKean*, 3 Hughes (U.S.), 23.

A writ of *habeas corpus* cannot be issued by a state court so as to affect or impair a warrant of extradition issued by the secretary of state in the hands of the United States marshal; *Matter of Vrebermaike*, 3 Law Reporter (N.S.), 608, 1 Am. Law Jour. (N.S.), 231.

The governor of one state has no authority to surrender a fugitive who has committed a crime in another state, unless judicial proceedings have been commenced against him for the crime in the state in which it was committed: *Matter of White*, 49 Cal., 433.

See *Tullis v. Fleming*, 69 Ind., 15.

A person cannot be arrested in one state for a crime committed in another state, unless a prosecution has been commenced and is pending against him for the alleged crime in the state having jurisdiction of the offence: *Matter of White*, 49 Cal., 433.

But see *Matter of Rosenblatt*, 51 Cal., 285; *Matter of Romanse*, 1 Utah, 23; *Tullis v. Fleming*, 69 Ind., 15.

It is a condition precedent to the obligation to surrender, that the executive of the state upon whom the demand is made be apprised of the facts upon which the duty depends: *People v. Brady*, 56 N. Y., 182.

See *Leary's Case*, 6 Abb. N. C., 44; *Tullis v. Fleming*, 69 Ind., 15.

Where a surrender of the party is demanded on an indictment, the fact that one is found shows the offence is one under the laws of the state making the demand: *Matter of Greenough*, 31 Verm., 279; *Matter of Sheldon*, 34 Ohio St. R., 319; *Matter of McKean*, 3 Hughes (U.S.), 23.

See *Hartman v. Aveline*, 68 Ind., 344; *Matter of Buell*, 3 Dillon, 116.

Printed statutes of state may be consulted to show whether the offence

charged is or is not a crime: *Matter of Sheldon*, 34 Ohio St. R., 319.

The fact that the party demanded is charged with crime, is to be proved by a copy of an indictment or an affidavit certified by the governor of the demanding state. Authentication under the provisions of the judiciary act as to proof of records of one state in another, cannot be required either by the governor or by the court on *habeas corpus*: *Leary's Case*, 6 Abb. N. C., 43.

See *People v. Donohue*, 12 Week. Dig., 173; *Matter of Sheldon*, 34 Ohio St. R., 319.

The warrant of the executive in an extradition case need not recite the facts constituting the crime; it is sufficient if it contains a substantial statement of the conditions necessary to its issue: *People v. Donohue*, 12 N. Y. Week. Dig., 173; *People v. Pinkerton*, 77 N. Y., 245.

The warrant of the governor is conclusive evidence in a proceeding on *habeas corpus* that the party named in the warrant stands charged with crime in the state demanding his surrender: *Leary's Case*, 6 Abb. N. C., 43.

See *People v. Donohue*, 12 N. Y. Week. Dig., 173.

A warrant issued by the governor of this Commonwealth, under the Gen. Sts., c. 177, § 3, for the surrender of a fugitive from justice, is *prima facie* evidence at least that all necessary legal prerequisites have been complied with, and if the previous proceedings appear to be regular, is conclusive evidence of the right to remove him to the state from which he fled: *Davis's Case*, 123 Mass., 324.

As to whether the warrant is conclusive, or may be met by evidence on the part of the prisoner showing that the papers presented to the government were in fact defective, *quære*: *People v. Pinkerton*, 77 N. Y., 245, affirming 17 Hun, 199.

The recitals in a warrant of the governor of this state for the arrest of a fugitive from the justice of another state are to be taken, at least *prima facie*, as true: *People v. Pinkerton*, 77 N. Y., 245, affirming 17 Hun, 199.

A prisoner under arrest, under a governor's warrant for his arrest, will not be discharged because the warrant contains no order for arrest: *Matter of Swearingen*, 13 S. C. R., 74.

1877

The Queen v. Wilson.

A statement in the warrant of the governor of the Commonwealth for the arrest and delivery up of an alleged fugitive from justice, that the fugitive is "charged with the crime of selling and furnishing intoxicating liquors contrary to the laws of Vermont, and represented to be a fugitive from the justice of said State of Vermont," shows that he has been charged with a crime against the laws of that state, and is a sufficient allegation to that effect: *Brown's Case*, 112 Mass., 409; *Tullis v. Fleming*, 69 Ind., 15.

See *Matter of Manchester*, 5 Cal., 237.

Theft is recognized as a crime, and is synonymous with larceny: *People v. Donohue*, 12 N. Y. W. Dig., 173.

It is not necessary that the evidence or copies thereof on which the governor acted should be attached to the warrant: *Leary's Case*, 6 Abb. N. C., 43.

See *People v. Donohue*, 12 N. Y. W. Dig., 173.

A return, therefore, to a writ of *habeas corpus*, setting forth such a warrant which contains recitals of facts necessary to confer authority, under the constitution and laws of the United States to issue it, is a sufficient justification for holding the prisoner, without producing the papers or evidence on which the government acted: *People v. Pinkerton*, 77 N. Y., 245, affirming 17 Hun, 199.

Where the preliminary papers are produced on *habeas corpus*, it is the right and duty of the court to determine whether they are sufficient. When such papers are withheld by the executive in the exercise of his official discretion, the court can only look to the warrant and its recitals for the evidence that the essential conditions of its issue have been fulfilled: *People v. Donohue*, 12 N. Y. W. Dig., 173.

The determination of the governor that the sworn evidence accompanying a requisition is sufficient to establish the facts upon which the requisition is based, is not conclusive of the matters therein set forth: *Jones v. Leonard*, 50 Iowa, 106; *Wilcox v. Nolze*, 34 Ohio St. R., 520.

See *Matter of Manchester*, 50 Cal., 237; *Tullis v. Fleming*, 69 Ind., 15; *Matter of Swearingen*, 13 S. C. Rep., 74; *Matter of Sheldon*, 34 Ohio St. R., 319; *Matter of Buell*, 3 Dillon, 116.

In order to justify the arrest in one state of an individual as a fugitive from justice from another state, upon the requisition of the governor of the latter state, the warrant of the governor of the state wherein such individual is arrested, and by virtue whereof such arrest is made, must show that the proofs specified in the act of Congress authorizing and regulating this proceeding, were produced at the time of the requisition, and were authenticated in the manner prescribed in said act. Such a warrant, which recites certain matters as though they were within the knowledge of the governor issuing the warrant, and then says, "which is evidenced by an authenticated affidavit of A. B.": Held insufficient. It must appear that the affidavit was authenticated by the governor making the requisition: *Matter of Edwards*, 2 Labatt (Cal.), 192, citing *Ex parte Thornton*, 9 Tex., 635; *Ex parte Smith*, 3 McLean, 121; *State v. Schlemm*, 4 Harr. (Del.), 577, and *Matter of Hayward*, 1 Sandf., 701.

See *Leary's Case*, 6 Abb. N. C., 44; *Matter of Sheldon*, 34 Ohio St. R., 319.

Where the demand is supported by an affidavit as authorized by the act of Congress of 1793 (1 U. S. Statutes at Large, 302), no less degrees of certainty is admissible than is required in an indictment for the same offence. If any distinction exists, the affidavit should be more full and explicit, and the offence should be therein distinctly and plainly charged: *People v. Brady*, 56 N. Y., 182; *Hartman v. Aveline*, 13 West. Jur., 208, 63 Ind., 344.

See *Matter of Manchester*, 5 Cal., 237; *Leary's Case*, 6 Abb. N. C., 44; *Matter of Sheldon*, 34 Ohio St. R., 319; *Matter of McKean*, 3 Hughes (U.S.), 23.

As to when the affidavits upon which a requisition is made do or do not show that the accused was guilty of the offence of,

Falsæ pretences: *People v. Brady*, 56 N. Y., 182; *Matter of Butler*, 7 Luz. Leg. Reg., 182; *Matter of Greenough*, 31 Verm., 219.

See *Matter of Greenough*, 31 Verm., 219; *Leary's Case*, 6 Abb. N. C., 44.

Forgery: *Matter of Manchester*, 5 Cal., 237.

So *indictment* for libel: *Matter of Buell*, 3 Dillon, 116.

The prisoner being in court, his

petition for the *habeas corpus* cannot properly be read in evidence, in his favor, on the trial of the issue raised by the traverse: *Leary's Case*, 6 Abb. N. C., 43.

See *People v. Donohue*, 12 W. Dig., 173.

Before a person charged with an offence can be delivered up as a fugitive from justice, the warrant of the governor must show upon its face, where the crime charged is obtaining money by false pretences, that such crime is contrary to the statute of the state claiming the fugitive, and also that it is not the duty of the judge hearing the case to take judicial notice of the laws of such state: *Matter of Butler*, 7 Luzerne Leg. Reg., 209; *People v. Brady*, 56 New York, 183; *Matter of Greenough*, 31 Verm., 279.

Though printed laws of another state may be read: *Matter of Sheldon*, 34 Ohio St. R., 319.

Courts cannot issue a certiorari to the governor of the state to require the production of such documents: *Leary's Case*, 6 Abb. N. C., 44.

See *People v. Donohue*, 12 N. Y. W. Dig., 173.

It is apparent that no conflict between State and Federal authorities should be provoked.

While, perhaps, the state courts could not by certiorari compel the governor of a state to return the papers on which he granted a warrant for the extradition of a fugitive—which is by no means certain—it is evident that the governor would rarely, when properly and respectfully applied to, and the courts can only apply by certiorari so that their granting one shows no disrespect to the executive, decline to return them.

1. The governor is not supposed to be, and frequently is not, a lawyer, and consequently it is not his duty to judicially determine the sufficiency of the papers.

2. While it is the duty of the governor in good faith to obey the law requiring him to surrender alleged fugitives from justice, yet it is a high prerogative which should be conservatively and judiciously exercised.

3. The governor, when he makes a surrender, sends a resident of his own state elsewhere, away from friends and

home, for trial. While it is his duty fairly to execute the laws, yet he should do so as well on behalf of residents of his own state, as on behalf of those of another demanding the extradition of one of his own people for trial elsewhere.

4. As between the two, his first duty is to his own citizens who have a right to appeal to him, as the executive officer of their state, to see that their rights are not invaded or trampled upon.

5. The governor surrenders no prerogative and yields no dignity in returning the papers. The judiciary is a co-ordinate branch of his own government, and, he as the highest citizen of the state, should be, and he appears to greatest advantage, when he yields to the requests of such co-ordinate branch.

6. The remarks so commonly made about the delays and expenses of *habeas corpus* proceedings are not entitled to a moment's consideration. Indeed they are despicable. Every citizen has a right to this priceless writ. Time and money ought not, for a moment, to be weighed against human liberty and human oppression. There is not the slightest danger, in ordinary cases, of erroneous rulings by the courts. If the papers be regular they will be so held, and obedience to the law will command greater respect. If they be defective no citizen should be sent among strangers, perhaps penniless and friendless, to battle at great disadvantage with the great power and influence of officers of the law, where, perhaps, the benefit of an excellent character would be lost, and where the process of a foreign court could not compel the attendance of the necessary witnesses to establish it. Many other reasons will readily suggest themselves, but it is believed the foregoing are amply sufficient to show the propriety of the executive yielding a willing acquiescence to the requests of the courts. Indeed, to the credit of the executive, we have never known a case wherein it was refused.

The question of identity of the person under arrest with the person charged, is always open for contest: *Matter of Butler*, 7 Luzerne Leg. Reg., 209; *Leary's Case*, 6 Abb. N. C., 43.

It is sufficient evidence to make a *prima facie* case, that the prisoner is

1877

Hudson v. Tooth.

the person described in the warrant :
Leary's Case, 6 Abb. N. C., 43.

See *People v. Donohue*, 12 N. Y. W. Dig., 173.

One who arrests another under a governor's warrant for his surrender as a fugitive from justice, is not liable for false imprisonment, even though the warrant be not valid on its face: *Matter of Titus*, 8 Benedict, 411, 8 Chicago Leg. News, 284.

Previous adjudications in proceedings by *habeas corpus* are no answer to a new writ where the relator is restrained of his liberty. The decision under one writ refusing to discharge him, does not bar the issuing of a second writ by another court or officer: *People v. Brady*, 56 N. Y., 183, distinguishing *Mercein v. People*, 25 Wend., 64.

See *Leary's Case*, 6 Abb. N. C., 44.

If a second demand for the surrender of a fugitive from justice be made, a discharge upon a prior warrant for the same offence is not a bar to the second proceeding: *Matter of McDonnell*, 11 Blatchf., 170.

The law of California authorizing the arrest of a fugitive from justice who has fled from another state before a demand for his surrender by the executive authority of the state from which he fled, and his detention for a reasonable time to afford an opportunity for such executive demand, is not in conflict with the constitution of the United States (§§ 2, art. 4). The warrant must be the same as if the offence was committed in the state, and must specify the offence alleged to have been committed: *Matter of Cuberth*, 49 Cal., 435; *Matter of Romanes*, 1 Utah, 23; *Matter of Rosenblatt*, 51 Cal., 285.

[8 Queen's Bench Division, 46.]

Nov. 19, 1877.

HUDSON and Others v. TOOTH.

Prohibition—Public Worship Regulation Act, 1874 (37 & 38 Vict. c. 85), ss. 7, 8, 9—Requirement as to Place of Hearing Cause, how far Directory.

The Public Worship Act, 1874 (37 & 38 Vict. c. 85), s. 7, makes provision for the appointment of a judge of the provincial courts of Canterbury and York. By s. 8 a representation under certain circumstances may be made to the bishop of illegal acts or omissions in the performance of the church services, by any incumbent within his diocese; and by s. 9 if the bishop is of opinion that proceedings should be taken on the representation, he shall, if the parties are unwilling to submit to his directions without appeal, transmit the representation to the archbishop of the province, and the archbishop "shall forthwith require the judge to hear the matter of the representation at any place within the diocese or province, or in London or Westminster."

A representation under the above act was forwarded to the Bishop of Rochester 47] *charging that T., the incumbent of a parish within the diocese, had been guilty of illegal practices in the conduct of divine service. The bishop transmitted the representation to the Archbishop of Canterbury, and the archbishop thereupon by instrument of requisition required the judge to hear and determine the matter of the representation "at any place in London or Westminster, or within the diocese of Rochester, as you may deem fit." Notice was given to T. that the case would be heard in Lambeth Palace, which, although within the province of Canterbury, is neither in London, Westminster, nor the diocese of Rochester.

In July, 1876, the case was heard at Lambeth Palace in his absence, and he was adjudged to have been guilty of illegal practices, and a monition was made for him to abstain from them. On his non-compliance with the monition, he was pronounced guilty of contempt and imprisoned. From first to last he took no notice of the proceedings, and in no way acquiesced in them:

Held, that the whole proceeding was void, and a prohibition must be granted, for the word "London" in the requisition could only be construed in its strict sense as the city proper of London, and the judge had no power, under the act or otherwise, to sit in any place beyond the limits fixed by the archbishop.

RULE obtained at the instance of the Rev. A. Tooth, calling on Lord Penzance, the official principal of the Arches Court, upon notice to him, or the registrar of his court, and also on R. Hudson, S. Gardiner, and R. Gunston, complainants in the case of *Hudson and others v. Tooth* in that court, to show cause why a writ of prohibition should not issue to prohibit all further proceedings, the matter being one in which there was no jurisdiction.

The facts upon the affidavits were that in February, 1876, the complainants, who were parishioners of St. James, Hatcham, of which Mr. Tooth was incumbent, forwarded a representation under the Public Worship Act, 1874 (37 & 38 Vict. c. 85), s. 7 ('), to *the bishop of the diocese [48 (Rochester) charging that Mr. Tooth had been guilty of illegal practices in the conduct of divine service. The bishop transmitted the representation to the Archbishop of Canterbury, and the archbishop thereupon by instrument of requisition required the judge to hear and determine the matter of the representation "at any place in London or Westminster, or within the diocese of Rochester, as you may deem fit." In June, 1876, notice was given to Mr. Tooth, who had been served with the representation, that the case would be heard in Lambeth Palace, in the Public Library, on the 13th of July.

On the 13th of July the case was heard in Lambeth Palace,

(') The Public Worship Act, 1874 (37 & 38 Vict. c. 85), s. 7, makes provision for the appointment of a judge of the provincial courts of Canterbury and York, and enacts that whenever a vacancy shall occur in the offices of official principal of the Arches Court of Canterbury and the Chancery Court of York, the judge shall become ex officio such official principal.

By s. 8: "If the archdeacon of the archdeaconry, or a churchwarden of the parish, or any three parishioners . . . shall be of opinion.

"(3.) That the incumbent has . . . failed to observe . . . the directions contained in the Book of Common Prayer relating to the performance in such church . . . of the services, rites, and ceremonies ordered by the said book . . . such archdeacon, &c., may represent the same to the bishop by sending to the bishop a form as contained in Schedule B to the act."

By s. 9: "Unless the bishop shall be of opinion . . . that proceedings should not be taken on the representa-

tion . . . he shall within twenty-one days after receiving the representation, transmit a copy thereof to the person complained of, and shall require such person, and also the person making the representation, to state in writing, within twenty-one days, whether they are willing to submit to the directions of the bishop touching the matter of the said representation without appeal . . . and if they shall not within the time aforesaid state their willingness to submit to the directions of the bishop, the bishop "shall forthwith transmit the representation in the mode prescribed by the rules and orders to the archbishop of the province, and the archbishop shall forthwith require the judge to hear the matter of the representation at any place within the diocese or province, or in London or Westminster," and . . . the judge shall pronounce judgment on the matter of the representation, and . . . shall issue such monition (if any) as . . . the judgment shall require.

1877

Hudson v. Tooth.

which, though in the province of Canterbury, is neither in the city of London, Westminster, or the diocese of Rochester, in Mr. Tooth's absence, and he was adjudged to have been guilty of illegal practices, and a monition made for him to abstain from them. On his non-compliance with the monition further proceedings were taken under which he was pronounced guilty of contempt and imprisoned. He was subsequently released from this imprisonment, but stated that he anticipated that further proceedings would be taken against him to enforce payment of the costs incurred by the complainants. From first to last he made no objection to the jurisdiction and took no notice of the proceedings, and it appeared that he was not aware of the form of the requisition until after his sentence, and shortly before the application for the rule.

On the 12th of July, 1877, the rule above mentioned was obtained.

49] *A. J. Stephens, Q.C., for the complainants, and Benjamin, Q.C., for Lord Penzance, showed cause: First, the hearing at Lambeth Palace was a hearing at "London" within the meaning of the requisition, for the word "London" must be taken to be there used in its popular sense, which includes Lambeth, and not in its strict sense as the city proper of London. The word "city" is not used, and in *Wallace v. Attorney-General* (1) the Master of the Rolls held that in a bequest to the "hospitals of London" the word "London" could not be confined to the limits of the city. In the Bishopric of Saint Albans Act (38 & 39 Vict. c. 34) the term "South London" is applied to the part of Surrey including Lambeth. Secondly, it was not a condition of the right to try the representation that the judge should sit in one of the places specified in the requisition. The act 37 & 38 Vict. c. 85, creates no new jurisdiction, but only procedure, and any irregularity in executing it is nothing but an irregularity in procedure, which does not affect jurisdiction.

[COCKBURN, C.J.: Does not the act give the discretion formerly vested in the bishop to the archbishop?]

SECT. 5 saves all jurisdiction existing before the act. Proceedings are now taken before Lord Penzance as the Dean of the Arches Court of Canterbury. It is well established that if the parties and the subject-matter of a cause are within the jurisdiction, the mode of citing one of the parties is only matter of procedure. Hale, Pleas of the Crown, vol. ii, p. 39, paragraph 23, stating that although sessions

(1) 33 Beav., 384; 33 L. J. (Ch.), 314.

are, by the statute of 6 R. 2, c. 5, to be held in the principal towns in the different counties, it had been decided that the justices could at their discretion appoint them to be held elsewhere. *Reg. v. Archbishop of Canterbury* (1), though upon a different act, shows that the citation to appear is a mere matter of procedure. Again, the archbishop had full power to require the judge to hear the case at any place within the province, and the substance of his requisition is to require the judge to hear it within the statutory limits. The place specified is a mere detail. The duties of the archbishop as to naming a place of hearing are ministerial, not judicial. The *condition of the judge's authority is [50 the simple direction to hear the cause, without reference to the place of hearing. The requisition followed the form in the rules which were prepared subsequently to the act, the word "province" being omitted from this form obviously by accident. But the rule does not supersede the act. The court will consider the general intention of the Legislature, which cannot be that the non-observance of a formal step in the proceedings shall nullify them altogether. If a strict construction of a regulation would defeat the object of the act, the law will not hold it to be imperative: *Liverpool Borough Bank v. Turner* (2); *Reg. v. Castro* (3). Lastly, assuming that there was an irregularity, the proper course was to apply for relief to the Ecclesiastical Court, or, upon appeal, to the Judicial Committee, instead of applying to this court after the final conclusion of the proceedings: *Margate Pier Company v. Hannam* (4).

A. Charles, Q.C., and W. Phillimore, in support of the rule: The argument that 37 & 38 Vict. c. 85, is merely an act to modify the existing procedure of the ecclesiastical courts is unfounded. The act creates a new and special jurisdiction, which cannot be enlarged by the fact that the judge has subsequently become official principal of the Court of Arches. If any one of the conditions of the right to exercise this jurisdiction fails, the whole proceeding falls to the ground. Under the former act 3 & 4 Vict. c. 86, s. 27, any person could institute proceedings, and it was the duty of the bishop, after a presentment from commissioners who formed a kind of grand jury, to hear the cause with three assessors, subject to an appeal to the Dean of Arches; 37 & 38 Vict. c. 85, prescribes an entirely different course. A

(1) 6 E. & B. 546; 25 L. J. (Q.B.), 346.

(2) Law Rep., 9 Q. B., 350; 6 Eng.

(3) 1 J. & H., 159; 2 De G. F. & J., R., 317.

502; 29 L. J. (Ch.), 827; 30 L. J. (Ch.),

(4) 3 B. & A., 266.

1877

Hudson v. Tooth.

new judge is appointed, who can only proceed in the manner directed by the act. The only authority which the Court of Arches ever had to hear a cause was by letters of request from the bishop. Passing on to the particular point before the court, it will be observed that the bishop has merely to transmit the representation to the archbishop, having no discretion in the matter, and it must be presumed that the 51] archbishop has some *duty to perform. The duty undoubtedly is that of issuing the requisition, which is the foundation of the jurisdiction of the judge, and if this requisition is not followed the whole proceeding is void, *Christie v. Unwin* (¹), where the same principle was held to apply even to the exercise of an authority conferred by statute on the Lord Chancellor. The suggested construction of the word "London" is quite untenable. The word must bear the same construction as it would in any other act of Parliament, and a decision as to the sense in which the word was used in a will can afford no assistance. As to the objection that there was a remedy by appeal to the Judicial Committee, the right of appeal does not bar the remedy by prohibition: *Burder v. Veley* (²).

COCKBURN, C.J.: I think this rule for a prohibition must be made absolute. I say so with very great regret, for the objection is of the most technical character, has nothing to do with the merits of the case, and might have been cured in a moment, if taken at the time, by transferring the hearing of the cause to the other side of the water. Nevertheless, although we see that this is a matter of the purest technicality, yet if the objection taken goes to the root of the jurisdiction, we are bound in the administration of the law to act accordingly.

Now, the form of the requisition to the learned judge before whom this cause came is in the terms that he shall exercise his jurisdiction "at any place in London or Westminster, or within the diocese of Rochester, as he may deem fit." The fact undoubtedly is that the cause was heard and the adjudication made not within the diocese of Rochester, but within the province of Canterbury; the requisition omitting all mention of the province of Canterbury. It was contended in the first place that, although there was an omission of the province of Canterbury as one of the districts within which the jurisdiction of the judge might be exercised, yet London was such a district, and the term "London" must be taken not in its strict but in its popular sense, in which would be included all those precincts which, though

(¹) 11 Ad. & E., 373.

(²) 12 Ad. & E., 233, at p. 256.

not forming part of the city of London or Westminster, are yet so connected with London itself as in popular acceptance to be included *within that term. I think it is [52 impossible to give that construction to the requisition. Even if the term had been "London" simply, I doubt very much whether it would not have been going much too far to say that the term "London" could be taken in that vague and loose sense in which the precincts of this huge metropolis are now sometimes spoken of as "London." But when I find that "London" is used in contradistinction to Westminster, which, according to the construction suggested by Dr. Stephens, would unquestionably be included in London, my own conviction is, looking at the provisions of the act and the rules that have been framed under it, that what was intended was that the archbishop, in giving jurisdiction to the judge, should exercise his discretion as to the place in the province at which the hearing of the matter of the complaint should take place. It might not be expedient to try it in the diocese on account of some strong feelings which the matter in dispute might have excited, and therefore it might be advisable to take it to the larger sphere of the province. It might, on the other hand, be desirable to send it to the diocese as the place where all parties lived, the parties complaining and the party complained against, in order that the matter might be adjudicated upon at the least expense, and with the greatest facility and convenience to all parties concerned. It might, on the other hand, be indifferent whether it was tried in the diocese or the province, and the convenience of the judge or the convenience of the parties might suggest that it should be sent to the metropolis. Why are the terms "London" and "Westminster" used? I cannot help thinking because at one time the Court of Arches, the court of this judge, sat in the city of London. At the time of the passing of the act it sat in Westminster, but its sittings might be transferred as new courts were built, the sittings might be transferred at one time from Westminster to London, and at another time possibly from London to Westminster, and therefore the act of Parliament included both. But, having included both, I think it is impossible to say that we can take London as including Westminster, which we must take to include something lying beyond the precincts of London itself.

Now then comes the question whether that being so, and the cause having been heard within the province of Canterbury, the *exigency of the statute is satisfied. I quite [53 agree with the argument that the statute creates a new juris-

1877

Hudson v. Tooth.

diction. The argument of Mr. Benjamin, founded upon the fact that the jurisdiction of the Dean of Arches existed long anterior to this act, does not seem to me to touch this question. It is not as Dean of Arches that this jurisdiction is created in the judge. It is a mere accident that the judge appointed under this statute has become the Dean of Arches. The jurisdiction is the creation of the statute, and by the statute it was to be vested in a barrister of a certain standing with the proviso, which possibly may have been put in (I do not say it was) with a view of inducing Lord Penzance to accept an office which, after the judicial functions he had before discharged, might otherwise have appeared derogatory. "If you will undertake this office—to adjudicate upon these matters ecclesiastical,—as soon as the office of Dean of Arches and of the corresponding office in the province of York shall fall vacant, that office shall be vested in you." It is, therefore, to my mind an entirely new office, one with which the Dean of Arches under the former constitution of the ecclesiastical court had nothing to do. A new authority and jurisdiction is also vested in the Archbishop of Canterbury. Before the act the duty of passing judgment upon a complaint of ecclesiastical misconduct belonged to the bishop. There is no doubt he would refer the matter eventually to the Dean of the Arches, but there was no intermediate jurisdiction in the Archbishop of Canterbury. A new jurisdiction is therefore created, although the complaint must in the first instance be to the bishop, and the bishop must notify it to the parties, and call upon them to say whether or not they will be bound by his decision; but if they will not agree to be bound by it without appeal, then the bishop refers the matter by the form given in the statute to the archbishop. But as far as the archbishop is concerned this is an entirely new authority, and an entirely new jurisdiction. This being so, in my opinion, the jurisdiction must be exercised in strict conformity to the statute which creates it. How is the archbishop to exercise his jurisdiction? By referring the matter to the judge, not generally leaving it to the discretion of the judge, where and when the cause shall be heard and adjudicated upon; but he is "to require the 54] judge to *hear the matter of the representation at any place within the diocese or province, or in London or Westminster." Mr. Benjamin made a faint attempt to say that all that was necessary was that the archbishop should require the judge to hear the matter of the representation, and that it was left entirely at the discretion of the judge to determine where he would hear the case, so long as he con-

fined himself to the diocese or province, or to London or Westminster. I think that is a most erroneous reading of this statutory proviso. It is not that the archbishop shall require the judge to hear and leave it to the judge to determine in which of those districts he will hear it. It is the archbishop who is to require the judge to hear it in one of those places, as in the discretion of the archbishop he shall think it most convenient. Then is this requirement essential to the jurisdiction of the judge? I think it was intended by the Legislature to be so. Therefore it is not competent to the judge, where the archbishop has fixed, in conformity with the statute, the place at which the hearing shall be held, to substitute for that place any other. It is part of the jurisdiction which the statute places in the power of the archbishop to create, and which it makes one of the conditions of the jurisdiction to be so created. Merely to appoint the judge to hear, without specifying the place at which the hearing is to be held, would be a vicious exercise of the archbishop's authority, and would confer no jurisdiction upon the judge. But Mr. Benjamin says further, "The omission in the form is an accident, a blunder of the clerk. The form which is drawn up and appended to the rules happens to have omitted the word 'province,' and the form used in the present action has followed the form appended to the rules. The word 'province,' it is true, is omitted, but it ought to be there, and therefore you may supply it, and the judge may be considered to have exercised his jurisdiction within a district prescribed by the archbishop." This argument is at once shattered when you look at the facts. The only jurisdiction which the judge can exercise is the jurisdiction given by the requisition of the archbishop, and when the archbishop omits the term "province," it is not for us to say that that omission is a mere accident, and was not in accordance with his intention. Suppose it had been the intention of the archbishop. Suppose the archbishop *had [55 thought that to allow this matter to be heard within the large sphere of his province would be a hardship and injustice to the parties, and he had omitted the word "province" purposely, but had left to the judge the option of trying it in the diocese or in London or Westminster? The whole question is whether the provision is merely directory or a substantial part of the jurisdiction. In my opinion it is more than directory. I regret, as I have said before, for the reasons I have given, that we should be obliged to give effect to such an objection as this. I cannot, however, but think that it goes to the root and foundation of the jurisdiction.

1877

Hudson v. Tooth.

MELLOR, J.: I am entirely of the same opinion. I have already had the advantage of hearing this point discussed in the previous case of *Serjeant v. Dale* (¹), and am able to come very conclusively to the same opinion as that expressed by my Lord. When we recollect how the act came to be passed, the circumstances under which it went through Parliament, the criticism which it underwent, and the protections which it was supposed were inserted in it, I cannot doubt that the origin of this provision was this. The then existing tribunal, that of the Dean of Arches, and the system of administering the law ecclesiastical were not sufficient to meet the exigencies of the case. Then what was done? The Legislature did not improve or extend the jurisdiction of the Dean of Arches, but erected an entirely new tribunal, which had at that time no relation whatever to the jurisdiction exercised by the Dean of Arches. The enactment is only so far one of procedure that it regulates the practice of the new court, and prescribes the mode in which the jurisdiction is to be exercised. That it was the result of some jealousy on the part of the public is clear. It deprives the bishop of his former jurisdiction, and requires him to transmit the representation or complaint forthwith to the archbishop of the province, who is invested with authority to send it to the judge appointed under the act. But he is to send it in a particular manner; by a request issued by himself in which he is to describe where the jurisdiction shall be exercised, and within what limits. I can 56] well understand that *this provision proceeded from some jealousy on the part of the public. *Reg. v. Archbishop of Canterbury* (²), which was relied on by Mr. Benjamin, is to my mind a very strong authority against the defendants. It was there decided that the local limit of the jurisdiction, prescribed by 3 & 4 Vict. c. 86, could not by any means be extended. It was thought possible that there might be some inconvenience in that, and the present act was passed; but then it is not left as a matter of discretion to any individual, except the archbishop, to determine within what place or what limits this jurisdiction shall be exercised. I cannot help thinking that the necessity of making this alteration, even by way of extension of the former limit, is a strong authority against Mr. Benjamin's contention.

The construction enlarging the definition "London" contended for by Dr. Stephens cannot be admitted. The construction of the provisions of a will proceeds upon very

(¹) 2 Q. B. D., 558.(²) 6 E. & B., 546; 25 L. J. (Q. B.), 346.

different principles indeed from that of a statute which defines and gives jurisdiction. The case which he cited affords no ground for holding that the word "London" in the act has any larger meaning than the city of London, and that it is the London which is meant by people in the country when they speak of coming up to town, although probably they are coming up to Westminster and not to London. It is really like the statutes which give jurisdiction at Nisi Prius and other procedure acts, in which London and Westminster are distinguished, the one from the other, and in which the jurisdiction prescribed to be exercised in the one cannot be exercised in the other. I agree entirely with my Lord that it is not a question of procedure but a question of jurisdiction, and I think it is a new jurisdiction; a new procedure adapted to the new jurisdiction, and the exposition of the authority of the archbishop which my Lord has given, entirely satisfies my mind as to what is the real meaning of the section.

That being so, I am of opinion that the jurisdiction was not properly founded, and that the proceedings which took place in the absence of Mr. Tooth must be considered as void.

LUSH, J.: I exceedingly regret the necessity under which I *feel of holding that this rule must be made abso- [57] lute. The objection is one thoroughly of a technical nature, but as nothing has been brought before us to show that the defendant has by anything he has done precluded himself from raising the objection, if it is a good one we are bound to give effect to it, though, I must say, considering the lapse of time that has occurred since the judgment was given, considering that the defendant has not thought fit to test the validity of that judgment by resorting to a court of appeal, the objection is one which comes with very bad grace from him. Nevertheless, if it is a good one, we are bound to give effect to it, and I am constrained to hold that it is a good one.

I cannot agree with Mr. Benjamin that the act in question is one which merely alters and regulates the procedure before the Court of Arches. On the contrary, it gives new and summary proceedings against clergymen who are charged with the particular breaches of ecclesiastical law mentioned in the 8th section, and enlarges the authority of the new tribunal over them. And whereas before and at the time this act passed no clergyman could be compelled to appear out of the diocese to answer any charge against him, this act authorizes his being summoned to appear anywhere within

1877

Hudson v. Tooth.

the province, or in London or Westminster. With regard to the summons, I again differ from Mr. Benjamin. The authority is not given to the judge, but it is given to the archbishop. The words in the 9th section appear to me to afford no sound argument to the contrary. According to the terms of the act, when the bishop remits the representation to the archbishop, "the archbishop shall forthwith require the judge to hear the matter of the representation at any place within the diocese or province, or in London or Westminster." Then comes the following section, which says that the judge shall give notice to the parties of the time and place at which he shall proceed to hear the matter; so that the archbishop is to fix the limit within which the proceeding is to be heard, and having so done, the judge is to appoint the particular place within those limits at which he intends to sit. That, therefore, is a material extension of the powers over clergymen which existed at the time this act passed. Unfortunately, the archbishop here adopted 58] the form framed under *the last section of this act, and that form, I have no doubt for good reasons apparent to those who framed the form, omits the word "province," and does not authorize the clergyman to be summoned to any place out of the diocese. Now as the act of Parliament does not give any express authority to frame forms, I do not think that form was binding upon the archbishop. The archbishop might, if he had chosen, have adopted the words the act, and have authorized the judge to summon him to appear anywhere within the province. But he has not done so. That being so, I think the archbishop has executed the authority which the act gives him, and defined the limits within which the judge was to sit to hear the complaint.

Well, the judge sat neither in the diocese nor in London, according to the construction I put upon the word, nor in Westminster. He sat within the province, namely, at Lambeth; but then the authority given by the archbishop does not extend to summon the clergyman anywhere within the province, but only within the diocese, or within London or Westminster. The defendant did not appear, and if I am right in my construction of the word "London," he was not bound to appear. He was not bound to appear, before the act passed, anywhere out of the diocese, and he now can only be bound to appear within those limits which the act authorizes the archbishop to assign, and the archbishop has not assigned the province as one of them.

Another argument is that Lambeth is within London. That depends upon whether the word "London" here is to

be taken to mean metropolitan London or municipal London. Metropolitan London embraces Westminster. Nobody, then, speaking of the metropolis at large, would think of mentioning Westminster, which is a part of it, as something distinct from London itself. Therefore I am constrained to hold that "London" here means London proper, otherwise there would be no necessity for naming the subordinate part, Westminster, which would be part of London. Therefore it must be taken to mean that the archbishop may require the judge to hear the matter at any place within the diocese, or within the city of London or Westminster. Unfortunately, the judge did not sit at either of those places. The defendant did not attend before him, and was not bound to attend. *I do not say what [59] would have been the consequences if he had attended. I am far from saying that then the proceedings would not have been perfectly regular; but he did not attend, and the consequence was that the judge proceeded in his absence, and pronounced judgment against a person who did not appear and who was not bound to appear. It therefore seems to me impossible that the judgment can stand. As I said, nothing is brought before us to show that the defendant has done anything whatever to preclude himself from taking the objection. The proceedings are not entirely at an end, and therefore we must assume that there is something upon which the prohibition can operate. Upon these grounds it is that I am bound, on the true construction of the act of Parliament, to say that a prohibition must go.

This same point was before my Brother Mellor and myself in *Serjeant v. Dale* ('). But inasmuch as there was another objection there which itself was fatal to the proceedings, we did not trouble ourselves to come to a decision upon this point; we merely observed that it was one of a very serious nature. We have now had the benefit of a full argument, and have heard all that can be alleged on the other side, and I must confess that the view we then entertained has only been strengthened, and that I now decide, without any doubt, that the whole proceeding was *coram non judice*, on the ground that the learned judge sat where he was not authorized to sit by the requisition of the archbishop, and the defendant did not appear; so that there was no authority to proceed against him in his absence. *Rule absolute.*

Solicitors for applicant: *Brooks, Jenkins & Co.*

Solicitors for complainants in *Hudson v. Tooth* and for Lord Penzance: *Moore & Currey.*

(') 2 Q. B. D., 558.

1877

Hudson v. Tooth.

See 1 Wells on Jurisdiction, §§ 117-121.

As to jurisdiction in one county where the offence is committed in another, within 500 yards of the county line, see *Davis v. People*, 56 N. Y., 95; *County of Floyd v. County of Cerro Gordo*, 47 Iowa, 186; *State v. Anderson*, 25 Minn., 66, 33 Am. Rep., 455.

In *Webber v. Truax*, 1 City Courts Rep., 242, it was held that a referee could not be appointed by the marine court of the city of New York to take an examination in an adjoining county, citing *Bonner v. McPhail*, 31 Barb., 106.

In *Northrup v. The People*, 37 N. Y., 208, the statute made it the duty of the judges of the Supreme Court of each district to appoint the times and places of holding courts of oyer and terminer, within their respective districts. It was held that such appointments having been made, it was irregular for a court properly convened pursuant to an appointment to adjourn to another court house in another place in the same county. The defendant, in an indictment, on the court having convened at the adjourned court house, having objected that the court had no right, power or authority to proceed with a trial upon his indictment, the Court of Appeals held that it was irregular for the court to do so, and reversed a conviction there had.

In *Bonner v. McPhail*, 31 Barb., 106, an action for slander in charging the plaintiff with perjury before a referee in a case in the city court of Brooklyn, while sitting in New York,

Judge Lott held the action would not lie, for two reasons:

1. That no order of reference had been made or entered, and consequently the party acting as referee was not, in fact, a referee, and had no judicial power whatever.

2. The reference was being carried on in New York.

Judge Brown also wrote an opinion,

refusing to consider the *second* question (p. 110).

In *Bucklin v. Chapin*, 53 Barb., 493-4, it is said, this case went off on the first point discussed by judge Lott, and that proceeding in a reference is a waiver of all objections, because of irregularities.

In *Gould v. Bennett*, 59 N. Y., 124, it affirmatively appeared (p. 125), that the appellant expressly *objected* to the adjournment, and that it was made under his objection and exception.

In *Birmingham, etc., v. Hatfield*, 48 N. Y., 224, it affirmatively appeared, p. 224, that the parties expressly objected to the adjournment. It was held that having once done so, they were not bound to repeat it.

But where the party is present when the adjournment is made and does not object, he will not afterward be allowed to do so: *First Nat. Bank v. Hamilton*, 50 How., 116.

In *Brush v. Mullaney*, 12 Abb. 344, the party had not appeared, or in any manner waived the objection, that a referee had no right, where the order gave him no power to do so, to hear the case outside of the county named as the place of trial. The court held that it was an irregularity, of which the party might avail himself by motion to set aside the judgment.

This case is now provided for by rule 26 of the Supreme Court of New York.

Where a referee was appointed by a local court having power to set only in the locality, it was held that an objection that the referee resided and that the trial was had out of the jurisdiction of the court, was untenable where it did not appear that the point was made at the trial, nor but that the decision was made in the jurisdiction: *Blake v. Lyon, etc.*, 77 N. Y., 626.

See also *Sanborn v. Lefferts*, 58 N. Y., 179, 185; *Buckman v. Chapin*, 53 Barb., 488, 35 How. Pr., 155.

[3 Queen's Bench Division, 60.]

Nov. 30, 1877.

THE QUEEN v. HOLBROOK and Others. [60]Libel—Criminal Information—Publication by Editor of Newspaper without Knowledge of Proprietors—Lord Campbell's Act (6 & 7 Vict. c. 96), s. 7.*

At the trial of a criminal information against the defendants for a libel published in a newspaper of which they were proprietors, it appeared that each of them managed a different department of the newspaper, but that the duty of editing what was called the literary department was left by them entirely to an editor whom they had appointed named G. The libel in question was inserted in the paper by G. without the express authority, consent, or knowledge of the defendants. The judge having directed a verdict of guilty against the defendants:

Held, by Cockburn, C.J., and Lush, J., that there must be a new trial, for upon the true construction of 6 & 7 Vict. c. 96, s. 7, the libel was published without the defendants' authority, consent, or knowledge, and it was a question for the jury whether the publication arose from any want of due care and caution on their part.

By Mellor, J., dissenting, that the defendants, having for their own benefit employed an editor to manage a particular department of the newspaper, and given him full discretion as to the articles to be inserted in it, must be taken to have consented to the publication of the libel by him; that 6 & 7 Vict. c. 96, s. 7, had no application to the facts proved, and that the case was properly withdrawn from the jury.

In this case a criminal information had been obtained by J. Howard against the defendants, R., E. G., and A. R. Holbrook, the proprietors of the *Portsmouth Times and Naval Gazette*, for a libel published in that newspaper.

At the trial, before Lindley, J., at the Winchester Summer Assizes, 1877, it appeared that the newspaper was managed by the three defendants, who resided at Portsmouth (where the paper was published), one of them, A. Holbrook, taking the advertising department; another, R. Holbrook, a small share in the commercial part of the paper; and a third, E. G. Holbrook, superintended the financial and printing department. The alleged libel, which was in the form of a letter, was inserted by Green, the editor, without the knowledge of the defendants, one of whom was at the time absent from Portsmouth owing to the illness of a relation. Green was himself called for the defence, and stated that he was employed by the defendants to edit the literary department of the newspaper, and added, "they" (the defendants) *"leave everything to me." The jury, under the direc- [61] tion of the learned judge, found a verdict of guilty against the defendants.

A rule having been obtained calling on the prosecutor to show cause why the verdict should not be set aside, or a new trial had, on the ground that the learned judge misdirected the jury in stating that the defendants were criminally re-

1877

The Queen v. Holbrook.

sponsible for the publication, although they had appointed a competent editor to conduct the newspaper, and on the ground that the publication was made without their actual authority, consent, or knowledge, and did not arise from want of due care or caution on their part.

A. Charles, Q.C., and A. L. Smith, showed cause: The act 6 & 7 Vict. c. 96 ('), has no application to the facts at the trial, which did not establish a presumptive case of publication, but showed an actual publication of the newspaper by the authority of the defendants. If the defendants, who authorized another person to edit their newspaper and put in it what he pleased, are protected by the statute, the result will be that no criminal information can ever be filed against a newspaper proprietor. The act was passed to remove the anomaly in the law of libel, by which proof of the proprietorship of a newspaper in which a libel was published was held to be conclusive proof of guilt. This is evident from the cases of *Rex v. Walter* ('); *Rex v. Gutch* ('); *Colburn v. Patmore* ('), which show that the proprietor of a newspaper who took no part in the publication of a libel was held to be criminally responsible for it. This being the state of the law, the act was passed with the intention of enabling the defendants to rebut the inference which would otherwise be drawn from the mere proof of proprietorship, by showing that, although proprietors, they had no hand in the appointment of the editor or *person who inserted the libel, or that the libel was inserted by some stranger without their intervention. The act was not intended to exonerate the active managers of newspapers, and to enable them to escape liability by committing one department of the paper of which they receive the profit, to an editor with full power to insert what he pleases.

[COCKBURN, C.J.: Why should the act give protection to a man who is presumed to be the publisher, and not extend it to one who is proved to be the actual publisher?

LUSH, J.: You contend that the act was passed, not to meet cases which had occurred, but to meet cases which had not occurred.]

(¹) 6 & 7 Vict. c. 96, s. 7: "Whensoever upon the trial of any indictment or information for the publication of a libel, under the plea of not guilty, evidence shall have been given which shall establish a presumptive case of publication against the defendant by the act of any other person by his authority, it shall be competent to such defendant to prove that such publication was made without

his authority, consent, or knowledge, and that the said publication did not arise from want of due care or caution on his part."

(²) 3 Esp., 21.

(³) Mood. & M., 433, at p. 437, per Lord Tenterden, C.J.

(⁴) 1 C. M. & R., 73, per Alderson, B., p. 76.

No authority upon the precise question can be found ; but in a civil action, *Barwick v. English Joint Stock Bank* ⁽¹⁾, it was held that the bank were liable for the fraud of their manager, for they were liable for the conduct of their agent in doing the business in which they had placed him ; and in *Reg. v. Stephens* ⁽²⁾ it was held that the owner of works, carried on for his profit by his agents, was liable to be indicted for a public nuisance, caused by the acts of his servants in carrying on the works.

H. T. Cole, Q.C., and *Folkard*, in support of the rule : It must be taken that the defendants did not authorize the publication of the libel. Neither could it be said that the publication was owing to any want of care on their part ; but, at the least, this was a question which should have been left to the jury. The report of the commissioners, appointed by the House of Lords to inquire into the law of libel before the passing of 6 & 7 Vict. c. 96, shows that it was the intention of the Legislature to protect the defendant where he is in a position to prove that the libel was published contrary to his instructions, and that he had not been acquainted with the contents of it.

COCKBURN, C.J.: I am of opinion that this rule for a new trial should be made absolute. The facts, as I understand them, are as follows: The defendants, three in number, are the proprietors of a newspaper in which this libellous article appeared. But it appears that at Portsmouth, the place where the newspaper is published, *the duties [63 of managing the newspaper, or conducting the newspaper, are divided between four persons. There is an editor, who manages what has been called the literary department of the paper ; one of the defendants takes the commercial part of the paper ; another the advertising part of the paper ; and the third the actual publication of the paper, the printing. At the time this article was inserted, one of the defendants had left and gone to a distant part of the country, and he, therefore, was certainly not cognizant of the fact of its publication. The others were present at the place of publication, and were engaged in discharging the duty which they had severally undertaken in the publication of this issue of the paper. But it was proved that in the part of the paper in which the libel appeared the duties had been left entirely to the editor—that neither of these defendants actually knew of the insertion of the letter in question. And now comes the question whether, although the editor, who was not proceeded against, might have been made re-

⁽¹⁾ Law Rep., 2 Ex., 259.

⁽²⁾ Law Rep., 1 Q. B., 702.

1877

The Queen v. Holbrook.

sponsible for the article which he himself inserted—whether the defendants, or any or either of them, are criminally responsible for the publication of this article. Now it is an undoubted principle of law in general that a man can only be made criminally responsible for an act which he has committed himself, or through the agency of another, either actually or constructively. And it is to be taken as a fact, as the case now stands, that the parties who were made the defendants in this criminal information were none of them actually cognizant of this publication; and it is not to be inferred, in my opinion, from the mere employment of an editor to conduct this part of the paper, however wide may be the discretion which they allowed to him in the conduct of it, that they gave him authority to do that which would be contrary to the criminal law of the land. You are at liberty to imply from the employment of an agent that whatever he does in the conduct of the business according to law has been sanctioned or authorized; but it is not, in my opinion, to be inferred that his employer has given him authority to commit crime, because he has employed him in the conduct of his business. But, at the same time, while that is the general proposition, there seems in practice to have been introduced an exception to the general rule in the [64] particular case of *libel, for whatever may formerly have been the view of the law, there can be no doubt Lord Kenyon, at *Nisi Prius*, and afterwards Lord Tenterden, also at *Nisi Prius*, held that where the fact of proprietorship was proved, and if the libel complained of was found in the publication conducted by the agents of the proprietor, the proprietor might be held criminally responsible. It is not at all necessary on the present occasion to say how far one assents to or dissents from that legal doctrine; it is enough to say that it was afterwards considered by some of the most enlightened thinkers of the day, lawyers and non-lawyers, that we had an anomaly in the law which violated the first principles of justice and ought to be got rid of. And I cannot doubt for a moment that it was with a view to correcting that anomaly that this 7th section, of what is popularly known by the name of Lord Campbell's Act, was passed. It was suggested, indeed, that it was to get rid of the difficulty in which a proprietor was placed by *prima facie* proof of his proprietorship; from the presumption which arose from certain evidence which led fairly to the inference of proprietorship. It was also suggested that the section in question was passed with a view to enable a proprietor, where a libellous article had been inserted in a pub-

lication of which he was the proprietor by some one who might be thought to be his agent, but who, in point of fact, was not his agent, the agency having never been created, or having been put an end to, that it was passed to enable him to get rid of that assumption by adducing proof to rebut it. But the obvious answer to both these propositions is that as neither case arose as the law stood before, there was no necessity for such legislative assistance—the man who appeared to be proprietor *prima facie* could not be prevented from disproving what *prima facie* appeared, but did not in point of fact exist. I can only come to the conclusion that Lord Campbell's Act, in this 7th section, was intended to meet the anomaly to which I have just referred, viz., that of holding a man criminally responsible for something in which he had taken no part, and, in fact, of which he was not even cognizant. This being so, I ask myself whether this case is not within the protection of the 7th section, and, I think, in regard to one of the defendants that it is clearly so. With regard to the others, it is more or less doubtful *what the fact might have been, but with regard to [65 the man who had gone away and who was living in a distant part of the country at the time, who knew nothing of what was going on at the time this article is published, it seems to me that he is clearly within the protection of the 7th section, unless it can be shown, which was not done in the present instance, that though absent, he gave actual authority to the editor to publish the libellous matter, or that he was, though at a distance, still taking his part in the conduct of the newspaper. But even in the last case it strikes me he could not be made responsible for that which he knew nothing of. With regard to the other defendants a different state of things presents itself. The statute excepts from the protection which it gives, the cases where authority has been given to publish libellous matter, where there has been consent to the publication either of the article in question or similar articles, where there has been knowledge of the act committed—that is, of the publication which is made the subject-matter of the offence—and where there has been, on the part of the proprietor whom it is sought to make responsible, any absence of due care and caution in the manner in which the newspaper is conducted, and as to the articles contained in it. Now, with regard to those defendants who were present and concerned in the immediate publication of that issue of the newspaper in which this article was inserted, it would be, in my opinion, a question for a jury whether or not, looking at their presence

1877

The Queen v. Holbrook.

at the time of the publication, looking at the circumstances of their being there at the time when the publication was issued—they had any knowledge of what was done, and, having that knowledge, whether they must be taken to have consented to what was done, or, at all events, whether, by not looking to see what the paper contained before they suffered it to be issued, they were wanting in due care or caution. These are questions which, I think, might have been left to the jury. If the jury had found an absence of those things which are made the conditions of the statutory protection, then the 7th section would not apply to them; but if it turned out that according to the view of the jury there had neither been authority, nor consent, nor knowledge, nor any absence of due care or caution, then, in my opinion, the 7th section would have applied, and would have defeated a criminal prosecution. I say 66] *nothing of civil responsibility, as that stands upon a totally different footing. Then as to the cases cited, and the arguments used, with the view of showing that such a proprietor is responsible civilly for the acts of his agent, I am not called upon to decide that point. We deal with penal responsibility, which stands upon a totally different footing, and is governed by a totally different principle. I can see no possible case to which the section applies if it is not to such a case as this. A party is sought to be made criminally responsible as a proprietor, but he is able to show that although he was a proprietor of the newspaper, and although he employed an agent by whom the libellous article was inserted, still that he never gave him authority to publish libels and knew nothing whatever of what may have been inserted, and therefore gave no authority, nor ever consented to, nor even knew of, the article in question. And I find a section passed for the cure of what was deemed to be an anomaly in point of principle, and in the criminal law of the land. Whether it was wise to alter that law I do not stop to consider. I think, therefore, that this section was applicable, and that the learned judge was wrong in holding it inapplicable. Consequently, this case must go down for a new trial. When it has gone down for a new trial the jury will have to determine the issue of guilty or not guilty, with reference to the facts to which I have adverted, and possibly the case may come before us again, should it be necessary, in some more definite form, in which we should be able to deal with it.

MELLOR, J.: I regret very much that I am unable to concur with the Lord Chief Justice in the view he takes of the

case. I need hardly say, in differing from him—and I believe also from my Brother Lush—I have the greatest diffidence in saying that I think, under all the circumstances of the case, that the view taken by the learned judge at the trial, that the effect of the evidence was to take the defendants out of the protection of s. 7, was right. It is to be observed that, although I dare say the principal bearing of this section will be upon cases relating to newspapers, yet it is not confined to newspapers and booksellers, but applies generally. The case might be different if the defendants were living at a distance, or taking no part in the management of the paper *containing the libel; I cannot, however, but [67 think that they must be held each of them, in one way or another, to take a share in the bringing out of the newspaper and in the actual publication of it. It is conducted for their profit; they receive all the benefit and advantage which accrues to proprietors, as proprietors, of a paper—we assume it to be a profitable undertaking—conducted for their benefit. Now, in all cases of this description, nothing is more probable than that libels may be sent for publication, and may be published, without any knowledge of the person who actually sends them to the editor, or the manager. He may by inadvertence publish things which are libels, although not intending to do so. Well, this being the state of things, and the paper conducted for their benefit and their profit, I am bound to say myself that I cannot come to the conclusion to which my Lord seems to come with reference to the absent partner in this case. I think he is in the same condition as the other partners. It is true he was not actually on the spot at the time the particular paper was published. But he had duties with regard to the publication of the paper to perform, and if he did not perform them himself, some one else had to perform them for his benefit. In that state of things, without the aid of the statute, there would be no doubt whatever that upon the proof of publication at the offices of the partnership, it must have been held to be a libel for which the proprietor would be criminally responsible. I agree that the object of the statute was to interpose for the benefit of persons who might have been made liable without actual participation in the publication of the libel. Now, my Lord says he knows of no case in which that clause can apply, if not in this case. With great submission to his judgment, I think it may. The discretion which is vested in the manager is a discretion vested in an individual man. He is selected as the editor of the newspaper, he is to be the *alter ego* with regard to the actual

1877

The Queen v. Holbrook.

management of the paper of the defendants. I cannot help thinking that they, having done that, must be taken to authorize and to consent to the conduct of the paper as it is conducted, and that although they did not know of the actual libel itself, they knew generally what was the course of the management of the newspaper. And therefore I cannot [68] not bring myself to the *conclusion that they do come within this exemption. The object of the statute was to give some relief, and if I mistake not, relief has been given. Now, I must take it upon the evidence that the defendants did not know of the actual publication of the article, but they had given, as it appears to me, an authority and consent as to the mode in which the paper should be conducted, and they were, therefore, responsible, as persons by whose authority and consent the libel has in fact been published. The prosecutor has only one matter to prove, but in order to bring themselves within the exemption the defendants have to prove two things. They have not only to prove that the publication was made without their authority, consent, or knowledge, but that the libel was not published from want of due care or caution on their part. Now, if the section had been divided, or there had been an alternative, I should have thought that my Brother Lindley ought to have submitted the matter to the jury. But if my Brother Lindley took the view that this case was not exempted by the section, because the article was inserted, according to his view, with the authority and consent of these defendants, then I think there was nothing for the jury, and that, therefore, he took the right course. There may possibly be an exemption in the case of persons who are mere proprietors of a newspaper, such as shareholders in the property, who take no part in the management of it themselves. Here I cannot help thinking that all the partners have committed themselves to the discretion of an individual. But suppose a case in which the editor—the person in whom they repose full confidence and allow this large discretion—supposing he were to die, or supposing he were to be discharged, and another editor was appointed without the consent and without the knowledge of the other proprietors, it may be then that the individual discretion which they had reposed in the individual editor was entirely gone, and that the new man could not be taken to be acting upon any authority or discretion vested in him by the defendants. Therefore I am of opinion, as at present advised—and I express great doubt, considering by what authority the other proposition has been sustained—that, upon the evidence that the editorship of the

paper, was conducted by Mr. Green, who says, "They leave it entirely to me," that is, repose discretion in *me, and [69 then goes on to describe the various parts which each of the defendants take in the conduct and management of the paper—that, under these circumstances, the judge was right in saying that the statute did not apply to the case. Upon the showing of the defendants themselves, he was of opinion that the publication was with their authority or consent, although without their knowledge. Therefore it was unnecessary, under the circumstances, to submit the question to the jury, because for the prosecution it was sufficient to show that it was done by the authority or consent of the defendants. For the defendants to obtain an acquittal under this section, they must have gone further, and not only shown that it was without their authority or consent, but have shown, in addition to that, that they had been guilty of no negligence or want of care or caution in the publication of the libel in question.

LUSH, J.: There are two questions for our decision, and the first is this—what is the true construction of the 7th section of this Libel Act? The second is—whether there is not evidence which ought to have been left to the jury in support of the defendants' assertion that they brought themselves within that section. Upon the first question, I am constrained to differ from the view taken by my Brother Mellor, and also from that taken by my Brother Lindley, as I understand my Brother Mellor agrees with that taken by my Brother Lindley at the trial. There can be no doubt that it is a question of great importance. We must consider, in reading this section, what is the object and the purpose of the act, and I own I prefer to gather that from the language of the act itself, and what appears to have been the state of the law at the time it was passed. It is an act professing to be, as it is, a remedial act, to "Amend the Law of Libel," and it does amend the then existing law in several instances. We have to ascertain, in order to put a right interpretation on the words of this remedial act, what was the mischief which it was designed to remedy. Now, one matter which was felt to be an anomaly and a grievance at the time the act was passed was this: it had come to be accepted and received as settled law that the proprietor of a newspaper was criminally—not merely civilly, but criminally responsible for a libel inserted in his paper, and a bookseller *or publisher was criminally responsible for a [70 libel in any book which was sold or published by the persons acting under his authority, even though he himself did

1877

The Queen v. Holbrook.

not know or authorize the insertion of any libel, and did not even know of its existence. It had been for many years received as the settled law, and, as I say, it was acknowledged on all hands to be an anomaly and felt to be a grievance. It was an anomaly because it differed from every other case. The case cited of the nuisance stood upon entirely different grounds, in that the owner of a business was held to be criminally responsible, because his servant, in the course of managing his business, had been guilty of a public wrong—a public nuisance. But a libel is a private injury. It is only treated by the law as a public one, because of its supposed consequences. It is really a private injury, for the party libelled has his remedy, either by action or indictment. That being the state of the law, we are to read the act with reference to this, and now I find in the 7th section words which exactly fit that state of things. I, therefore, do not feel at liberty to adopt the very narrow construction suggested by Mr. Charles, which would make it applicable only to a hypothetical state of things, which, as far as we know, had never existed, at least, as a subject of judicial decision, and not to apply it to a state of things which was always recognized as an anomaly, and always felt to be a grievance. I cannot read a remedial act in that sense. The words appear to be exactly fitted to my interpretation—that a newspaper proprietor cannot be criminally responsible for a libel of which he had no knowledge at all, nor a bookseller criminally responsible for a book sold from his counter containing a libel of which he knew nothing. What is the fair meaning of these words as applied to that state of things? “Whensoever, upon trial of any indictment or information for the publication of a libel, under a plea of not guilty, evidence shall have been given which shall establish a presumptive case of publication against the defendant by the act of any other person by his authority, it shall be competent to such defendant to prove that such publication was made without his authority, consent, or knowledge, and that the said publication did not arise from want of due caution on his part.” They exactly fit this case. The editor had [71] inserted a libel acting under his authority. *They exactly apply to the bookseller whose servant has sold over his counter a book containing a libel, the bookseller having given no authority for the issue of the libel. The defendants are there carrying on the business, and this section cannot be taken to mean, in my view, that the paper itself must be published without consent, authority, or knowledge, or that the particular book must be sold without their

consent, authority, or knowledge. What it must mean is that the libel—speaking of the publication of the libel—that the libel was there “without his authority, consent, or knowledge, and the publication did not arise from want of due care or caution on the part of the defendant.” That is precisely the remedy one would expect to be applied by the Legislature to the existing anomaly. And why should we confine it to anything short of that which was known to be a matter denounced by the public and by those who had to suffer the penalties of this very severe and stringent law? I cannot doubt for a moment that that is the fair meaning of this clause. It means that the proprietor of a newspaper, or the proprietor of a bookseller’s business, whose authorized agent inserts in the paper, or sells over the counter in a book, some libellous matter without his knowledge, shall not be made criminally responsible if he is able to show that the libellous matter was published “without his authority, consent, or knowledge,” and that it “did not arise from want of due care or caution on his part.” These words appear to me to afford ample protection to the public, without inflicting any exceptional and severe injury upon the proprietor himself. Then comes the question—Was there evidence here which the learned judge should have left to the jury, tending to show that this was inserted without the authority, consent, or knowledge of the proprietors, and without any want of due care and caution on their part? Now I cannot read the evidence of the editor without coming to the conviction that there was abundant evidence which might, and ought to have been left to the jury. His evidence is that the defendants had nothing to do with the editorship of the paper. What is the editor’s evidence? “They leave it entirely to me. Richard Holbrook takes but a small share in the management of the commercial part of the paper. E. G. Holbrook has the management of the financial and printing departments. *Arthur Hol- [72 brook has the management of the advertisement department.” There is no evidence that any single paper was sold or issued by them after the complaint was made to them, or after they knew of the libel being there. Therefore it appears to me that there was abundant evidence, which should have been left to the jury, that would justify them in finding that this libel was inserted without their “authority, consent, or knowledge, and that the said publication did not arise from any want of due care or caution on their part.” It is quite competent to the prosecutor upon the second trial to prove, if he can, that the defendants sold

1877

The Queen v. Holbrook.

papers after they knew of the libel. That would make publication on their part, and is quite a different matter. There is no such evidence here. Now, the learned judge held that there was no evidence whatever to bring them within the protection of that 7th section; and in that respect I cannot help thinking—I do so with great diffidence, as my Brother Mellor disagrees with me—that he was wrong, and that this evidence, which should have been left to the jury, and which would have justified them in finding the defendants not criminally responsible, entitles them to the protection which this clause, in my view, was intended to give.

Rule absolute.

Solicitors for prosecution: *Gregory, Rowcliffes & Rawle.*

Solicitors for defendants: *Ford & Ford*, for Feltham, Portsea.

A criminal intent is the essential element of a crime: *Kerrains v. People*, 60 N. Y., 221, 228.

An act by the defendant, and an evil intent by him, must combine to constitute, in law, a crime: 1 Bish. Cr. Law (6th ed.), §§ 206, 287–291.

This rule does not apply to civil suits, for they are brought to enforce a compensation in damages for a loss or injury, where both parties may be guilty of no intentional wrong, yet one of them must necessarily suffer: 1 Bish. Cr. Law (6th ed.), § 247.

In *Lamb v. People*, 96 Illinois, 73, several burglars, among which were Lamb, had robbed the store of E. S. Jaffray & Co., and taken the goods on a wagon to the pawnshop of one Friedburg. “Albert Race, a police officer, coming up and being about to arrest some of the parties, he was shot and killed. It was claimed that defendant had nothing to do with that. The court was asked to charge, that unless defendant was present aiding, abetting and encouraging the person who committed the murder, or unless the jury should find that defendant, before the homicide, counselled or advised the persons in charge of the goods to oppose and resist whosoever should attempt to seize said goods, or interrupt them in the secreting or disposing of said goods, and that the killing of the deceased occurred in the course of such resistance, as the defendant had so counselled and advised them, they ought to acquit the defendant.” The

court refused. On error the conviction was reversed, the court holding that it may be stated as a general proposition, that no one can be properly convicted of a crime to the commission of which he has neither expressly or impliedly given his assent. Where the accused was present and committed the crime with his own hands, or aided and abetted another in its commission, he will be considered as having expressly assented thereto. So where he has entered into a conspiracy with others to commit a felony or other offence, under such circumstances as will, when tested by experience, probably result in the unlawful taking of human life, he will be presumed to have understood the consequences which might reasonably have been expected to follow from carrying into effect the purpose of the unlawful combination, and also to have assented to the doing of whatever would reasonably or probably be necessary to accomplish the objects of the conspiracy, even to the taking of life. But further than this the law does not go. If the accused in such case has not expressly assented to the commission of the crime which happened to be the result of attempting to carry into effect the purpose of the conspiracy, and the unlawful enterprise was not of such character as would probably involve the necessity of taking life in carrying it into execution, then there can be no implied assent, and consequently no criminal liability for the unexpected result. The court, after

using the language above quoted, say (pp. 83-4), "The principle which underlies and controls cases of this character is the elementary and very familiar doctrine applicable alike to crimes and mere civil injuries, that every person must be presumed to intend and is accordingly held responsible for the probable consequences of his own acts or conduct. When, therefore, one enters into an agreement with others to do an unlawful act, he impliedly assents to the use of such means by his co-conspirators as is necessary, ordinary or usual in the accomplishment of an act of that character. But beyond this his implied liability cannot be extended. So if the unlawful act agreed to be done is dangerous or homicidal in its character, or if its accomplishment be necessarily, or probably require the use of force and violence, which may result in the taking of life unlawfully, every party to such agreement will be held criminally liable for whatever any of his co-conspirators may do in furtherance of the common design, whether he is present or not.

But where the unlawful act agreed to be done is not of a dangerous or homicidal character, and its accomplishment does not necessarily or probably require the use of force or violence, which may result in the taking of life unlawfully, no such criminal liability will attach merely from the fact of having been a party to such an agreement. The views here expressed are fully sustained by the following authorities: 1 Bish. Crim. L. (6th ed.), § 641; Hawkins' P. C., book 2, chap. 29, §§ 19, 20, 21; Foster, 869, 870; Regina v. Franz, 2 F. & F., 580; Regina v. Horsey, 3 id., 287; Regina v. Luck, id., 448; Roscoe's Crim. Ev., 655, 673; Regina v. Tyler, 8 C. & P., 616; Regina v. Lee, 4 F. & F., 63; Regina v. Turner, id., 839; Rex v. Hawkins, 3 C. & P., 392; Watts v. State, 5 W. Va., 532; Rex v. Howell, 9 C. & P., 487."

In Reynolds's Case, 83 Gratt. (Va.), 834, the defendant was convicted of murder in the second degree, in aiding another to commit the crime. The court ordered a new trial, saying (pp. 841-3),

"The prisoner certainly did not kill deceased; nor do the facts certified show, or even tend to show, that he

assented in any way, or to any extent, to the said killing, or to the act by which it was done, or to its being done by any act of any other person. The prisoner never struck the deceased, nor offered to strike him, nor assented to his being struck by any other person. He was a youth going to school at the time the homicide was committed, and near the place of its commission. He and his brother Burwell Reynolds were living with their father, and working for him on his farm, near the place where they were going to school. On the day on which the homicide was committed they went in the morning from the place where the school was kept to their father's farm, and returned in the evening to the place of the school. When they got near to the latter place, in driving along the road, there was a saw-log lying in the road, which had been cut and put there by the deceased, or his direction; he being engaged in hauling logs to a saw-mill. At that point they were overhauled by the deceased, who was driving a wagon, and seems to have been about to haul the log in question. He was not prevented by them from so doing, nor did they say anything to him on the subject. When they were approaching the log in the road it seems that Burwell Reynolds was driving the slide, and Lee Reynolds was walking with a stick and a gun in his hand, which latter, it seems, he was in the habit of carrying about with him. It is stated, in the certificate of facts, that there was a conflict of testimony at this point as to how the difficulty occurred; whether Lee Reynolds threw the stick upon the deceased, or whether the deceased ordered him to drop it; but that the deceased did get the stick into his possession, and that Lee Reynolds backed and the deceased followed him in a scuffle over the gun for fifteen paces until the prisoner got to the log, then Shelton struck him with the stick and knocked him over the log. At this moment Burwell Reynolds, who was with the slide, came up from the rear and stabbed Shelton in the back with a large tobacco knife."

Now it does not appear that Lee Reynolds had anything to do with the stabbing of the deceased, or any knowledge, or any intention on the part of Burwell Reynolds to stab or kill him,

or that said Burwell at that time had in his possession the knife by which the stabbing was done, or any other weapon; nor that any effort was made to use the gun which Lee Reynolds then happened to have in hand, nor that the said gun was then loaded, even with bird shot. The deceased pursued Lee Reynolds, took away his stick; attempted to take away his gun, and knocked him over the log. During all this time, and notwithstanding this violence on the part of the deceased towards the prisoner, it does not appear that the latter gave to the former a single blow, or that such a blow was ever given. In this state of things "Burwell Reynolds, who was with the slide, came up from the rear and stabbed Shelton in the back with a large tobacco knife." Now how can Lee Reynolds be made liable for this act which he did not commit, to which he did not consent, and of which he had no knowledge nor information until it was done.

So it is error in the court to refuse to instruct the jury that if the defendant and another had simultaneously assaulted the deceased, but without a mutual understanding that they would injure him, and the other, without the knowledge or contribution of the defendant, had caused the death of the deceased, the defendant was not guilty.

So "If you believe that V. struck the fatal blow, before you can convict the defendant you must believe, beyond a reasonable doubt, that the defendant and V. had a mutual understanding that they would inflict upon the deceased some unlawful act or bodily harm:" *Waybright v. State*, 56 Ind., 122.

In *Chapman v. State* (1 Tex. App. R., 727), the defendants were indicted for stealing a cow, which it was proved they aided in killing. The court instructed the jury, in effect, that if the defendants were present and in any way participated in killing the cow, then it devolved on them to prove circumstances tending to excuse or justify their participation, unless such circumstances appeared from the evidence adduced by the state. Held, that the instruction was erroneous in two respects: 1. Because it pretermits the guilty knowledge necessary to inculcate the defendants as aiders and abet-

tors; and, 2d. because it ignores the presumption of innocence and doctrine of reasonable doubt, and misdirected the jury as to the burden of proof.

A corporation may unquestionably be guilty of criminal offences within the scope of corporate duty or corporate liability, except such as involve merely personal action of the guilty party, such as perjury, homicide, etc.: *People v. N. Y. Cent. R. R.*, 74 N. Y., 302; 1 Bish. Cr. Law (6th ed.), §§ 417-423; 1 Whart. Cr. Law (8th ed.), § 91.

Though its members who do not personally and knowingly participate in the criminal act would not be: 1 Bish. Cr. Law (6th ed.), § 424.

A stockholder or corporator has no individual interest in property of the corporation: *Mickles v. Rochester City Bank*, 11 Paige, 119, 127-8, affirmed in *Court of Errors*, Id., 129 note; *Central, etc. v. Walker*, 66 N. Y., 428; *Darlington v. Mayor*, 31 id., 197; *Field on Corporations*, §§ 127, 128.

The general rule of law that to bind a corporation by a contract, it must be made by the person to whom the management of its affairs is by law committed. The stockholders, even all of them at a general meeting, cannot, even by a unanimous vote, bind the corporation by contract.

Their action would at most be advisory, and not obligatory on the directors. The directors may adopt, upon sufficient consideration, the act of the stockholders or of strangers, and thus make it binding on the corporation; but it is the act of adoption which make it obligatory on the corporation, and not the original act of the parties: *Insurance Bank v. Bank of the U. S.*, 7 Penn. Law Jour., 129, 4 id. (Clarke's), 125 bottom paging; *McCullough v. Moss*, 5 Den., 567, 575.

A corporation for loaning moneys invested plaintiff's moneys on a mortgage, which it was agreed should belong to him. When the mortgage was paid the company was insolvent. The directors received payment, and the money went with the general assets of the company into the hands of a liquidator. Plaintiff sued the directors, claiming they knew at the time of receiving the money the company was insolvent, and that having, with that knowledge, mingled plaintiff's money with the assets of the company, were liable

therefor. Held, by the Court of Appeal, that they were not liable: *Wilson v. Lord Bury*, 5 Q. B. Div., 518.

The court (p. 526) saying (in the language of Lord Cairns in *Ferguson v. Wilson*, L. R., 2 Chy., 77): "What is the position of directors of a public company? They are merely agents of a company. The company itself cannot act in its own person for it has no person; it can only act through directors; and the case is, as regards those directors, merely the ordinary case of principal and agent."

In the case of *McCabe v. Jones*, 12 N. Y. Weekly Dig., 339, a civil action in the New York common pleas, for libel, in publishing in the *New York Times* a statement that a charge of perjury had been made before a Jersey City magistrate, the plaintiff at the trial term recovered a verdict against the defendant for \$250. On appeal, the general term (*Daily Register*, June 7, 1881) reversed the judgment, Judge Beach saying: "It appears from the evidence that the libellous article was printed in the *New York Times*, a newspaper published by a joint stock association, called the New York Times Publishing Association. The defendant is its secretary and treasurer, and also owns a majority of the shares of the stock; but had no knowledge of or personal affinity with the publication complained of. He testified to occupying a controlling position by virtue of the number of shares owned by him, and perhaps a controlling influence as to the conduct and general management of the paper, if he chose to exercise it in that way, which he had never done. The latter declaration evidently refers to the ownership of a majority of the stock. The proprietor of a newspaper is liable for defamatory matter published without his knowledge, because of the delegation by him to others of power to do the wrong, the printer and editor, by reason of their direct connection with and control over the contents of the paper. The defendant does not appear to have held any position whereby personal liability attached under those principles. Being the secretary and treasurer of the association necessarily gave him no authority, and imposed upon him no duty to supervise the printed matter, or charged him with any action

relative thereto. Neither does the law impose a liability for the libellous imprint solely from owning stock, even if a majority of the shares. There is no needful legal connection between that status and publishing the paper or control of its contents. The defendant's testimony does not place him in a situation of either proprietor, publisher, editor or printer, or where he would be liable as the principal of those directly connected in having to do with the publication. . . . The company is the proprietor and publisher, and may sue and be sued in the manner provided by statute, while the editor and printer, by virtue of their employment, are its servants, and not those of an individual owner of stock."

Chief Justice Daly, who concurs with Judge Beach in reversing the judgment, makes the following indorsement upon Judge Van Hoesen's opinion: "I agree in what is above stated, except that it devolved on the defendant to show that the kind of supervision or controlling influence which he had, and could but did not exercise, was not of the kind that enabled him to say authoritatively what should or should not appear in the paper. It was for the plaintiff to show this, as it was for him to make out his case and prove the personal liability of the defendant for what appeared in the paper. I am therefore of opinion, with Judge Beach, that the judgment will have to be reversed."

Judge Van Hoesen, in a dissenting opinion, says: "The defendant said he had a kind of supervision of the articles which appeared in the *New York Times*. What the nature and the extent of that supervision were, he did not say. I think that it devolved on him, after he had admitted that he had a kind of supervision, to show that it was not of that kind which enabled him to say authoritatively what should or what should not appear in the columns of the paper. If he had control of the columns and the power to reject and exclude anything which met with his disapproval, he must be held to the liability of a publisher of the libel, though he was only a shareholder in a joint stock company. It is true that a shareholder of a joint stock company was not, at the time this action was tried, liable for any obligation of the

company, until a judgment against the company had been obtained, and its property exhausted . . . but this immunity did not extend to the stockholder, who himself incurred a liability for the wrongful act which made the company also liable. I think the judgment should be affirmed with costs."

In *State v. Barksdale*, 5 Humphrey (Tenn.), it was held that a municipal corporation is bound to keep its streets in repair, and for neglect in so doing may be indicted and fined, but no member of the corporation is individually responsible for such neglect. The same doctrine was reiterated in *State v. Mayor*, etc., 11 Humphrey, 219.

In *Com. v. Mason*, 12 Allen, 185, the court held that where an act was not done by the accused but by one claimed to have acted as his agent, "The burden was on the government to establish the fact that the persons who made the sales were agents of the defendant. Probability of guilt is not sufficient to authorize a conviction. The jury are to be satisfied beyond a reasonable doubt of the facts necessary to establish the guilt of the accused."

A master cannot be convicted of a crime if the act was the result of negligence by his servant: *Reg. v. Bennett*, *Bell's Crown Cas.*, 1; 8 *Cox's Cr. Cas.*, 74.

In *Reg. v. Wilmett*, 8 *Cox's Cr. Cas.*, 281, *Coltman, J.* (p. 281), charged the jury, "A man is not criminally responsible for the acts of his servants, and if his servants improperly receive into his warehouse articles marked with the broad arrow, without his knowledge, he is not responsible."

An inkeeper is not liable to be indicted for the offence, committed in his absence and without his knowledge, by his barkeeper, of selling spirituous liquors to an intoxicated person.

The general rule is, that a master is liable in a *civil suit* for the negligence or unskillfulness of his servant, when he is acting in the employment of his master; but that he is not subject to be punished by *indictment* for the offences of his servant, unless they were committed by his command or with his assent.

If the jury, in a criminal case, have a reasonable doubt of the defendant's

guilt, they should acquit him: *Hipp v. State*, 5 *Blackf. (Ind.)*, 149.

So, in a prosecution for illegally selling liquor, it is competent for the defendant to rebut the *prima facie* evidence of agency, where the liquor was sold by defendant's servant: *Anderson v. State*, 22 *Ohio St. R.*, 305.

In this case the court said (p. 308), "When it in fact appears that the person accused in no way participated in the criminal act, he ought not by *construction* to be made punishable for it."

See *Com. v. Mason*, 12 *Allen*, 185; *Mullineux v. People*, 76 *Ills.*, 211; *State v. Privett*, 4 *Jones' N. C. Law*, 100.

In *Barnes v. State*, 19 *Conn.*, 398, defendant was indicted for selling, by his clerk, liquor to a common drunkard, under a statute making it an offence to do so in person "or by an agent." In discussing the question whether he was *criminally* liable for the act of an agent, the court said (p. 407), "We are aware, as already intimated, the master is sometimes made responsible civilly for his servant's misconduct. This responsibility may grow out of an express or implied undertaking that the thing to be done shall be well done; or out of that great principle of vigilance imposed upon a master that he must see his business is conducted so as not to injure others; or that his servants shall be duly attentive and prudent. But the master is never liable criminally for acts of his servant done without his consent, and against his express orders. The liability of a bookseller to be indicted for a libel sold from his store, by his clerk, is nearest to it. But the character of these cases has not always been understood. If carefully examined, they will be found to contain no new doctrine. The leading case is *Rex v. Almon*, 5 *Burr.*, 26, 86. Other cases followed as may be seen: 2 *Stark on Slander*, 34 (2d ed.); 1 *Hawk.*, c. 73, § 10; *Rex v. Walter*, 3 *Esp. R.*, 21; *Rex v. Gutch*, 1 *Moody & Malk.*, 437; *Attorney-General v. Liddon*, 1 *Crompt. & Jer.*, 220, 1 *Tyrw.*, 41; 2 *Crompt. & Jer.*, 493, 2 *Tyrw.*, 523.

"But having examined these cases, we speak with confidence that they contain no new doctrine. They make a sale in the master's store *high*, and un-

explained, decisive evidence of his assent and co-operation, but they will not bear out the claim that a bookseller is liable, at all events, for a sale by his general clerk. Lord Mansfield said, in *Rex v. Almon*, 'The master may avoid the effect of the sale, by showing he was not privy, nor assenting to it, nor encouraging it.' So, in *Starkie*, it is said that the defendant, in such cases, may rebut the presumption, by showing that the libel was sold contrary to his orders, or under circumstances negating all privy on his part."

In *Rex v. Gutch*, 1 Moody & Malkin, 433, it was held that the *proprietor* of

a newspaper is *prima facie* answerable for what appears in it, but the presumption arising from proprietorship may be rebutted and exemption established.

Lord Kenyon laid down the same rule in *Rex v. Holt*, 5 Term R., 448-4.

This rule was approved by the Court of Appeals in *Verona Cheese Co. v. Murtaugh*, 50 N. Y., 819.

Even when an offence is perpetrated by the *servant* of the *accused*, he is liable *civily* only where the offence is committed by his authority or with his knowledge and assent: *Verona, etc., v. Murtaugh*, 50 N. Y., 814, 817.

[3 Queen's Bench Division, 73.]

Dec. 19, 1877.

***THE COMPANY of the Proprietors of the REGENT'S [73
CANAL, Appellants; THE ASSESSMENT COMMITTEE OF ST.
PANCRA'S, Respondents.**

Poor Rate—Canal—"Lands of a like quality"—Mode of Assessment.

By a canal company's special act, it was provided that the lands of the company, whether covered with water or not, and also all dwelling houses, wharves, warehouses, lockhouses, and other houses of the company, should be ratable; the lands according to their quantity and quality, and the dwelling houses, &c., according to the nature and respective uses, dimensions, and descriptions thereof; and should be charged and assessed in like manner as lands of a like quality and dwelling houses, &c., of a like and similar size, nature, dimension, or description in the respective parishes where the same should be situate, were, or should be assessed or charged. The lands adjoining the canal were all built upon, and the assessment committee sought to assess the canal and towing-path on the following principle. They assumed the area occupied thereby to be covered by buildings similar in ratable value to the buildings adjoining the canal, allowing for necessary roads, access, &c., and then took a proportionate part of such ratable value as representing the ratable value of the lands so covered as distinguished from the buildings:

Held, that, the canal ought to be rated in like manner as land of the like quality in the parish uncovered with buildings, the value of which might be increased from time to time by circumstances, and that the mode of assessment proposed by the assessment committee was therefore incorrect.

SPECIAL CASE, stated under the provisions of "The Valuation (Metropolis) Act, 1869," sect. 40, notice of appeal to the Assessment Sessions having been previously given by the appellants, as provided by the said act.

1. The Regent's Canal Company was incorporated by an act of Parliament, 52 Geo. 3, c. 195, local and personal, for the purpose of "making and maintaining a navigable canal from the Grand Junction Canal in the parish of Padding-

1877 Regent's Canal Co. v. St. Pancras Assessment Committee.

ton to the River Thames, in the parish of Limehouse, with a collateral cut in the parish of St. Leonard, Shoreditch, in the county of Middlesex."

2. The canal was made in pursuance of the said act, and part of the said canal passes through the parish of St. Pancras, in which parish there are four double locks. The property of the said company in the said parish in the occupation of the company, consists as described in the valuation list hereinafter mentioned, of

No. 6590—Canal, towing-paths, sloping banks, and locks.

No. 6591—Dwelling house, office, and stable.

74] *No. 6591a—Cottages, near locks;

and the extent of the property above mentioned, numbered 6590, is about $21\frac{1}{2}$ acres, and the length of the canal 2 miles 3 furlongs and 196 yards, of width varying from 31 ft. to 129 ft.

3. By 52 Geo. 3, c. 195, s. 101, it is enacted as follows: "And be it further enacted that the lands, whether covered with water or not, and all dwelling houses, wharves, warehouses, lockhouses, and other houses of and belonging to the said company shall be ratable and chargeable to the maintenance of the poor, and to all other parochial rates and taxes in the several parishes and places where they are respectively situated; the lands according to their quantity and quality, and the dwelling houses, wharves, warehouses, lockhouses, and other houses according to the nature and respective uses, dimensions, and descriptions thereof; and shall be charged and assessed in like manner as lands of a like quality, and dwelling houses, wharves, warehouses, lockhouses, and other houses of a like and similar size, nature, dimension, or description, in the respective parishes where the same shall be situate, are, or shall be assessed or charged, and that the rates, duties, and other personal property of the said company liable to be rated to the poor or other parochial taxes in any such parishes or places shall be rated and assessed in like manner and in the same proportion as other personal property ratable in the said parishes and places respectively shall be rated and assessed, and according to the length of the line of the said navigation in such respective parishes and places, and not otherwise, or in any other manner: provided that, before such personal property shall be rated, fourteen days' notice shall be given in writing to, or left at the dwelling house or usual place of abode of the treasurer or clerk, or any other officer of the said company residing in the parish or place where such rate shall be

intended to be made by there spective overseers of the poor of the intention so to do."

4. At the date of the passing of this act (1812), the lands through which it was proposed that the canal should pass, and through which it afterwards was made, were to a considerable extent lands agricultural and pasture, and some of the said lands were used as yards or gardens, and some were covered with houses, &c. At the present time within the parish the lands adjoining the canal have been built upon, with the exception of that part passing through *Regent's Park, and these buildings are assessed to [75 the poor rate. If the area now occupied by the canal and towing-path were assumed to be covered by buildings, similar in ratable value to the buildings adjoining the canal, allowing for necessary roads, access, &c., and a proportionate part of such ratable value were taken as representing the ratable value of the lands so covered, as distinguished from the buildings standing upon them, then such proportionate part would be the sum of £1,134 gross, and £915 net ratable value.

5. The area of uncovered land in the parish in 1873 amounted to about one-fourth of the total area of the parish. If the canal were assessed in the ordinary way in which canals—the acts of Parliament relating to which do not contain any special provision as to rating—are now assessed, namely, by deducting from the gross receipts in the parish the expenses and outgoings in the parish, and allowances for tenant's and trade profits, risks, maintenance, &c., then the sum at which the property of the company is now assessed exceeds the sum at which the appellants claim to be rated.

6. In June, 1875, the overseers of the parish of St. Pancras made, under the provisions of the Valuation (Metropolis) Act, 1869, a valuation list of the property in the said parish, and in the said list the "gross value" of the property belonging to the Regent's Canal Company, therein numbered 6,590, was increased from £500 to £2,268, and the "ratable value" from £418 to £1,418, the sums of £500 and £418 respectively, being the amount of the "gross" and "ratable" values at which the same property had been assessed in the assessment of 1870.

7. The company duly objected, before the assessment committee of the said parish of St. Pancras, to the valuation list with respect to the property therein numbered 6,590, on the ground that the "gross" and "ratable" values of the said property were not made in accordance with the

1877

Regent's Canal Co. v. St. Pancras Assessment Committee.

requirements of the Company's Act of Parliament, 52 Geo. 3, c. 195, s. 101, but the company failed to obtain such relief as they deemed just. In their notice of objection they stated, as the correction which they desired to make, that the "gross value" should be reduced to £107 10s., and the "ratable value" to £86.

76] *8. Notice of appeal was duly served, upon which it was agreed to state this case.

9. If the said canal and towing-path were assessed (as the appellants contend they ought to be assessed) as uncovered land of similar quantity and quality, applicable to any purpose except building purposes, on a building agreement, the "gross" and "ratable" values would not exceed the values which the appellants desired to have inserted in the valuation list in lieu of those inserted by the parish officers; or if the canal and towing-path were rated and assessed as, in the alternative, the appellants contend that they ought to be assessed, according to their quantity and quality as uncovered land, in like manner as lands of the like quantity and quality are, in point of fact, assessed in the parish of St. Pancras, the appellants' valuation would be correct.

10. The respondents contend that the section set out in paragraph 3 was not inserted by the Legislature for the purpose of limiting, directly or indirectly, the assessable value of the appellants' property, but only to remove a difficulty that then existed from the view of the law then laid down by the courts, namely, that canal rates or dues, &c., were assessable, *per se*, and only in the parish in which they were considered to be earned, namely, where the voyages respectively terminated; that this view of the law was altered shortly after this act, and the canal rates, &c., have been since considered as an element of the occupation, in other words as of the quality of the land, and therefore the property should be rated on the principle laid down in paragraph 5, or, in the alternative, on the annual value of the adjoining lands as in paragraph 4.

The question for the opinion of the court is, upon what principle the canal and towing-path are to be valued and assessed?

If the court should be of opinion that either of the two contentions of the appellants is right, then the gross and ratable values are to be reduced to £215 gross and £204 ratable.

If the principle stated in paragraph 4 be correct, then the gross value is to be reduced to £1,134, and the ratable value to £915.

If the principle stated in paragraph 5 be correct, then it is agreed that the amount of the gross and ratable values respectively shall be determined by an arbitrator.

**F. M. White*, Q.C., for the appellants: It will not [77 be seriously contented that the canal is to be rated in the manner suggested in the 5th paragraph of the case. The only other manner suggested by the respondents is that suggested in the 4th paragraph, but on that point the case is governed by the decision in *Grand Junction Canal Co. v. Hemel Hempstead* (*). There was in that case a section containing special provisions as to the rating of a canal very similar to the present, inasmuch as a distinction was drawn in the section between lands and buildings, which is the case here. The court on that ground distinguished the case from *Reg. v. Glamorganshire Canal Co.* (*), where it was held that in estimating the value of the canal the value of adjoining lands, as enhanced by being built upon, might be considered. The true mode of assessment applicable to this case, according to the decision in *Grand Junction Canal Co. v. Hemel Hempstead* (*), is to take into consideration the value of other land in the parish, as it may exist from time to time, for any purposes to which the land may be most profitably applied except building purposes. It is admitted that the amount suggested by the appellants gives the full value as estimated by the actual existing value of adjacent land for any purposes except building purposes.

[LUSH, J.: Why should you exclude building purposes?]

Because a tenant from year to year will not give the value of the land for such purposes. That value is not in the land until it is let for a term of years on a building agreement.

[He also cited *Reg. v. Grand Junction Canal Co.* (*).

Holland (Castle with him), for the respondents: The respondents contend that the true principle of rating applicable to this case is that suggested in the 4th paragraph of the special case. The words of the section in this case are different from those of the section in *Grand Junction Canal Co. v. Hemel Hempstead* (*). The words here are "and shall be charged and assessed in like manner as lands of a like quality." It is clear that the word "quality" does not mean producing quality for agricultural purposes. It means to include the value as it might exist from *time to [78 time for any purpose. If so, why are building purposes to be excluded? The intention of the Legislature is obvious:

(*) Law Rep., 6 Q. B., 173.

(*) 3 E. & E., 186; 29 L. J. (M.C.), 238.

(*) W. R., 597.

1877

Regent's Canal Co. v. St. Pancras Assessment Committee.

though, on the one hand, the canal is not to be rated, as a railway is, with reference to its profits, on the other it is to be rated as if the land had remained in the hands of individuals, and so been applicable to the same purposes as other land in the parish. The rest of the land in the parish is building land.

[LUSH, J.: The section distinguishes between land and buildings, clearly showing that the land is not to be treated as if covered with buildings.]

It is not suggested that it should be so treated, for the respondents propose to deduct the value of the buildings.

[LUSH, J.: Has such a mode of valuation as that you propose been heard of before in the history of rating? How is the value of the land to be separated from that of the building upon it?]

That is a mere question of valuation. It might be difficult to apportion the whole value, but it is submitted that it would not be impossible for persons experienced in valuation to arrive at a fair and reasonable estimate of what was attributable to the land and what to the building upon it. With regard to the objection that you must take the value to let from year to year, it has often been held that where there is no actual lease, still the reasonable expectation that the tenancy will continue may be considered. So here, though there is no actual building lease in fact, why should not the yearly value be estimated on the footing that the tenancy will continue for a reasonable time?

MELLOR, J.: I am of opinion that the mode in which the assessable value of the lands is estimated by the appellants is the most correct. There is considerable difficulty in any aspect of the case. I cannot think, however, that the principle for which Mr. Poland contended can really be what the act of Parliament intended by the use of the word "land" taken in connection with the residue of the section. A marked distinction is made between lands and buildings. It is admitted that this land could never be covered with buildings, but it is right that it should pay a rate according to the varying circumstances which may cause the value of [79] land in the neighborhood to alter. The intention of *the section seems to me in accordance with that view. The respondents contend, on the other hand, that the land is to be treated as built upon; and then, in some way or other, the value of the building is to be separated from that of the land, so that the simple value of the land may be so arrived at. It seems to me that the land must be dealt with, in estimating its value, as subject to the limitations imposed by the

statute; and I do not think the statute sanctions the introduction of any such principle of rating as that contended for by the respondents. Such a mode of rating would be an entire novelty, and would, in my opinion, give rise to great difficulties and complications.

LUSH, J.: I am of the same opinion. The view that underlies the contention of the respondents is, it seems to me, that the soil of the canal ought to be treated as if covered by buildings, which it no doubt would have been but for the canal. They are not, however, bold enough to go that length; but they propose, first, to suppose the land covered with buildings, and then to deduct the value of the buildings, thus by some means severing the value of the building from that of the land on which it is built. How that is to be done I am unable to gather from the argument. I suppose those who devised this ingenious theory of rating have some idea how it is to be carried out, but I confess it seems to me a complete novelty, and I have not been able to understand how in practice it would be worked. The act, it must be observed, draws a clear distinction between houses and lands. The land is to be rated as land of the same quantity and quality, &c.; that means land not used for building purposes. The word "quality" cannot mean producing quality, but the obvious intention is that the value shall be estimated with reference to that of land of a similar description not built upon, though it may be enhanced in value by the proximity of buildings. For these reasons our judgment must be for the appellants.

Judgment for the appellants.

Solicitors for appellants: *Ellis & Ellis.*

Solicitors for respondents: *Cunliffe, Beaumont & Davenport.*

As to when railway and other structures upon public streets are to be deemed and to be assessed as lands in New York, see 19 Eng. R., 104 note; Laws 1881, chap. 293, vol. 1, p. 398; Hudson River, etc., v. Patterson, 11 Hun, 525 (overruling Utica, etc., v. Supervisors, 1 Barb. Chy., 447), affirmed 74 N. Y., 365; People v. New York, etc., 19 Hun, 460, affirmed 82 N. Y., 459.

As to the rules by which the lands

of railway companies should be assessed, see Thompson's Assessors and Collectors' Manual (2d ed.), 130-4; Laws N. Y. 1880, chap. 542; People v. Fredericks, 48 Barb., 173, 33 How. Pr., 150; People v. Barker, 43 N. Y., 70; People v. Shields, 6 Hun, 556; Randall v. Elwell, 52 N. Y., 521, 11 Am. R., 75, and note; Cooley on Taxation, title Railroads; Burroughs on Taxation, 181 *et seq.*; Saxton's Tax Laws, N. Y., 69-71.

1878

Welply v. Buhl

[8 Queen's Bench Division, 80.]

Jan. 11, 1878.

80]

*WELPLY V. BUHL.

Practice—Remitting Case to County Court—30 & 31 Vict. c. 142, s. 10—Security for Costs, Extension of Time for giving.

An order was made under 30 & 31 Vict. c. 142, s. 10, remitting an action to the county court unless security was given for costs within a week. The plaintiff did not give security within the time limited, but after that time applied for and obtained an order extending the time for giving security :

Held, that until the plaintiff had lodged the writ and order remitting the action with the registrar of the county court in accordance with the 10th section of 30 & 31 Vict. c. 142, s. 10, the action remained in the superior court, and consequently there was jurisdiction to make the order extending the time for giving security.

APPEAL against an order of Fry, J., at chambers.

In this case the master had, on the 7th of December, made an order that, unless the plaintiff should, within a week, give full security for the defendant's costs to the satisfaction of one of the masters of the court, the cause should be remitted for trial to the Westminster County Court, under 30 & 31 Vict. c. 142, s. 10. On the 11th of December the matter came before the master to fix the nature of the security, and he ordered that the plaintiff should either give security by payment of £75 into court, or by a bond as specified in his order.

The plaintiff did not give security within the week as required, and did not lodge the writ and order remitting the action with the registrar of the county court as provided by the 30 & 31 Vict. c. 142, s. 10; but on the 20th of December he applied to a master at chambers for further time, and the master made an order that the plaintiff should be at liberty to give full security within three days, notwithstanding the time limited by the first order had expired, or to pay money into court instead of giving security, and that on such security being given or money paid into court, the proceedings should be continued in the Queen's Bench Division, as if security had been given or money paid into court in accordance with the former order.

On the 21st of December the plaintiff paid the required amount into court. The defendant applied to Fry, J., by 81] way of appeal *against the master's order extending the time, and Fry, J., rescinded the order.

C. Russell, Q.C., and *Tapping*, moved by way of appeal against the order of Fry, J.: They contended that until the plaintiff had lodged the writ and order remitting the ac-

tion with the registrar of the county court, as required by the 10th section of 30 & 31 Vict. c. 142, the action remained in the superior court, and the master had jurisdiction to vary the order.

Anderson showed cause: He contended that the effect of the order was to remit the action to the county court upon the expiration of the time limited for giving security for costs, and that consequently there was no jurisdiction to make the order extending the time: *Scutt v. Freeman* (*).

COCKBURN, C.J.: I think the order of Fry, J., must be set aside. This is a case in which the court, or a judge, or a master exercising the judge's authority has jurisdiction under 30 & 31 Vict. c. 142, s. 10, to make one of two orders—viz., to order that, if security be not given or money paid into court to secure the defendant's costs, the action shall be stayed; or, in the alternative, to order that it shall be remitted to the county court. The master made an order that the cause should be remitted unless security was given or money paid into court within a certain time, and it appears that neither of those things was done within the time limited. Therefore, as things stood, the plaintiff could not have gone on in the superior court, but, if he wished to proceed, must have done so in the county court.

Then, how does the case get to the county court? Not by virtue of the order, for the act provides that the plaintiff shall himself take it there by lodging the writ and the order remitting the action with the registrar. Unless and until he does so the county court has no jurisdiction, for it can only acquire the jurisdiction by the mode of procedure prescribed by the act. In the meantime it appears to me that the cause remains in the superior court. I feel the force of the argument that the plaintiff cannot be allowed to keep up that state of things indefinitely; but it seems *to me that the remedy, if the defendant wishes to [82 force the plaintiff either to abandon the action or to take it to the county court, is by applying for a further order to compel him to adopt one of these two courses. If the master had adopted the other alternative pointed out by the section, and had merely stayed the proceedings, instead of remitting the action to the county court, there would have been no doubt that the action would still have been in the superior court. I think that there is no real difference between the effects of these two forms of order, until the action has been taken to the county court by the plaintiff. Until that is done it remains in the superior court, and may

(*) 2 Q. B. D., 177; 20 Eng. Rep., 262.

1878

Welply v. Buhl.

be dealt with accordingly. And so, as it seems to me, a judge or master has still jurisdiction to vary the order. For these reasons, I think that the order of Fry, J., was wrong and must be set aside.

MANISTY, J.: I am of the same opinion. The statute has prescribed a mode by which an action in the superior court may be removed to the county court; but until it has been so removed the proceedings, though they may have been stayed, remain in the superior court. The county court does not, as it seems to me, acquire jurisdiction until the writ and order are lodged with the registrar. If the plaintiff does not take this step, I think an order may, in some form or other, be procured to compel him to do so, or to abandon the action, for the act renders it obligatory upon him to lodge the writ and order.

Rule absolute.

Solicitor for plaintiff: *J. E. S. King.*

Solicitors for defendant: *Alsop & Co.*

See next case.

It will be seen that, in the principal case, if the plaintiff failed to give the requisite security the case was not to be ended, but was to be remitted to an inferior court. In such case it remained in the court making the order until the cause was actually remitted to the lower court, and that court became possessed of it. In the next case, *Whistler v. Hancock*, the order terminated and dismissed the case absolutely unless the plaintiff, within a fixed time, delivered a bill of particulars. That not having been done, the case was held to be terminated, and to be no longer pending.

In *New York* the rule of the Court of Appeals as to sending down a remittitur was intended to protect the party against surprise, and to give him time to obtain an order staying the sending down of the remittitur: *Lyme v. Ward*, 1 N. Y., 531.

If he do not do so, and, after ten days' notice of the affirmance, the remittitur is regularly sent down and filed, this court will not, ordinarily, relieve him: *Latson v. Wallace*, 9 How., 334.

Otherwise, if irregularly or improperly sent down: *Chamberlain v. Fitch*, 2 Cow., 243; *Palmer v. Lawrence*, 5 N. Y., 455; *Newton v. Harris*, 8 Barb.,

306; *McFarlan v. Watson*, 4 How., 128, as explained in *Langley v. Warner*, 2 Code R., 97.

The broad doctrine laid down in some of the cases (9 How., 334; 1 N. Y., 239; *Id.*, 240; 2 *id.*, 559), that the Court of Appeals loses all jurisdiction over the case by the filing of the remittitur, does not, as we understand it, accord with the present practice of the court. The mere filing has no *special* and *overpowering* effect over the court above: *Judson v. Gray*, 17 How., 289; *Palmer v. Lawrence*, 5 N. Y., 455; *Chamberlain v. Fitch*, 2 Cow., 243.

The Court of Appeals would by resolution request the court below to return the remittitur, when it would comply with the request: *Vernilyea v. Seldon*, 6 How., 41; *Bogardus v. Rosendale Co.*, 1 Duer, 592; *Chamberlain v. Fitch*, 2 Cow., 243; *Newton v. Harris*, 8 Barb., 306; *Murray v. Blatchford*, 2 Wend., 221; *Wilmerdings v. Fowler*, 15 Abb. Pr. (N.S.), 86; *Cushman v. Hadfield*, 16 *id.*, 109, and note.

See Mr. Hun's edition *Rules of Courts N. Y.*, pp. 18-24, 31; 1 *Bliss's N. Y. Code Civ. Proc.*, 88, 552, 896-8; *Jones v. Anderson*, 5 N. Y. Weekly Dig., 344, 71 N. Y., 599.

As to remittiturs from the Supreme Court of the United States, see U. S.

Whistler v. Hancock.

1878

v. Gomez, 23 How. U. S., 326; Matter of Creashaw, 15 Peters, 119. R. S., §§ 701-4; U. S. Supreme Court Rule, 24; Desty's Federal Procedure, pp. 263-4; Bump's Federal Procedure, 347.

See Myers's Index to U. S. Supreme Court Rep., title "Mandate," 2 Abb. U. S. Prac. (8d ed.), 269; U. S.

[3 Queen's Bench Division, 83.]

Jan. 11, 1878.

*WHISTLER V. HANCOCK.

[83]

Practice—Dismissal of Action for want of prosecution—Order XXIX, Rule 1—Extension of Time for delivery of Statement of Claim.

An order was made under Order XXIX, Rule 1, dismissing an action for want of prosecution, unless a statement of claim should be delivered within a week. The week having expired, and no statement of claim having been delivered:

Held, that the action was at an end, and there was no jurisdiction to make an order subsequently extending the time for delivery of the statement of claim.

APPEAL against an order of Fry, J., at chambers.

This was an action upon a dishonored check under the Bills of Exchange Act. The defendant obtained leave to appear and defend. On the 15th of December, a master made an order under Order XXIX, Rule 1, dismissing the action for want of prosecution, unless the statement of claim were delivered within a week.

On the 22d of December the plaintiff took out a summons to set aside the appearance, and this on the 27th of December was dismissed by the master. The plaintiff gave notice of appeal against the decision of the master. On the 29th of December the plaintiff delivered a notice in lieu of statement of claim under Order XXI, Rule 4. On the 31st of December the plaintiff took out a summons for further time for delivering statement of claim, and on the 1st of January the master made an order giving the plaintiff a week's time. This order was set aside on appeal, by Fry, J., on the ground that the master had no jurisdiction to make the order.

Jelf, for the plaintiff, moved to rescind the order of Fry, J.: He contended that the master had jurisdiction under Order LVII, Rule 6.

Lyon, for the defendant, showed cause.

COCKBURN, C.J.: This is a very plain case. The defendant obtained an order that unless the statement of claim were delivered within a week the action should be at an end. The plaintiff took out a summons to set aside the appearance, and if he could have obtained an order to that effect before the week was out, he would have been the victor;

1877

Angus v. Dalton.

84] but before his summons could be heard he *fell under the operation of the order dismissing the action, and the action was at an end. It cannot be contended that the taking out of a summons to set aside the appearance in the meantime could keep the action alive after the period when by the operation of the master's order it was defunct. For these reasons, I think the master had no jurisdiction, and the order of Fry, J., was right.

MANISTY, J.: I am of the same opinion. The mistake on the part of the plaintiff was in not applying within the week to set aside or vary the order of the 15th of December.

Rule refused (').

Solicitors for plaintiff: *Richard Jones & Co.*

Solicitors for defendant: *H. R. Jones.*

(') This decision was followed in the Exchequer Division in *Wallis v. Hepburn* where the same question arose. An order was made at chambers on the 8th of November, 1877, to dismiss the action unless a statement of claim were delivered within ten days. The time having expired, on the 20th of November a master's order was made extending the time for delivering the statement of claim. This order having been affirmed at chambers by Pollock, B., the defendant appealed.

Jan. 12. *Jelf*, for the defendant, cited *Whistler v. Hancock*.

Pitt-Lewis, for the plaintiff.

Jan. 14. THE COURT (Cleasby, B. and Hawkins, J.), after consulting the judges of the Queen's Bench Division, held that there was no jurisdiction to make the order of the 20th of November, the action being then dead, and that the order must be set aside.

Appeal allowed.

Solicitor for plaintiff: *J. Haynes.*

Solicitors for defendant: *Peacock & Goddard.*

See note to preceding case.

[8 Queen's Bench Division, 85.]

April 26; Dec. 11, 1877.

85] *ANGUS & CO. V. DALTON AND THE COMMISSIONERS OF HER MAJESTY'S WORKS AND PUBLIC BUILDINGS.

Easement—Lateral Support of House by adjoining Soil—Twenty Years' uninterrupted Enjoyment—Presumption, how far affected by inability to prevent Enjoyment—Conversion of Dwelling house into Factory—2 & 3 Wm. 4, c. 71, s. 2.

In an action by the owners of a factory against the defendants for excavating the soil of an adjoining house in such a manner as to leave the foundation of part of the factory without sufficient lateral support, and thereby causing it to fall, it appeared that the two buildings had apparently been erected at the same time, and were estimated to be upwards of 100 years old. Both had been occupied as dwelling houses until about twenty-seven years before the accident, but the plaintiffs' predecessor had then converted his house into a coach factory, removing the internal walls, and

erecting a stack of brickwork which both served as a chimney stack, and supported the girders which had to be put up to sustain the floors. The defendants, in taking down the adjoining house and in digging cellars which had not previously existed, left a support for the chimney stack which proved insufficient, and it fell, drawing after it the entire factory:

Held, by the majority of the court (Cockburn, C.J., and Mellor, J.), that the defendants were entitled to judgment, for first, no grant of a right of lateral support for the factory by the adjacent land could be presumed from the enjoyment of such support by the plaintiff for twenty years, inasmuch as the owners of this land never had any power to oppose the conversion of the dwelling house into a factory, and had no reasonable means of resisting or preventing the enjoyment by such factory of lateral support from the adjoining soil, and for the same reason such support was not an easement which had been enjoyed for twenty years within the Prescription Act (2 & 3 Wm. 4, c. 71, s. 2), as it could not be said to have been enjoyed by a person claiming right thereto and without interruption.

By Lush, J., dissenting, that after twenty years' enjoyment without physical obstruction of such support for the land with the factory upon it, it must be presumed that it had been enjoyed by virtue of some grant or agreement; that the mere absence of assent on the part of the adjoining owner was immaterial, and that the plaintiff was entitled to judgment.

CLAIM, stating that plaintiffs were coach builders, and possessed of the land, buildings, manufactory, and premises in Westgate Road, Newcastle-upon-Tyne, known as "Angus' Coach Manufactory and Show Rooms," where they carried on the business of coach builders; that they were entitled to have the land and buildings supported by the land adjacent thereto, and by the land and minerals under the same, and were entitled to support for their buildings from the walls of a building adjoining thereto; that the defendants wrongfully removed the land and minerals under and *adjacent to the buildings of the plaintiffs, [86 and wrongfully and carelessly removed the walls of the adjacent building, and made excavations in land adjacent to the land and premises of the plaintiffs in a negligent and careless manner, and without taking reasonable and proper precautions to support and secure the buildings of the plaintiffs. That by reason of the premises the buildings of the plaintiffs were deprived of the support to which they were entitled, and a large part of them fell.

Defence, 1, by the defendant Dalton, denying the right to support, the trespasses, &c., in the statement of claim, and alleging that the trespasses, &c., were done (if at all) by contractors employed by him who were not under his management or direction, and over whom he had no control. 2. By the Commissioners of Works and Buildings, denying the right to support, the trespasses, &c., and alleging that the commissioners had contracted with the defendant Dalton for the execution of building works on premises adjacent to the plaintiffs' premises, by which contract it was provided that Dalton should complete the work conformably

1877

August v. Dalton.

to the specification and conditions. That by the specification it was provided that he should shore up the adjoining buildings and make good all damage that might be caused thereto during the erection of the building; that if any trespass, damage, or injury was done by Dalton in the execution of the works it was caused by his neglect, and was not a necessary and probable consequence of the works ordered by the other defendants.

Reply: joining issue upon the defences, and demurring to so much of them as disclaimed liability for the acts of Dalton and the contractors respectively.

At the trial, before Lush, J., at the Newcastle Summer Assizes, 1876, the learned judge directed a verdict for the plaintiffs for the amount claimed, subject to a reference to ascertain the damages, and extended the time to enable the plaintiffs to move for judgment.

1877. April 26. The plaintiffs moved accordingly.

Littler, Q.C., *G. Bruce*, and *Ridley*, for the plaintiff.

Sir J. Fitzjames Stephen, Q.C., and *Shields*, for the Commissioners of Works and Buildings.

87] **Herschell*, Q.C., and *Wheeler*, for the defendant Dalton.

The facts of the case, the arguments, and cases cited will be found in the following judgments.

Cur. adv. vult.

Dec. 11. The following judgments were delivered:

LUSH, J.: The plaintiffs are owners in fee of a coach factory at Newcastle-upon-Tyne. The defendant Dalton is a builder, who had been employed by the Commissioners of Works and Buildings, under a contract to take down a house adjoining to the plaintiffs' factory, and to erect in its stead, a building to be used as a probate office.

The action is brought for excavating the soil of the adjoining property, on which the probate office was to be built, to such a depth, as left the foundation of that part of the coach factory without sufficient lateral support, and thereby causing the factory to fall.

The two houses were apparently built at the same time, and were estimated to be upwards of a hundred years old. They were divided by a wall which belonged to the house pulled down, and which wall had been taken down by the defendants without injury to the factory.

Up to the year 1849, being about twenty-seven years before the accident, both houses had been occupied as dwelling houses; but in that year the plaintiffs' predecessor con-

verted his house into a coach factory, and to adapt it to this purpose he removed the internal walls, and erected on his own soil close to and in contact with so much of the dividing wall, a large stack of brickwork serving the twofold purpose of a chimney stack, and also of a support to the main girders which had to be put in to sustain the floors. These girders were inserted into the stack on the one side, and into the plaintiffs' wall on the opposite side, and were strongly secured with braces and struts, and they thus formed the main support of the upper stories of the factory. When the defendants removed the dividing wall they left this stack untouched, and erected on the site of the dividing wall, a temporary wooden gable so as to protect the factory while the new building was in progress. There had been no cellarage in the adjoining house, and it was *not disputed [88 that if none had been made, the stack and the factory would not have been affected by the alterations.

The defendants, however, having removed the dividing wall and erected the temporary gable, proceeded to dig to the depth of several feet below the level of the foundation of the plaintiffs' stack, leaving a thick pillar of the original clay around the stack for the purpose of supporting it during the erection of the new dividing wall. This pillar, however, large as it was, proved to be insufficient. After exposure to the air, and before the foundations of the new wall had been completed, it gave way, and the stack sunk and fell, drawing after it the entire factory.

Under these circumstances, it was contended, on behalf of the defendants, first, that the plaintiffs' factory was not entitled to the support of the adjacent soil; and, secondly, that at all events the Commissioners of Works and Buildings were not responsible for the negligence of the contractor, in not leaving sufficient support or not properly shoring up the chimney stack.

These points were reserved at the trial, which took place before me at Newcastle at the summer assizes, 1876, and a verdict was entered for the plaintiffs, subject to the questions of law and to a reference to an arbitrator to assess the damages, in case the verdict should stand against both or either of the defendants.

We expressed our opinion during the argument that upon the subordinate question of the liability of the commissioners for the acts of the contractor, we were bound by the case of *Bower v. Peate* (¹), but we took time to consider our judgment upon the main question, namely, whether the

(¹) 1 Q. B. D., 321; 16 Eng. R., 374.

1877

Angus v. Dalton.

plaintiffs had acquired a right to the support of the adjacent soil for their building, especially having regard to the fact that it had been altered from a dwelling house to a factory, and that the adjacent soil had thereby, and by the use made of the altered fabric, been burdened with considerable additional weight beyond what it had to bear when the house was originally built.

It was not suggested, nor was there any ground for the supposition, that up to the moment of the fall, the factory was not a perfectly sound and stable building, nor that any alteration had been made in it since its conversion from a [89] dwelling house in the *year 1849. It had, therefore, stood for twenty-seven years in the condition in which it was immediately before the accident, having had during all that time the support of the adjacent natural soil.

The right to support from the adjacent soil, and the right to lights, which are distinguished as negative easements, bear a close analogy to one another. They have often been treated as standing on the same footing, and the only distinction which can, as it appears to me, be suggested between them is, that the one is more onerous to the servient tenement than the other, for the one absolutely deprives the adjoining owner of a portion of his land for building purposes. He cannot raise any erection so near to the windows as to obstruct the light, whereas the claim to lateral support only prevents him from lessening that measure of support which the dominant tenement has enjoyed. So long as he prevents the latter from falling or sinking, which he may generally do by underpinning or other contrivance, he may use his own land as he pleases. It is to the degree, and not the kind of support that the dominant owner looks, and it is that alone to which he has gained a right. But as respects the acquisition of the right, the two claims appear to me to be identical. The owner who builds to the extremity of his land may open windows overlooking his neighbor's land. He may also lay his foundations as much or as little below the surface of his soil as he pleases. The adjoining owner cannot object or maintain any action against him for no right of his is thereby invaded. His only remedy is to build up against the windows, or take away the support which the house derives from his soil, before an adverse right has been gained: see *Cross v. Lewis* (*).

All the authorities agree that a building which has acquired the status of an *ancient* building is protected from invasion of its easements of light and support. Down to

(*) 2 B. & C., 686,

the time of James I, it was the practice to prescribe for such easements as having existed from the time of legal memory (see *Bland v. Mosely* ⁽¹⁾), and it was expressly held in *Bowry v. Pope* ⁽²⁾ that a party could not maintain an action for a nuisance in stopping the lights of his house unless he had gained a right in the lights by prescription. Theoretically *an *ancient* house at this period was a house [90 which had existed from the time of Richard I. Practically, it was a house which had been erected before the time of living memory, and the origin of which could not be proved. But it afterwards came to be settled law that an uninterrupted possession of light, water, or any other easement for twenty years afforded a ground for presuming a right by grant, covenant, or otherwise, according to the nature of the easement; and if there was nothing to rebut the presumption, a jury might and should be directed to act upon it ⁽³⁾).

The statute 21 Jac. 1, c. 16, which limited the time of making an entry on lands to twenty years, seems to have suggested the necessity of a corresponding period for the acquisition of these easements. The earliest recorded case that I am aware of was in 1761. In that year Wilmot, J., ruled that where a house had been built forty years and had had lights at the end of it, if the owner of the adjoining ground built against them, so as to obstruct them an action lay; "and this," he said, "is founded on the same reason as when they have been immemorial, for this is long enough to induce a presumption that there was originally some agreement between the parties." And he added that twenty years was sufficient to give a man a title in ejectment on which he may recover the house itself, and he saw no reason why it should not be sufficient to entitle him to any easement belonging to the house.

In 1769 the same learned judge tried an action for stopping lights which had existed for sixty years. The defendant offered to show that the lights did not exist prior to that period, a defence which would undoubtedly have destroyed a claim by prescription, and which, before the time of James I, would have been held good. But the learned judge overruled it. "If a man," said he, "has been in possession of a house with lights belonging to it for fifty or sixty years no man can stop up those lights. Possession for such a length of time amounts to a grant of the liberty of making them. It is evidence of an agreement to make them. If I am in possession of an estate for so long a period as sixty

(1) Cited in *Aldred's Case*, 9 Rep., 58 a.

(2) Leon., 168.

(3) 2 Saund., 174, note 2 by Serjeant Williams.

1877

Angus v. Dalton.

91] years, I cannot be disturbed even by a writ of *right, the highest writ in the law. If my possession of the house cannot be disturbed shall I be disturbed in my lights? It would be absurd" (2 Saund., 175 a).

In a case like the present which came before Lord Ellenborough in 1803, that learned judge directed the jury as follows: "Where a man has built at the extremity of his land, and has enjoyed his building above twenty years, by analogy to the rule as to lights, &c., he has acquired a right to support or as it were of leaning to his neighbor's soil, so that his neighbor cannot dig so near as to remove that support; but it is otherwise of a house newly built." This case is quoted in 1 Selw. N. P., 10th ed., p. 435, upon the authority of Lawrence, J.

No facts are stated, and it is probable that no rebutting evidence was offered, and that this may account for the strong way in which the proposition was put. But it shows that at all events, in the absence of any such evidence, Lord Ellenborough considered the right to be established by an uninterrupted enjoyment of twenty years. In 1824 the right to lights which had been enjoyed for thirty-eight years came before the Court of Queen's Bench in *Cross v. Lewis* (*). In delivering judgment in favor of the right, Bayley, J., says, "I do not say that twenty years' possession confers a legal right, but uninterrupted possession for twenty years raises a presumption of right; and ever since the decision of *Darwin v. Upton* (*) it has been held that in the absence of any evidence to rebut that presumption, a jury should be directed to act upon it. It has been argued that in order to found such a presumption it must be shown that the first act was illegal. If so, the doctrine of presumption can never apply to windows; for a person building a house, even at the extremity of his own land may lawfully open windows looking towards the adjoining property. If his neighbor objects to them he may put up an obstruction, but that is his only remedy; and if he allows them to remain unobstructed for twenty years that is a sufficient foundation for the presumption of an agreement not to obstruct them." And Holroyd, J., who tried the case, says, "At the trial I considered the windows as ancient lights, and that the plaintiff had a right by law to enjoy them; and that it was not a question to be determined by a jury with-

92] out *some evidence to contradict the idea of their being ancient. . . . A man may on his own land erect a house with windows looking towards his neighbor's premises. At

(*) 2 B. & C., 686.

(*) 2 Saund., 174 b.

first they may be obstructed, but if no interruption is offered, he may at length prescribe for them as ancient windows, and claim to have them free from obstruction as in *Bland v. Mosely*” (').

It is not suggested in this judgment, nor in any other judgment that I am aware of, what kind of evidence would be sufficient to rebut the presumption derived from twenty years' uninterrupted possession. But this judgment plainly teaches what would not be sufficient. It would not be enough for the adjoining owner to say to the building owner, “I object to your opening windows overlooking my land.” To make his objection effectual, he must follow it up by actual obstruction. “That,” says Bayley, J., “is his only remedy,” and Holroyd, J., added, “At first they may be obstructed, but if no interruption is offered he may at length prescribe for them as ancient windows,” evidently meaning by “interruption” actual physical obstruction.

When we consider that at this period the courts were familiar with the doctrine of adverse and non-adverse possession, which grew out of the statute of James I, it is not difficult to surmise what kind of evidence would be, in the minds of the judges, proper evidence to rebut the presumption derived from actual uninterrupted enjoyment. The building owner would not ask his neighbor for his permission to enable him to build his own house where and how he pleased on his own land. If he asked anything it would be that his neighbor would forbear to exercise his right to obstruct the windows he intended to open, or to take away the adjacent soil upon which his house depended for support. It was not an unusual thing before the Prescription Act for the adjoining owner to grant what was called a “lease” of the lights overlooking his premises. Many such instances have come before the court, and one such occurs in a case now pending in this division on a rule for a new trial. I refer to the case of *Hunt v. City of London Real Property Company*. Another mode of preserving the right of the adjoining owner was to exact a periodical payment from the building owner as an acknowledgment that he held his lights upon sufferance. An *instance is found in [93 the remarkable case of *The Plasterers' Company v. The Parish Clerks' Company* (*), where it appeared that 10s. a year had been paid ever since the fire of London as an acknowledgment of the right of the adjoining owner to obstruct the lights when he pleased.

I conclude, therefore, that the mere absence of assent, or

(') Cited in *Aldred's Case*, 9 Rep., 57 a.

(*) 6 Ex., 630; 20 L. J. (Ex.), 362.

1877

Angus v. Dalton.

even the express dissent of the adjoining owner, would not prevent the right to light and support from being acquired by uninterrupted enjoyment, and that nothing short of an agreement, either express, or to be implied from payment or other acknowledgment, that the adjoining owner shall not be prejudiced by abstaining from the exercise of his right, would suffice to rebut the presumption. In other words, that it would be presumed after the lapse of twenty years, that the easement had been enjoyed by virtue of some grant or agreement, unless it were proved that it had been enjoyed by sufferance.

This was the state of the law as to this class of easements at the time the Prescription Act (2 & 3 Wm. 4, c. 71) passed. That act by the third section distinguishes lights from all other easements, and deals with them in a different manner. It converts twenty years' actual enjoyment into a right absolute and indefeasible, "unless it shall appear that the same has been enjoyed by some consent made or given for that purpose by deed or writing." Payment of rent or other acknowledgment, therefore, no longer keeps open the right of the adjoining owner to obstruct lights, and in the case of *The Plasterers' Company v. The Parish Clerks' Company* (') just mentioned, it was held that although the plaintiffs had paid the agreed acknowledgment for nearly 200 years, the right of the adjoining owner to build against them was taken away by the act.

But the particular easement in question is not provided for by the Prescription Act. The second section points to affirmative easements only; to such as are gained by an active assertion of right in some form or other, and which are capable of being opposed in their inception. [See *Webb v. Bird* (').]

In erecting a building on his own land the owner does no 94] more *than make a lawful use of his own property. He makes thereby no assertion of right against his neighbor, and the latter has no power to prevent, and no right to complain of the erection.

As the Writ of Right has been abolished, and the Limitation Act now in force (3 & 4 Wm. 4, c. 27), which passed subsequently to the Prescription Act, abolishes also the distinction between adverse and non-adverse possession, the reasoning of Wilmot, J., has a force beyond what it had when his judgments were given.

The law of lights having been settled by the Prescription

6 Ex. 630; 20 L. J. (Ex.), 362. (C.P.), 284, affirmed in error, 13 C. B. 10 C. B. (N.S.), 268; 30 L. J. (N.S.), 841; 31 L. J. (C.P.), 336.

Act, any argument drawn from the Limitation Act applies only to such an easement as the one in question, which was left untouched by the Prescription Act. It seems to me to be the necessary consequence of the Limitation Act, that such an easement should be gained by a length of enjoyment commensurate with that by which a title to the house is gained. It would be a strange anomaly to hold that a title to the house should be acquired, and not a title to that which is essential to its existence—that the law which bars the owner from recovering the tenement itself after he has acquiesced in a usurped ownership by another for twenty years, yet leaves him at liberty, if he happens to be adjoining owner, to let it down and destroy it altogether, by taking away that which has been its natural support during the whole period. I cannot help thinking that the revolting fiction of a lost grant may now be discarded, in view of the necessary effect of the Limitation Act upon such an easement as this.

It is not, however, necessary in this case to base my judgment on this ground. If the right to support still rests on the doctrine of presumption, no facts are shown which in my opinion are admissible to rebut it, for nothing is shown except that the adjoining owner was not asked for and did not give his assent to the alteration of the house into a factory; and this, for the reasons already given, cannot, in my opinion, be held to constitute rebutting evidence. If notice to the adjoining owner that an additional burden has been cast upon his land be an ingredient, that is disposed of by the fact that the conversion of the dwelling house into a factory, and the use of the premises as a factory during twenty-seven years, were things open and notorious.

*There are here, then, all the elements which go to [95 make up the ordinary presumption, unmixed with any rebutting element. If such a length of enjoyment under such circumstances does not create a right to support from the adjacent soil, then no building the date of whose origin can be proved can claim it. For the common law does not present any alternative to the time of legal memory, except twenty years' enjoyment. This would be an alarming doctrine, especially at the present day, when a very small proportion of the owners of houses now standing could rest their title to support upon immemorial enjoyment.

Of the cases subsequent in date to those I have quoted, the first is *Wyatt v. Harrison* (*). This was an action similar to the present, but the declaration did not allege that

(*) 3 B. & Ad., 871.

1877

Angus v. Dalton.

the house was an ancient house, or that it had existed for twenty years. To so much of the declaration as charged the digging so near to the foundation as to cause the house to fall, the defendant demurred. And the court gave judgment in his favor. "Whatever the law might be," said Lord Tenterden, "if the damage complained of were in respect of an ancient messuage possessed by the plaintiff at the extremity of his own land, which circumstance might imply the consent of the adjoining proprietor at a former time to the erection of a building in that situation, it is enough to say, that in this case the building is not alleged to be ancient, but may, as appears from the declaration, have been recently erected; and if so, then, according to the authorities, the plaintiff is not entitled to recover." The most that can be argued from this decision is that the court seemed to be not free from doubt whether, if the house had been alleged to be ancient, the plaintiff would have been entitled to recover.

The next case in order of time is *Dodd v. Holme* (¹), a case exactly resembling the present. The house was in fact thirty-five years old. It was alleged, in some counts, to be an ancient house, in others, to be more than twenty years old. The defence was that the plaintiff's wall was in so rotten a state that it could not have been effectually shored up; that it had only a slight foundation, and was pressed 96] by a great weight of rubbish on the *plaintiff's premises, and that even if undisturbed, it could not have stood six months. Bolland, B., directed the jury as follows: "If I have a building on my own land, which I leave in the same state, and my neighbor digs his land adjacent, so as to pull down my wall, he is liable to an action. If, however, I had loaded my wall so that it had more on it than it could well bear, he would not be liable." And he stated the question to be whether the fall was occasioned by the defendant's negligence (not shoring up), in which case the verdict ought to be for the plaintiff, or by its own infirmity, in which case they should find for the defendants. The jury found for the plaintiff. A rule was obtained for a new trial, on the ground of misdirection, but the court, after argument, discharged it, thus affirming the right to support. *Partridge v. Scott* (²) followed, in point of time, *Dodd v. Holme* (¹). The action was brought for excavating coal on land adjoining to the plaintiff's, and so letting down two houses, the one an ancient house, the other a new one. It appeared that the plaintiff had within twenty years exca-

(¹) 1 A. & E., 493.(²) 3 M. & W., 220.

vated under the ancient house, so that the question, as stated by the court in their judgment, was precisely the same as to both houses. "In this case," said Alderson, B., in delivering the considered judgment of the court, "if the land on which the plaintiff's house was built had not been previously excavated, the defendants might, without injury to the plaintiff, have worked the coal to the extremity of their own land, without leaving a rib of ten yards, as they have done. And if the plaintiff had not built his house on excavated ground, the mere sinking of the ground itself would have been without injury. He has, therefore, by building on ground insufficiently supported, caused the injury to himself without any fault on the part of the defendants, unless at the time, by some grant, he was entitled to additional support from the land of the defendants. There are no circumstances in the case from which we can infer any such grant as to the new house, because it has not existed twenty years, nor could the right to any easement have become absolute, even under Lord Tenterden's Act, until after the lapse of at least twenty years from the time when the house first stood on excavated *ground, and [97 was supported in part by the defendants' land." No such point as that arises in this case. *Bonomi v. Backhouse* (') involved the very point in contest here. There was a difference of opinion between the Exchequer Chamber and the Court of Queen's Bench upon the question, whether the Statute of Limitations ran from the time the excavation was made which ultimately caused the sinking, or only from the time the damage accrued to the house. The Court of Queen's Bench held that the act of excavating was itself wrongful, and that the statute ran from that time. The Exchequer Chamber held that the plaintiff had no cause of action until actual damage done, and this decision was affirmed by the House of Lords ('). The damaged building was forty years old, and the judgment affirmed the right to support from both the adjacent and subjacent soil.

Hunt v. Peake (') came before Wood, V.C., in 1860, after the decision of the Exchequer Chamber in *Bonomi v. Backhouse* ('), but before the decision of that case in the House of Lords. It was a bill to restrain the defendants from working any mine under the plaintiff's houses, and from working mines adjacent thereto so as to cause damage or injury to the foundations of the houses. The Vice-Chan-

(') E. B. & E., 622; 27 L. J. (Q.B.), 181. (') 9 H. L. C., 503; 34 L. J. (Q.B.), 378 (Ex. Ch.); 28 L. J. (Q.B.), 378.

(') 1 Joh., 705; 29 L. J. (Ch.), 785.

1877

Angus v. Dalton.

cellor came to the conclusion that the soil would have fallen if there had been no building, and therefore found it unnecessary to determine the question raised in the present case. But he says in the course of his judgment: "Suppose a person has for twenty years remained in the enjoyment of a privilege, as an ancient house, as it is called in the authorities, is he, or is he not, entitled, in consequence of having had that house for twenty years supported as it was supported, to continue to enjoy the privilege against any operations of his neighbor in the adjoining soil? Upon this, unquestionably, I do find considerable discussion.—And, perhaps, in the last authority that has been cited, namely, *Solomon v. Vintners' Company* (¹), not only was there considerable discussion but some doubt was thrown upon it, and although it has been held in some previous authorities that the right [98] does exist, I *do not know that it has come clearly, pointedly, and precisely in question in the former authorities. No doubt the dicta in *Bonomi v. Backhouse* (²) and *Humphries v. Brogden* (³) are clear to the effect that you may acquire by a twenty years' acquiescence on the part of your neighbor a right to the easement, or whatever it is termed, of having the house you have added to your own soil, supported by your neighbor's soil. But that doctrine has been called in question in the present case, and was called in question in the case of *Solomon v. Vintners' Company* (¹). That case, however, was not quite of the same character, being the case of a house which leaned upon another, and had come by accident to be supported in that way."

Further on the Vice-Chancellor says, however: "If I decided upon that point (the right of the house to support) all the dicta—for I doubt whether there is any precise decision upon the question, are favorable to the plaintiffs, but I have not thought fit to rest their rights upon this state of circumstances. It is the ground that needs support," &c. Neither the cases cited in Saunders, vol. ii, nor the case before Lord Ellenborough, nor *Cross v. Lewis* (⁴) was cited before the Vice-Chancellor, nor had, as I have said, the case of *Bonomi v. Backhouse* (²) been heard by the House of Lords. If that case is carefully considered it can hardly be said that it is not a decision involving this very point. The question put by the House to the judges assumes the right of the plaintiffs' building to support both from subjacent

(¹) 4 H. & N., 585; 28 L. J. (Ex.), 370.

(²) 12 Q. B., 739; 20 L. J. (Q.B.), 10.

(³) E. B. & E., 622; 27 L. J. (Q.B.),

(⁴) 2 B. & C., 686.

378 (Ex. Ch.); 28 L. J. (Q.B.), 378.

and adjacent soil. It is in these words: "A. B. is the owner of a house. C. D. is the owner of a mine *under the house and under the surrounding land*. C. D. works the mine, and in so doing leaves insufficient support to the house. The house is not damaged, nor is the enjoyment of it prejudiced until some time after the workings have ceased. Can A. B. bring an action at any time within six years after the mischief happened, or must he bring it within six years after the workings rendered the support insufficient?"

It appears from the statement of facts in that case that although the defendants had worked the coal *under the plaintiffs' house*, *those workings did not cause the [99 subsidence, but the subsidence was caused by the working away of the pillars of coal under the adjacent land. Willes, J., in delivering the judgment of the Exchequer Chamber, thus states the facts upon which the judgment of that court was founded, and which judgment the House of Lords affirmed: "The plaintiff was owner of the reversion of an ancient house. The defendant for more than six years before the commencement of the action worked some coal mines 280 yards distant from the house. No actual damage occurred until within the last six years. The question is, is the Statute of Limitations an answer to the action?" ('). The House of Lords evidently thought it immaterial whether the workings which caused the subsidence were under or around the house, and where the surface belongs to one owner and the minerals beneath to another, in the absence of any grant, reservation, or contract, the right to vertical support must stand on the same footing as the right to lateral support: see *Rogers v. Taylor* ('). Neither the adjacent soil nor the subsoil can under these circumstances be worked so as to cause the surface land to subside, nor can an artificial burden placed on the land impose a servitude upon the one or the other until the erection has stood twenty years.

I have intentionally passed by the case of *Solomon v. Vintners' Company* (') as well as that of *Peyton v. Mayor of London* ('), because these cases appear to me to admit of other considerations than are involved in the present case. The plaintiffs here claim the support of the natural soil of the adjacent land. The plaintiffs in those cases claimed a continuance of artificial support, namely, the support of adjoining buildings, and that without showing whether the

(') E. B. & E., p. 654; 28 L. J. (Q.B.), 380. (') 4 H. & N., p. 599; 28 L. J. (Ex.), 370.

(') 2 H. & N., 828; 27 L. J. (Ex.), 178. (') 9 B. & C., 725.

1877

Angus v. Dalton.

houses were originally built by the same owner at the same time so as to be dependent on each other, or which of the two was first built, or how the one came to lean upon the other, or whether some neighboring sewer or other excavation caused both to sink.

The Lord Chief Baron observed in *Solomon v. Vintners' 100] Company* (*) *that it seemed contrary to justice and reason that a man by building a weak house adjoining to his neighbor's could, if that weak house at all got out of the perpendicular and leant upon the adjoining house, compel his neighbor to pull down his own house within twenty years, or to bring some action at law, the precise nature of which was not very clear, in order to prevent a right from being acquired by twenty years' enjoyment. In a subsequent case, where it appeared that the houses were built by the same owner, at the same time, and so as to require mutual support, it was held that each retained a right to the support of the other: *Richard v. Rose* (*). The *Corporation of Birmingham v. Allen*, recently decided in the Court of Appeal (*), I mention only to show that it has not been overlooked. That case decided that the right to support is confined to the *adjoining* land, and that where that land which, if it had been left in its natural state, would have afforded sufficient support to the plaintiffs' house, had been excavated for coals by its owner, the owner of the house could not acquire a right as against land farther off, though next adjoining to the intervening land.

The case of *Humphries v. Brogden* (*) and other like cases I also pass by, as they go no farther than to establish the position that the owner of surface land is entitled of common right to the support, lateral and vertical, which nature has provided for it.

For the reasons already given, and upon the authority of the cases to which I have adverted, I am of opinion that the factory in question had acquired the status of an ancient building, and that as the excavation made by the defendants was the sole cause of its falling, the defendants are responsible for the whole of the damage done.

COCKBURN, C.J.: This is a case of very great importance as regards the law of easements. It is an action brought against the defendant Dalton, a builder, and the Commissioners of Works and Buildings, by whom Dalton was employed, for excavating under the soil of premises belonging 101] to the commissioners, by *means of which an adjoin-

(*) 4 H. & N., p. 599; 27 L. J. (Ex.), 370. (*) 9 Ex., 218; 23 L. J. (Ex.), 3.

(*) 6 Ch. D., 284; 22 Eng. R., 811.

(*) 12 Q. B., 739; 20 L. J. (Q.B.), 10.

ing coach factory of the plaintiffs to which they allege that they, as owners of the factory, had a right of lateral support from the soil adjacent, was caused to fall.

The facts were as follows: The plaintiffs are the owners in fee of a coach factory at Newcastle-upon-Tyne, erected by them some twenty-seven years before the event complained of. Prior to that time the premises had been a dwelling house, as had also been the adjoining premises, now purchased by the defendants, the commissioners, for the purpose of converting them into a probate office. While both houses still stood, they appeared to be coeval in point of age, and there was reason to think that they had stood for about a hundred years. Though immediately contiguous there was no party-wall between them. Each, as I understand the facts, rested on its own walls, built to the extremity of the soil of the respective owner. In this state of things the plaintiffs at the time already stated, namely twenty-seven years before the alleged cause of action, altered the character of the house belonging to them, and constructed a coach factory in its place. They removed the supports on which the fabric had previously rested, and substituted for them a stack of brickwork, which they carried to the extremity of their soil, and which served at once as a chimney stack and as a support to the main girders by which the upper stories of the factory were upheld. They did this without any grant from the owner of the adjoining premises of any right of lateral support, or any assent on his part to the use of such support, unless his assent is to be inferred from his taking no steps to resist the acquisition and enjoyment of such an easement.

The Commissioners of Works having purchased the adjoining house, with the intention, as I have said, of erecting a probate office on its site, employed the defendant Dalton to take down the house, and prepare the ground for the erection of the intended office. In doing this, according to the plans for the new office, it became necessary to take down the wall adjoining the plaintiffs' premises, and to excavate the ground to the extremity of the defendants' own soil. It was not contended on the trial that in doing this they were guilty of any negligence. They took such measures as appeared necessary to prevent any damage to the plaintiff's premises. In excavating they left a thick pillar of clay, *which might well have been deemed suffi- [102
cient for the purpose, immediately round the plaintiffs' stack, for the purpose of supporting it. But on exposure to the air the clay cracked and gave way, and the pillar,

being by the excavation deprived of the lateral support which it had previously derived from the adjacent soil, gave way and fell, and, falling, brought down the factory, which, as has been said, rested mainly upon it.

It is scarcely necessary to observe that any easement of lateral support, which may have attached to the plaintiffs' premises as the house before stood, was lost by the taking down of the old house and substituting a building of an entirely different construction as regards the wall or foundation on which it rested. No question arises therefore as to whether, if the house had been reconstructed as it stood before, the right to support would still have remained. The construction of the premises as altered was entirely different. As the house previously stood the weight, if supported by the defendants' adjacent soil, was supported by the entire range of that soil. In the new building the weight rested entirely on the chimney stack, and was thus concentrated on one spot. It may well be that, if the plaintiffs' former construction had remained, the defendants' soil, notwithstanding the excavation, would have sufficed to support the building. The nature of the easement thus became essentially different, and the easement now claimed must therefore depend upon the effect of the support having been afforded during the twenty-seven years.

The only question therefore is whether by the enjoyment of the lateral support to their factory from the adjacent soil for the time stated, without more, the plaintiffs had acquired an easement which prevented the commissioners from dealing as they pleased with their own land for legitimate purposes. I am of opinion that they had not, and consequently that the defendants are not responsible for what has happened.

That the right to the lateral support of the adjacent soil for a building which has been superadded to the soil is an easement, as distinguished from the proprietary right to such support for the soil itself in its natural condition, is undoubted. Equally certain is it that, except where the positive law steps in, and, in the absence of any legal origin, gives to a fixed period of possession or *enjoyment the status of absolute and indisputable right, every easement as against the owner of the soil must have had its origin in grant. Upon both these points the authorities are uniform and positive. It is no doubt equally true that, in the absence of proof of any grant, the existence of a lost grant may be presumed from length of enjoyment. And in no system of jurisprudence has this doctrine been carried

to greater lengths than in our own. In the absence of any sufficient law regulating the period of prescription, judges, to make up for this deficiency, were in the habit of directing juries to presume grants, in the past or possible existence of which no one believed—a practice to be deprecated, and, in spite of precedent, to be followed with great reserve, and certainly with no disposition to extend it.

Looking to the importance of the question here involved, and to the fact that the law as to lateral support, not having hitherto been brought before a court in banc, has not been made the subject of authoritative decision, it may be useful to trace the growth of this doctrine as to presumption and the extent to which it has been carried, and for this purpose, to review the authorities on the law of prescriptive easements.

At the common law there appears to have existed no fixed period of prescription. Rights were acquired by prescription when possession or enjoyment had existed beyond the memory of man, or where, as the legal phrase was, “the memory of man ran not to the contrary.” But by several statutes, fixed periods were limited for the bringing of actions for the recovery of real estate. Prior to the statute of Merton, Bracton tells us that the limitation in a writ of right was from the time of Henry I, that is to say, from the year 1100, or 135 years⁽¹⁾.

By the statute of Merton (20 Hen. 3, c. 8), the limitation in a writ of right was from the time of Henry II, a period of seventy years. Writs of mort d’ancestor, and of entry, were not to pass the last return of King John from Ireland, a period of twenty-five years. Writs of novel disseisin were not to pass the first voyage of the king into Gascony, a period of fifteen years.

New periods of limitation were fixed by the Statute of Westminster, 3 Edw. 1, c. 39 (1275). By this statute the time for *bringing a writ of right was limited to the [104 time of King Richard I, a period of eighty-eight years. Writs of mort d’ancestor, of cosinage, of aiel, and of entry, were limited to the coronation of Henry III, about fifty-eight years. The writ of novel disseisin was to remain limited as before, namely, to the passage of Henry III into Gascony.

It is plain that this statute had reference to actions for the recovery of real estate. Nevertheless the judges, with that assumption of legislative authority which has at times characterized our judicature, proceeded to apply the rule

(1) L. 2, f. 179.

1877

Angus v. Dalton.

as to prescription established by the statute to incorporeal hereditaments, and, among others, to easements.

As might have been foreseen, as time went on, the limitation thus fixed became attended with the inconvenience arising from the impossibility of carrying back the proof of possession or enjoyment to a period which, after a generation or two, ceased to be within the reach of evidence. But, here again, the Legislature not intervening, the judges provided a remedy by holding that if the proof was carried back as far as living memory would go, it should be presumed that the right claimed had existed from time of legal memory, that is to say, from the time of Richard I. This convenient rule having been established, the judges seem not to have thought it worth while, when the statute of 31 Hen. 8, c. 2, was passed, by which in a writ of right the time was limited to sixty years, to apply, by an analogous use of that statute, the time of prescription established by it to actions involving rights to incorporeal hereditaments.

In a case of *Bury v. Pope* (') in an action for stopping lights, according to the report, "It was agreed by all the justices that if two men be owners of two parcels of land adjoining, and one of them doth build a house upon his land, and makes windows and lights looking into the other's lands, and the house and the lights have continued by the space of thirty or forty years, yet the other may upon his own land and soil lawfully erect an house or other things against the said lights and windows, and the other can have no action; for it was his folly to build his house so near to the other's land; and it was adjudged accordingly."

105] *And as late as 1 Car. 2, it was held in a case of *Sury v. Piggott* ('), that to maintain an action for obstructing lights, the light must be prescribed for as having been enjoyed time out of mind.

But the statute of Jac. 1, c. 21, which limited the time for bringing a possessory action to twenty years, led soon afterwards to a very important change in the law by the arbitrary adoption of that period by the courts as sufficient to found the presumption of the existence of a right from the time of legal memory. Here, again, the boldness of judicial decision stepped in to make up for defects in the law which the supineness of the Legislature left uncared for. But it is to be observed, and the observation is specially important to the present purpose, that with all their desire to reduce the period of prescription within reasonable limits, the courts never gave greater effect to length of enjoyment than

(') Cro. Eliz., 118.

(') Poph., 166.

that of affording a presumption of prescriptive right, capable of being rebutted by proof of an origin at a time later than that of legal memory. Hence, if in the course of a cause it appeared that the disputed right had had a later origin, the presumption failed, and the claim of right was defeated.

The frequency of this result gave rise to a new device. As, independently of prescription, every incorporeal hereditament must have had its origin in grant, the fiction was resorted to of presuming after long user a grant by a deed which in the lapse of time had been lost. At first, to raise this presumption it was required that the user should be carried back as far as living memory would go; but after the statute of James, user for twenty years was—here again, without any warrant of legislative authority, and by the arbitrary ruling of the judges—held to be sufficient to raise this presumption of a lost grant, and juries were directed so to find in cases in which no one had the faintest belief that any grant had ever existed, and where the presumption was known to be a mere fiction. Well might Sir W. D. Evans, while admitting the utility of this doctrine, say that its introduction was “a perversion of legal principles and an unwarrantable assumption of authority” (*).

Thus the law remained till the act of 2 & 3 Wm. 4, c. 71, was passed with the view of putting an end to the scandal on the *administration of justice, which arose [106 from thus forcing the consciences of juries. How far it has effected this purpose will be seen further on.

But this doctrine of presumption from user or enjoyment under the former law could not, according to the highest authorities, be carried, as regarded the presumption of a lost grant, any more than that which had reference to the existence of an easement beyond time of legal memory, further than that of a presumption capable of being rebutted and so destroyed. It is true that in an early case of *Lewis v. Price* (*), which was an action on the case for obstructing the plaintiff's lights, where the house had been built forty years, Wilmot, J., told the jury that the action lay, saying that “this was founded on the same reason as when lights have been immemorial, for this is long enough to induce a presumption that there was originally some agreement between the parties.” And he added, that “twenty years was sufficient to give a man a title in ejectment, in which he might recover the house itself: and he therefore

(*) 2 Ev. Poth., 139.

(*) Sir E. Williams' Saund., 504 note.

1877

Angus v. Dalton.

saw no reason why it should not be sufficient to entitle him to any easement belonging to the house."

So, in a subsequent case of *Dougal v. Wilson* ('), which was also an action for obstructing lights, on the defendant's attempting to show that the lights had not existed for more than sixty years, the same judge said, "If a man has been in possession of a house, with lights belonging to it, for fifty or sixty years, no man can stop up those lights. Possession for such a length of time amounts to a grant of the liberty of making them; it is evidence of an agreement to make them. If I am in possession of an estate for so long a period as sixty years, I cannot be disturbed even by a writ of right—the highest writ in the law. If my possession of the house cannot be disturbed, shall I be disturbed in my lights? It would be absurd." He adds, "And I should think a much shorter time than sixty years might be sufficient." From this language it would no doubt appear that the learned judge considered that, after such a length of possession as would be a bar to an action to recover an estate under the statutes of Henry VIII or James I, the presumption in favor of a grant in the case of an easement would become absolute. But this view of the law was corrected in the case of **Darwin v. Upton* (*), which came before the Court of King's Bench on a motion for a new trial in an action which had been tried before Gould, J., in which it was alleged that the learned judge had directed the jury that twenty-five years' possession was an absolute bar, incapable of being overturned by any contrary proof, whereas it was only a presumptive proof which might be explained away. Lord Mansfield, in giving judgment, explains the value and effect of presumptions of this nature, and places the doctrine on its true footing. He says, "The enjoyment of lights with the defendants' acquiescence for twenty years is such decisive presumption of a right by grant or otherwise that, unless contradicted or explained, the jury ought to believe it; but it is impossible that length of time can be said to be an *absolute bar*, like a statute of limitations; it is certainly a presumptive bar which ought to go to a jury. Thus, in the case of a bond there is no statute of limitations that bars an action upon it, but there is a time when a jury may presume the debt to be discharged, as if no interest appear to have been paid for sixteen or twenty years. The same rule prevails in the case of a highway. Time immemorial itself is only presumptive evidence, for so it was held in the case of *The*

(') 2 Sir E. Williams' Saund., 504.

(*) 2 Sir E. Williams' Saund., 506.

Mayor of Kingston-upon-Hull v. Horner ('). In a case before me at Maidstone, I held length of time, when unanswered and unexplained, to be a bar." Willes, J., said, "There was a case before me at York, where I held uninterrupted possession of a pew for twenty years to be presumptive evidence merely, and that opinion was afterwards confirmed in the Court of Common Pleas." And Buller, J., says, "I incline very much to think that the judge was misunderstood, for he could never call it an absolute bar. In the *Welles Harbor Case*, this court went fully into the doctrine, and the rule of law is clear that length of time is presumptive evidence only. The judge said, 'I think twenty years' uninterrupted possession of these windows is a sufficient right for the plaintiff's enjoyment of them.' Now, that expression is open to a double construction. If the judge meant it was an absolute bar, he was certainly wrong, if only as a presumptive bar, he was right."

The learned editor adds that the next day Buller, J., said that Ashurst, J., had waited on Mr. J. Gould, who said he had never *had an idea but it was a question for a [108 jury, and would have left it to the jury if the counsel for the defendant had asked it; that he compared it to the case of trover, where a demand and refusal are evidence of, but not an actual conversion. Upon this the rule was discharged.

In the case of *The Mayor of Hull v. Horner* ('), just referred to, Lord Mansfield thus explains the law: "There is a great difference between length of time, which operates as a bar to a claim, and that which is only used by way of evidence. A jury is concluded by length of time that operates as a bar; as where the Statute of Limitations is pleaded in bar to a debt; though the jury is satisfied that the debt is due and unpaid it is still a bar. So in the case of prescription, if it be time out of mind, a jury is bound to conclude the right from that prescription if there would be a legal commencement of the right. But any written evidence showing that there was a time when the prescription did not exist is an answer to a claim founded on prescription. But length of time, used merely by way of evidence, may be left to the consideration of the jury to be credited or not, and to draw their inference one way or the other, according to circumstances."

In *Keymer v. Summers* ('), Yates, J., told the jury that thirty years' user of a right of way would afford a presumption of a right of way; but he put it no higher. It is true

(') Cowp., 102.

(*) 1 Cowp., 102, at p. 108.

(*) Bull. N. P., 74.

1877

Angus v. Dalton.

that in two cases, the first that of *Balston v. Bensted* (1), at Nisi Prius, the other that of *Bealey v. Shaw* (2), in banc, Lord Ellenborough laid it down that "twenty years' exclusive enjoyment of water in any particular manner afforded a conclusive presumption of right in the party so enjoying it derived from grant or act of Parliament." But the decision in the latter case, which is expressly disapproved of by Lord Wensleydale in *Chasemore v. Richards* (3), turned on the particular facts; and the law as there laid down by the Chief Justice is not in accordance with the current of authorities, and is scarcely consistent with his own language in *Campbell v. Wilson* (4). In that case a way had been used [109] for twenty years, but must have originated within thirty-seven years, as at that time all ways had been extinguished under an award, except such as were therein set out, of which the way in question was not one, and there was some reason to think on looking at the award that the way in question had been used by mistake, but there was no evidence to show that this was so; and the Chief Justice at the trial left "in substance the question to the jury whether the enjoyment originated in a grant or in any other manner." A new trial having been applied for on the ground of misdirection, Lord Ellenborough says, "Though by possibility the parties might, in fact, have acted on the mistake of the award, yet on the evidence given nothing appears to show that they referred their acts to the award, and, therefore, it comes to the common case of adverse enjoyment of a way for upwards of twenty years, without any thing to qualify that adverse enjoyment. On looking into the award we might possibly suppose that the use of the way originated by mistake, but no evidence was given of any fact accompanying the enjoyment to show that the parties acted upon such a mistake. There was, therefore, no reason why the jury should not make the presumption as in other cases, that the defendant acted by right, and that was in substance the direction of the learned judge." From this language the Chief Justice would appear to have treated the presumption arising from user as capable of being rebutted by the other circumstances of the case if the evidence had warranted it. Grose, J., said, "I cannot say that upon this evidence, the jury might not make the presumption which they have done, though had I been one of them, I do not know that I should have dared to do so." And Lawrence, J., said, "No doubt adverse enjoyment of a right of

(1) 1 Camp., 463.

(2) 6 East, 208.

(3) 7 H. L. C., 386; 29 L. J. (Ex.), 81.

(4) 3 East, 294.

way for twenty years unexplained is evidence sufficient for the jury to found a presumption that it was a legal enjoyment, and such in effect was the opinion of the learned judge in his direction to them." "If in exercising the right of way from time to time it had appeared that the party had asserted his right to be grounded on the award, though it was exercised ever so adversely, I do not know how the jury would be warranted in referring it to any other ground than what the party himself insisted on at the time. The weak part of the plaintiffs' case is that it does not appear by the evidence that the enjoyment of the way did arise *from [110 mistake. Then if there were an adverse possession for above twenty years, and not explained by any evidence, why might not the jury presume a grant?"

In *Cross v. Lewis* (¹), which was an action for obstructing ancient lights, and in which the lights were proved to have existed for thirty-eight years, Bayley, J., when the case was before the Court of King's Bench, on a rule *nisi* to enter the verdict for the defendant, says: "I do not say that twenty years' possession confers a legal right; but uninterrupted possession for twenty years raises a presumption of right; and ever since the decision in *Darwin v. Upton* (²), it has been held that in the absence of any evidence to rebut that presumption, a jury should be told to act upon it." Littledale, J., says, "The facts were sufficient to raise the presumption of a grant." Holroyd, J., who had tried the cause at Nisi Prius, says, "At the trial I considered the windows in question as ancient lights, and that the plaintiff had by law a right to enjoy them, and that it was not a question to be determined by the jury without some evidence to contradict the idea of their being ancient lights." "A man may on his own lands erect a house with windows looking towards his neighbor's premises. At first they may be obstructed, but if no interruption is offered he may at length prescribe for them as ancient windows." The learned judge was here evidently confounding two distinct things, prescription, which in theory required to be carried back to time of legal memory, but might be presumed from enjoyment to have had so long an existence, and an easement founded on the presumption of a lost grant, which was the matter before the court; but he admits that if "evidence to contradict the idea of the windows being ancient lights had been offered, it would have been matter for the jury."

In a still later case, that of *Livett v. Wilson* (³), in an action of trespass, the defendant pleaded in justification a right of

(¹) 2 B. & C., 686.

(²) 2 Wm. Saund., 175 b.

(³) 3 Bing., 115.

1877

Angus v. Dalton.

way acquired by lost grant. On the trial it appeared that the premises occupied by the plaintiff and the defendant had formerly been in the hands of a single owner, who had [111] conveyed part to a person *under whom the defendant claimed, but the right of way asserted was not reserved in the conveyance. There was also some conflict of evidence as to the undisputed user of the way, but the weight of evidence on this point showed that the right had generally been contested. On this evidence the judge left it to the jury to say whether there had been uninterrupted user for more than twenty years by virtue of a deed, and that such deed had been lost, in which case they should find for the defendant; but if they thought no way had been granted by deed, they should find for the plaintiff. On an application for a new trial, Best, C.J., uses this emphatic language: "I think that the direction of the learned judge was perfectly right, and that he went far enough. I do not dispute that if there had been an uninterrupted usage for twenty years, the jury might be authorized to presume it originated in a deed; but even in such a case a judge would not be justified in saying that they *must*, but they *may*, presume the deed. If, however, there are circumstances inconsistent with the existence of a deed, the jury should be directed to consider them, and to decide accordingly."

The case of *Doe d. Fenwick v. Reed* (1) is not directly in point to the present, yet it is analogous to it, and it deserves attention on account of a dictum of Holroyd, J. It was an action of ejectment to recover property, into the possession of which the defendant's ancestor had been admitted as a creditor, after a judgment obtained against the then owner, more than half a century before, till the debt should be satisfied, and his family had remained in possession ever since. Abbott, C.J., in giving judgment, said: "I am clearly of opinion that the direction was according to law. In cases where the original possession cannot be accounted for, and would be unlawful unless there had been a grant, the rule may, perhaps, be different, and the cases cited are of that description. Here the original possession is accounted for, and is consistent with the fact of there having been a conveyance. It may, indeed, have continued longer than is consistent with the original condition. But it was surely a question for a jury to say whether that continuance was to be attributed to a want of care and attention on the part of the Charlton family, or to the fact of there having been a conveyance of the estate. As the defendant's ances-

(1) 5 B. & A., 232.

tor's *had originally a lawful possession, I think it [112 was incumbent on him to give stronger evidence to warrant the jury in coming to a conclusion that there had been a conveyance." And Holroyd, J., said: "Here the original enjoyment was consistent with the fact of there having been no conveyance, for it was in satisfaction of a debt. The true question was presented to the jury. In cases of rights of way, &c., the original enjoyment cannot be accounted for unless a grant has been made; and therefore it is that from long enjoyment such grants are presumed. But even in these cases, evidence to rebut such a presumption would be admissible."

The text writers are quite in accordance with these dicta and decisions. "The presumption of right in such cases," says Mr. Starkie⁽¹⁾, "is not conclusive; in other words, it is not an inference of mere law, to be made by the courts, yet it is an inference which the courts advise juries to make wherever the presumption stands unrebutted by contrary evidence." "This presumption," says Mr. Best in his work on Evidence⁽²⁾, "only obtains its practically conclusive character when the evidence of enjoyment during the required period remains uncontradicted and unexplained." "The presumption of right," says the same learned author (s. 379) (referring to what had been said by Lord Ellenborough in *Balston v. Bensted*⁽³⁾, and *Bealey v. Shaw*⁽⁴⁾), "from twenty years' enjoyment of incorporeal hereditaments, is often spoken of as a conclusive presumption, an expression almost as inaccurate as calling the evidence a 'bar.' If the presumption be 'conclusive' it is a *presumptio juris et de jure*, and not to be rebutted by evidence, whereas the clear meaning of the cases is that the jury ought to make the presumption, and act definitely upon it, unless it is encountered by adverse proof." And in his work on Presumptions, the same learned writer, speaking of presumptions from user, writes: "This presumption only obtains its practically conclusive character when the evidence of enjoyment during the required period remains uncontradicted and unexplained;" in support of which proposition he refers to *Livett v. Wilson*⁽⁵⁾. Mr. Taylor, in his valuable work on Evidence (p. 795), classes the presumption arising from user *and enjoyment among what [113 he terms "*disputable*" presumptions. "These," he says, "as well as the former"—that is conclusive presumptions—

(1) 3 Stark. Ev., p. 911, 3d ed.

(2) Best on Evidence, sect. 380.

(3) 1 Camp., 462.

(4) 6 East, 208.

(5) 3 Bing., 115.

1877

Angus v. Dalton.

"are the result of the general experience of a connection between certain facts or things, the one being usually found to be the companion or the effect of the other. The connection, however, in this class is not so intimate or so uniform as to be conclusively presumed to exist in every case, yet it is so general that the law itself, without the aid of a jury, infers the one fact from the proved existence of the other in the absence of all opposing evidence. In this mode the law defines the nature and amount of the evidence which is sufficient to establish a *prima facie* case, and to throw the burthen of proof on the other party; and if no opposing evidence is offered, the jury are bound to find in favor of the presumption. A contrary verdict might be set aside as being against evidence."

"The rules in this class of presumptions," says Mr. Greenleaf (¹), "as in the former, have been adopted by common consent, from motives of public policy, and for the promotion of the general good, yet not, as in the former class, forbidding all further evidence, but only dispensing with it till some proof is given on the other side to rebut the presumption raised."

The true principle is, as it seems to me, correctly stated in Mr. Goddard's learned and able treatise on the Law of Easements, p. 90. "The whole theory of prescription depends upon the presumption of a grant having been made. If, therefore, it can be shown that no grant could have been legally made, or that any easement lawfully created must have been subsequently extinguished by unity of seisin or otherwise, or if it can be shown to be a very improbable thing that a grant ever was made, the presumption cannot arise, and the title by prescription fails."

An instance in which such a presumption failed is to be found in the case of *Barker v. Richardson* (²). There lights had been enjoyed for more than twenty years over land which during part of the time had been glebe land. The defendant, a purchaser under 55 Geo. 3, c. 147, had obstructed the lights. It was held that a grant could not be presumed, inasmuch as the rector, being only tenant for life, was incompetent to grant such an easement.

[114] *The books are strikingly deficient in decisions on the subject of the easement of lateral support. I have been able to find only two cases prior to the passing of 2 & 3 Wm. 4, c. 71, in which the right has directly come in question. In some other cases which have occurred it has been coupled with the question of negligence, and the decisions

(¹) On Evidence, p. 734.

(²) 4 B. & A., 579.

have had reference to the latter question. The subject is treated of in *Palmer v. Fleshees* ⁽¹⁾ (referred to in Com. Dig., Action on the case for Nuisance, C). The action, indeed, was for stopping up lights, the facts being that a man, having a piece of land, built a house on part of it, and sold the house to the plaintiff, and then sold the rest of the land to the defendant, who, building thereon, obstructed the plaintiff's lights; and it was held that the action lay. In the course of the cause it was resolved by the judges: (1.) that if a man, being seised of land, leases forty feet to A. to build a house thereon, and forty feet to B. for a like purpose, and one of them builds a house, and then the other digs a cellar in his land which causes the wall of the first adjoining house to fall, no action will lie, for every one may deal with his own to his best advantage; but, "*semble*," that it would be otherwise if the wall or house were an ancient one. (2.) That if a man, having a piece of land, builds a house on part of it, and leases the house to one, and the other part of the land to another, neither the lessor, nor any one claiming under him, can stop up the lights, for otherwise it would be in the power of the lessor to frustrate his own grant. *Aliter*, if the land adjoining a house is the land of a stranger, for the latter may build on his own land, and the owner of the first house will be without remedy unless such house were an ancient house, and the lights ancient lights. The case does not, however, say what length of time will constitute a house or lights "*ancient*," nor does it touch the subject of presumption.

No case in which the subject of support comes directly into question occurs till that of *Stansell v. Jollard*, in 1803, which is shortly stated in Selwyn's *Nisi Prius*, vol. i, p. 445, from the MS. of Mr. Justice Lawrence. "In an action on the case," it is there said, "for digging so near to the gable end of the house of the plaintiff, let to a tenant, that it fell, Lord Ellenborough held that where, as in the case before the court, a man had built to *the extremity of his [115 soil, and had enjoyed his building above twenty years, by analogy to the case of lights, &c., he had acquired a right to a support, or, as it were, of leaning to his neighbor's soil, so that his neighbor could not dig so near as to remove the support, but that it was otherwise of a house, &c., newly built." From the language of this statement it would certainly appear that Lord Ellenborough treated the twenty years as conclusive. But the report is a very meagre and unsatisfactory one, depending entirely on the accuracy

⁽¹⁾ Sid., 167.

1877

Angus v. Dalton.

of Mr. Justice Lawrence's note. The decision appears to have occurred at *Nisi Prius*. The probability is, as there does not appear to have been anything to rebut the presumption arising from the twenty years' enjoyment, that the judge told the jury they must act upon such a presumption as one obtaining in the case of lights and other easements. To have gone further would have been to go beyond the necessity of the case. I cannot help looking upon this case of *Stansell v. Jollard*, as one of very doubtful authority. I observe that it has since been questioned in the case of *Solomon v. Vintners' Company* (*).

In some later cases, as I before mentioned, the complaint of the withdrawal of support was founded, not on the right of support absolutely, but on the allegation of negligence in removing the adjoining building. Thus, in *Massey v. Goyder* (†) the grievance complained of was the taking down an adjoining building, and digging the foundations of a new building erected in its place, without giving due and proper notice to the plaintiff, the owner of an adjoining house, so as to give him the opportunity of taking precautionary measures, as also in respect of negligence in taking down the first building and in excavating. It was there held by Tindal, C.J., that if the defendants had used reasonable and ordinary care in the doing of the work, having given due notice to the plaintiff, they would not be answerable in point of law for damage caused to the plaintiff's premises. In *Brown v. Windsor* (‡), which was an action for excavating under the defendants' wall, on which the plaintiff's house, built twenty-seven years before, rested, the complaint was of negligence in the manner in which the work had been carried on, besides which there was proof that the defendant [16] *had expressly authorized the resting of the plaintiff's house on his wall. So in *Dodd v. Holme* (†) the question on which the decision turned was the allegation and proof of negligence. In *Peyton v. Mayor of London* (†) the cause of action relied on was that the defendant, by taking down his house adjoining that of the plaintiff without shoring up, had injured the plaintiff's house. It was held that, as the plaintiff had not alleged or proved any right to have his house supported by the defendant's house, the defendant was not liable for what had happened. In *Walters v. Pfeil* (†) the complaint was of negligence in taking down the defendant's house, whereby the plaintiff's house was

(1) 4 H. & N., 585; 28 L. J. (Ex.), 370.

(2) 4 C. & P., 161.

(3) 1 Cr. & J., 20.

(4) 1 A. & E., 493.

(5) 9 B. & C., 729.

(6) 1 M. & M., 362.

injured. There was no question as to support from the adjacent soil. In none of these cases did the right to lateral support come into question; and though some of them have been cited in support of the plaintiff's case, I cannot see that they have any bearing on the question before us.

I am very far from saying that when houses or buildings have stood for many years, especially when they appear to be of equal age, the presumption of a reciprocal easement of lateral support ought not to be made. It may reasonably be inferred that they were built under any of the circumstances from which, at the present time, a grant would properly be implied. Thus they may have been built by one owner, or under a common building lease, or if built by different owners, where some arrangement for mutual support was come to. Thus, had the plaintiff's premises remained in their original condition, I should have been prepared to make the necessary presumption to uphold the right. Where land has been sold by the owner for the express purpose of being built upon, or where, from other circumstances, a grant can reasonably be implied, I agree that every presumption should be made and every inference should be drawn in favor of such an easement, short of presuming a grant when it is undoubted that none has ever existed. But in the absence of any such circumstances there is no form of easement in which, as it seems to me, the doctrine of presumption should be more cautiously and sparingly applied than the easement of lateral support. For this easement is obviously one of a *very anomalous [117 character. In every other form of easement the party whose right as owner is prejudicially affected by the usur has the means of resisting it if illegally exercised. In the case of the so-called "affirmative" easements he can bring his action, or oppose physical obstruction to the exercise of the asserted right. Even in the case of another negative easement, and which is said to approach the more nearly to this—that of light—the supposed analogy entirely fails. For although no action can be brought against a neighboring owner for opening windows overlooking the land of another, there is still the remedy, however rude, of physical obstruction by building opposite to them. But against the acquisition of such an easement as the one here in question the adjoining owner has no remedy or means of resistance, —unless, indeed, he should excavate in his own immediately adjacent soil while the neighboring house is being built, or before the easement has been fully acquired, for the purpose of causing the house to fall. But what would

1877

Angus v. Dalton.

be thought of a man who thus asserted his right? Or, possibly, as in the present instance, he may have built to the extremity of his own land, and may require the support of his soil to uphold his own house. Is he to endanger and perhaps destroy his own house by excavating under it for the purpose of preventing his neighbor from acquiring the right of support? The question, as it seems to me, answers itself. To say that by reason of an adjoining house being built on the extremity of the owner's soil a right of support is to be acquired in the absence of any grant or assent, express or implied, against the adjacent owner, who may be altogether ignorant whether the house or other building is supported by his soil or not, and who, whether he knows it or not, has no means of resisting the acquisition of an easement against himself, either by dissent or resistance of any kind, appears to me to be repugnant to reason and common sense, as well as to the first principles of justice and right.

For these reasons I cannot entertain a doubt that—at all events as the law stood before the passing of the Prescription Act, 2 & 3 Wm. 4, c. 71—the presumption of a grant, if any, arising in this case from the support to the plaintiff's premises having been had for the twenty-seven years, [18] was open to be rebutted; and that *when it was proved—or, what is the same thing, admitted—that when the plaintiff's premises were rebuilt—the original easement, if any, being, as I have already pointed out, gone—the assent of the defendant's predecessors was not asked for or obtained by grant, or in any other way, to any support being derived from their soil, the presumption was at an end.

We have then to consider whether any alteration in the law as applicable to this case has been introduced by the statute just referred to. First, does the statute apply to the presumption of a lost grant at all? Secondly, if it does, does it apply to the easement under consideration? Thirdly, if it does, is the right of the party interested to rebut the presumption, by proving that no grant ever existed, taken away?

Now, it is first to be observed that the act professes to deal with the matter of prescription alone. It is entitled, "An Act for Shortening the Time of Prescription in certain Cases;" and what is here meant by "prescription," if it admitted of any doubt, is immediately made apparent by the preamble, which is in these words: "Whereas the expression 'time immemorial,' or time whereof the memory

of man runneth not to the contrary, is now by the law of England in many cases considered to include and denote the whole period of time from the reign of King Richard I, whereby the title to matters that have been long enjoyed is sometimes defeated by showing the commencement of such enjoyment, which is in many cases productive of inconvenience and injustice; for remedy thereof, be it enacted," &c. Then come the remedial enactments of this strange and perplexing statute. What was wanted was a fixed period of prescription, such as is to be found in the French and Italian Codes, in which for easements at once continual and apparent a prescriptive period of thirty years is fixed; in all others the right can only be founded on positive proof of title, unless arising from the disposition of a common owner. See Articles 688-707 of the French Code, and Articles 629-630 of the Italian Code. Thus fictitious presumptions, with us the arbitrary creation of the courts, and repugnant at once to common sense and to the consciences of judges and juries, are altogether got rid of.

But while this period of prescription is fixed by the statute *at the longer period of sixty years in the case of [119 rights of common and other profits *à prendre*, and of forty years in the case of easements, unless in either case it appears that the enjoyment had been had under some deed or writing, with regard to any intermediate period it was enacted that, after an enjoyment for twenty years without interruption by any person claiming right, no claim shall be defeated by showing only that the enjoyment commenced earlier than the twenty years. To both enactments is however appended the important provision that "such claim may be defeated in any other way by which the same is now liable to be defeated."

By this roundabout, and it must be admitted, somewhat clumsy contrivance, so far as prescriptive rights were concerned, the presumption arising from twenty years' user or enjoyment was rendered a *presumptio juris et de jure*, and conclusive. But as regards the presumption of a lost deed in rights arising from supposed grant, although the statute may have introduced easements created by grant for the purpose of making such rights indefeasible by prescription at the end of forty years, it is difficult to see how the presumption arising from an enjoyment for twenty years can be in any way affected by the act. For such a presumption was never liable to be rebutted by evidence of a still earlier user, which is the inconvenience which the statute professes to remedy. On the contrary, the effect of such proof could

1877

Angus v. Dalton.

obviously only be to strengthen the presumption. The act does not go the length of saying that the twenty years' user in the case of easements shall have any greater effect than it had before. It is only to the exceptional easement of light that it has given the character of indefeasibility at the expiration of the twenty years of uninterrupted enjoyment,—a special enactment which would have been wholly unnecessary if the effect of the general enactment had been to make all easements indefeasible at the end of twenty years. The only conclusion, therefore, at which I can arrive is that, as regards the effect of twenty years' user or enjoyment in the matter of easements by presumed grant, the law stands exactly as it did before the passing of the act.

But, secondly, is the easement we are dealing with within the act? The act requires that the user or enjoyment shall [20] have *been under a "claim of right" and "uninterrupted." A man builds a house on his own land. He may lay the foundations so deep as not to need the support of his neighbor's soil, or he may not do so, and the support may be needed; but in the latter case the neighbor may not be aware of it, and there is nothing to convey to him the knowledge that the support is in fact had, nor if he knew it has he any means practically of preventing it. Is this an enjoyment "of right" within the 1st and 2d sections of the act, according to the meaning put upon the term by this court in *Tickle v. Brown*?⁽¹⁾

Again, the enjoyment is required to be uninterrupted. Now, interruption may arise either from a disuser by the one party or from physical obstruction opposed by the other. I take the statute to have contemplated interruption as arising from either cause. Can it have been intended to include a form of easement to which no interruption could be opposed by the party whose rights are to be prejudicially affected? But the answer to the third question may render the foregoing one unimportant. Does the statute take away the right of the party denying the grant to rebut the presumption arising from user? I answer most assuredly not. For it says expressly that "the claim may be defeated in any other way by which the same is now" (that is, by the then existing law), "liable to be defeated." Now, nothing can, I think, be more certain, for the reasons I have before given, and from the authorities I have cited, than that the presumption of a lost grant from twenty years' user was under the previous law capable of being rebutted, and so the claim defeated, by proof that no grant had ever existed.

(1) 4 A. & E., 369.

I find nothing in the decisions which have taken place since the statute which shakes my confidence in the view I have expressed. The mining cases, such as *Humphries v. Brogden* (*), *Harris v. Ryding* (*), *Rogers v. Taylor* (*), *Rowbotham v. Wilson* (*), *Bonomi v. Backhouse* (*), are not at all in point. The right of support there claimed was not of lateral but of vertical support, and was not *in the [12] nature of an easement but of a proprietary right—the right of the owner of the surface land to have the support of the strata below as of absolute right, independently of user or of right acquired by enjoyment. This distinction was expressly pointed out by Lord Wensleydale when the case of *Bonomi v. Backhouse* (*) was before the House of Lords. He says, “I think it perfectly clear that the right in this case was not in the nature of an easement, but that the right was to the enjoyment of his own property, and that the obligation was cast upon the owner of the neighboring property not to interrupt that enjoyment.”

The case of *Brown v. Robins* (*) comes nearer to the present, but nevertheless is plainly distinguishable. It was an action for excavating beneath land adjoining the plaintiff's house, and so causing the fall of the house which had been built on land previously excavated beneath the surface, and which the defendants knew to have been so excavated. The plaintiff was held entitled to recover;—to my mind a very questionable decision—but only on the express finding of the jury that the land would equally have sunk if no building had been superadded to its weight.

The case of *Partridge v. Scott* (*) is still nearer to the present, and the language of the court with reference to the easement claimed, which was one of support, is deserving of observation with reference to the case before us. The plaintiff had built a house on land which had been previously excavated by mining below. Four years after the house was built the defendants in working a mine immediately adjoining removed the minerals which afforded lateral support to the plaintiff's house, without leaving sufficient to uphold it, but the removal of the minerals would not have had that effect if the house had not been built on excavated soil. It was held that no right of support could be claimed under such circumstances, ex-

(*) 12 Q. B., 739; 20 L. J. (Q.B.), 10. (*) 9 H. L. C., 503; 34 L. J. (Q.B.),

(*) 5 M. & W., 60. 181.

(*) 2 H. & N., 828; 27 L. J. (Ex.), 173. (*) 4 H. & N., 186; 28 L. J. (Ex.),

(*) 8 H. L. C., 348; 30 L. J. (Q.B.), 49. 250.

(*) E. B. & E., 355; 9 H. L. C., 503; (*) 3 M. & W., 220.

34 L. J. (Q.B.), 181.

1877

Angus v. Dalton.

cept by way of easement, which of course could not have been acquired under twenty years; the language of the court leaving it doubtful whether in their opinion if the support had been had for the twenty years a right thereto would have been acquired. In delivering the judgment, 122] Baron Alderson says, "He *(the plaintiff) has, by building on ground insufficiently supported, caused the injury to himself without any fault on the part of the defendants, unless at the time by some grant he was entitled to additional support from the land of the defendants. There are no circumstances in the case from which we can infer any such grant as to the new house because it has not existed twenty years, nor as to the old house because though erected more than twenty years it does not appear that the coal under it may not have been excavated within twenty years, and no grant can at all events be inferred, nor could the right to any easement become absolute even under Lord Tenterden's Act, until after the lapse of at least twenty years from the time when the house first stood on excavated ground, and was supported in part by the defendant's land. If the law stood as it did before Lord Tenterden's Act (2 & 3 Wm. 4, c. 71, s. 2), we should say that such a grant ought not to be inferred from any lapse of time short of twenty years after the defendants might have been or were fully aware of the facts. And even since that act the lapse of time under these peculiar circumstances would probably make no difference. For the proper construction of that act requires that the easement should have been enjoyed for twenty years under a claim of right. Here neither party was acquainted with the fact that the easement was actually used at all; for neither party knew of the excavation below the house. We should probably, therefore, have been of opinion that there was no user of the easement under a claim of right, and that Lord Tenterden's Act, therefore, would not apply to a case like this. However, the facts of this special case do not raise that point."

The case of *Rogers v. Taylor* (') is still nearer to the point. The plaintiff, having built two cottages on waste belonging to the Crown in the year 1824, obtained a grant of the surface from the Crown exclusive of the minerals. In 1853 the defendant, who as tenant of the owner of the mines was working a quarry underneath the house, cut away the supports of the roof of the quarry under the house, which caused the house to fall. The judge at the trial left it to the jury, from the enjoyment of the support for upwards of

(') 2 H. & N., 828; 27 L. J. (Ex.), 173.

twenty years, if they thought the enjoyment had been *uninterrupted—which was a question in the cause— [123 to presume a grant from the owner of the quarry, and this direction was held by the Court of Exchequer to be right. But in this direction, which was given in deference to previous decisions, and which I now think went to the extreme verge of the law—for no one could have believed in the reality of such a grant—the effect of the enjoyment was only put as a matter of presumption. There is nothing to lead to the inference that, had there been rebutting evidence, it ought not to have been submitted to the jury.

The only case which would appear to be adverse to this view is that of *Hide v. Thornborough* (¹), in which Parke, B., at Nisi Prius, held that where the house of the plaintiff had been supported by the adjoining land of the defendant for twenty years to the knowledge of the defendant, the house of the plaintiff had acquired a right to such support, so as to give the plaintiff a right to damages for injury to his house by its withdrawal. But it is to be observed that this was a decision at Nisi Prius, and which does not appear to have undergone much consideration, and, what is more important, there was no evidence to show the origin of the user or to rebut the presumption arising from the continuance of the support and so to negative, as is the case here, the presumption of a grant.

The same learned judge in *Gayford v. Nicholls* (²) uses language which might imply an opinion that twenty years' enjoyment would give an absolute right to support. There the plaintiff's buildings had been injured by excavations made in the defendant's soil; but the buildings were modern, and it was held that the plaintiff could not recover. Parke, B., in delivering judgment says: "This is not a case in which the plaintiff has the right of the support of the defendant's soil either by virtue of a twenty years' occupation, or by reason of a presumed grant, or by a presumed reservation, where both houses were originally in the possession of the same owner; for unless a right of support by some such means can be established, the owner of the soil has no right of action against his neighbor who causes the damage by the proper exercise of his own right." But this was *obiter dictum*, and not necessary to the decision. The case of *Arkwright v. Gell* (³) is an authority *on [124 this question, as well as on the question of presumption. It was an action for diverting from certain cotton mills water flowing down a mineral sough, and of which the mills had

(¹) 2 C. & K., 250. (²) 9 Ex., 702; 23 L. J. (Ex.), 205. (³) 5 M. & W., 203.

1877

Angus v. Dalton.

for many years had the benefit. The stream was an artificial not a natural one. In giving the judgment of the court, the Lord Chief Baron says, and his language is well worthy of attention: "What is the species of right or interest which the proprietor of the surface where the stream issued forth, or his grantees, would have in such a water-course at common law, and independently of the effect of user under the recent statute 2 & 3 Wm. 4, c. 71? He would only have a right to use it for any purpose to which it was applicable, so long as it continued there. A user for twenty years or a longer time would afford no presumption of a grant of the right to the water in perpetuity; for such a grant would in truth be neither more nor less than an obligation on the mine owner not to work his mines by the ordinary mode of getting minerals below the level drained by that sough, and to keep the mines flooded up to that level in order to make the flow of water constant for the benefit of those who had used it for some profitable purpose. How can it be supposed that the mine owners could have meant to burthen themselves with such a servitude so destructive to their interests—and what is there to raise an inference of such an intention? The mine owner could not bring any action against the person using the stream of water, so that the omission to bring an action could afford no argument in favor of the presumption of a grant; nor could he prevent the enjoyment of that stream of water by any act of his, except by at once making a sough at a lower level and thus taking away the water entirely, a course so expensive and inconvenient that it would be very unreasonable, and a very improper extension of the principle applied to the case of lights to infer from the abstinence from such an act an intention to grant the use of the water in perpetuity, as a matter of right." The learned judge next proceeds to consider the case with reference to Lord Tenterden's Act. "It remains to be considered whether the statute 2 & 3 Wm. 4, c. 71, gives to Mr. Arkwright and those who claim under him any such right, and we are clearly of opinion that it does not. The whole purview of the act shows that it applies only to such rights as would before [25] the act have been *acquired by the presumption of a grant from long user. The act expressly requires enjoyment for different periods, 'without interruption,' and therefore necessarily imports such an user as could be interrupted by some one 'capable of resisting the claim,' and it also requires to be 'of right.' But the use of the water in this case could *not be the subject* of an action at the suit of the

proprietors of the mineral field lying below the level of the Cromford Sough, and was incapable of interruption by them at any time during the whole period by any reasonable mode, and as against them it was not 'of right;' they had no interest to prevent it; and until it became necessary to drain the lower part of the field, indeed at all times, it was wholly immaterial to them what became of the water so long as their mines were freed from it." This reasoning as it seems to me, implies that the presumption arising from user may be negatived by the surrounding circumstances; more especially where the user could not be interrupted by the party against whom the easement is claimed. In the case before us the neighboring owner could not bring an action; he could not interrupt the user by anything he could do or could reasonably be expected to do.

As regards the matter of presumption, *Chasemore v. Richards*, in the House of Lords⁽¹⁾, is very much to the present purpose. It was an action for intercepting, by the formation of a reservoir on the defendant's own land, and the use of mechanical appliances, currents of water, which before ran under ground, and percolating through the soil, fed the stream of the River Wandle, on which the plaintiff had an ancient mill worked by the stream, the supply of water to the mill being thereby diminished. In delivering the opinion of the judges, which was adopted by the House of Lords, Wightman, J., says: "In such a case as the present, is any right derived from the use of the water of the River Wandle for upwards of twenty years for working the plaintiff's mill? Any such right against another, founded upon length of enjoyment, is supposed to have originated from some grant from the owner of what is sometimes called the servient tenement. But what grant can be presumed in the case of percolating waters depending upon the quantity of rain falling, or the natural moisture of the soil? and *in the absence of [126 any visible means of knowing to what extent, if at all, the enjoyment of the plaintiff's mill would be affected by any water percolating in and out of the defendant's or any other land? The presumption of a grant arises only where the person against whom it is to be raised might have prevented the exercise of the subject of the presumed grant; but how could he prevent or stop the percolation of the water?"

So here I ask how could the adjoining owner prevent the plaintiffs' building from pressing laterally on his soil? Lord Wensleydale afterwards says (*Ibid.*, p. 385): "I do not think that the principle on which prescription rests can be

(1) 7 H. L. C., 370; 29 L. J. (Ex.), 83.

1877

Angus v. Dalton.

applied. It has not been with the permission of the proprietor of the land that the streams have flowed into the river for twenty years or upwards. '*Qui non prohibet quod prohibere potest assentire videtur.*' But how, here, could he prevent it? He could not bring an action against the adjoining proprietor; he could not be bound to dig a deep trench in his own land to cut off the supplies of water in order to indicate his dissent. It is going very far to say that a man must be at the expense of putting up a screen to window lights, to prevent a title being gained by twenty years' enjoyment of light passing through a window. But this case would go very far beyond that. I think that the enjoyment of the right to these natural streams cannot be supported by any length of user if it does not belong of natural right to the plaintiff. For the same reason I dispute the correctness of Lord Ellenborough's opinion in the case of the spring in *Balston v. Bensted* ⁽¹⁾, where there had been twenty years' enjoyment of it in a particular mode."

The principle thus asserted is directly applicable to the present case. How could the defendant's predecessor have prevented the plaintiffs' house from being built on their own land?

In *Webb v. Bird* ⁽²⁾, it was held by the Court of Common Pleas (the judgment of which court was afterwards affirmed on appeal ⁽³⁾) that an easement which was incapable of interruption was not within Lord Tenterden's Act. The action [27] was brought for *obstructing the passage of air to the plaintiff's windmill. That, of course, is not this case, but the grounds on which the case was held not to be within Lord Tenterden's Act are directly to the present purpose. "I do not think," says Erle, C.J., "the passage of air over the land of another was or could have been contemplated by the Legislature when framing that section. They evidently intended it to apply only to the exercise of such rights upon or over the surface of the servient tenement as might be interrupted by the owner if the right was disputed. It is clear to my mind that that was the intention of the Legislature, because the section provides that the claim shall not be defeated 'where there has been actual enjoyment for the period mentioned without interruption.' I am at a loss to conceive what would be an interruption of such a right as is here claimed. In the case of a way, the exercise or enjoyment of the right may be interrupted by the erection of a gate or other impediment. So of the analo-

⁽¹⁾ 1 Camp., 463.

⁽²⁾ 10 C. B. (N.S.), 268; 30 L. J. (C.P.), 284.

⁽³⁾ 13 C. B. (N.S.), 841; 31 L. J. (C.P.), 335.

gous right to water. So a claim to lights may be obstructed or interrupted by the erection of a hoarding or other screen by the owner of the servient tenement." And on the appeal in the Exchequer Chamber (¹), Wightman, J., in giving the judgment of the court, says: "It has to be considered whether, independently of the statute, the right claimed may be supported upon the presumption of a grant arising from the uninterrupted enjoyment as of right for a certain term of years. We think in accordance with the judgment of the Court of Common Pleas and the judgment of the House of Lords in *Chasemore v. Richards* (²), that the presumption of a grant from long continued enjoyment only arises when the person against whom the right is claimed might have interrupted or prevented the exercise of the subject of the supposed grant." After referring to what had been said by Lord Wensleydale in *Chasemore v. Richards* (³), the learned judge continues: "In the present case it would be practically so difficult, even if not absolutely impossible, to interfere with or prevent the exercise of the right claimed, subject as it must be to so much variation and uncertainty, as pointed out in the judgment below, that we think it clear that no presumption of a grant or easement in the nature of a grant can *be raised from the non- [128 interruption of the exercise of what is called a right, by the person against whom it is claimed, as a non-interruption by one who might prevent or interrupt it."

In the case of *Solomon v. Ventners' Company* (⁴) the facts were peculiar. Three contiguous houses standing on a declivity had for thirty years been out of the perpendicular, the first leaning on the second, the second on the third. The lowest house having been taken down, its removal caused injury to the highest. An action having been brought, it was held that the action would not lie, partly because, there being an intermediate house, no right of lateral support could accrue, partly because—and it is on this point that Baron Bramwell rests his judgment—as an adjacent owner can never know whether the neighboring building requires the support of his soil, or may have sufficient support on its own foundations, the enjoyment cannot be said to be open, and therefore cannot be adverse. The Lord Chief Baron, in his judgment, casts doubts on the authority of *Stansell v. Jollard*, and *Hide v. Thornborough* (⁵), cases on which I have already commented.

(¹) 13 C. B. (N.S.), 843; 31 L. J. (C.P.), 336.

(²) 4 H. & N., 585; 28 L. J. (Ex.), 370.

(³) 2 C. & K., 250.

(⁴) 7 H. L. C., 349; 29 L. J. (Ex.), 81.

1877

Angus v. Dalton.

The same question as arises in the present case, was raised before Vice-Chancellor Wood, in that of *Hunt v. Peake* (¹), and the authorities were gone into, but it became unnecessary to decide it, as the learned Vice-Chancellor was of opinion, as matter of fact, that the land would equally have fallen had no building been erected on it.

The last authority which I shall cite, but which appears to me conclusive to show that, notwithstanding Lord Tenterden's Act, a presumption arising from user can be rebutted by showing that no grant could ever have existed, is the case of *Mill v. Commissioners of the New Forest* (²). The claimant, an allottee of waste land under an Inclosure Act, in an inquiry held under 17 & 18 Vict. c. 49, an Act for the Settlement of Claims upon and over the New Forest, claimed a right of common in the waste lands in right of such allotment, and proved an enjoyment for thirty years, exercised as of right and without interruption, which it was contended gave an absolute right under the 1st section of the act. But [29] it was held that the origin of the enjoyment *might be shown, and that as by reason of the statutes 9 & 10 Wm. 3, c. 36, and 1 Anne, c. 7, the right could have had no origin in a grant from the Crown, the claim could not be sustained. After expressing a doubt whether Lord Tenterden's Act could operate so as to repeal the act of Wm. 3, Jervis, C.J., says: "It is, however, unnecessary to give any opinion upon that matter, because I am of opinion that assuming that Lord Tenterden's Act does apply, still the claim cannot be supported. It is not sought to be defeated or destroyed by showing *only* that the right, profit, or benefit was first taken or enjoyed at any time prior to the period of thirty years, but by showing that it never had any legal existence." And Cresswell, J., said: "I am entirely of the same opinion. It seems to be imagined by Mr. Smith that, because you cannot defeat a claim which may be lawfully made at the common law by custom, prescription, or grant, to any right of common or other profit *à prendre*, by showing *only* that such right or profit was first taken or enjoyed at any time prior to the period of thirty years, therefore you cannot defeat it at all. I do not find that stated in Lord Tenterden's Act. There is no attempt in this case to defeat the claim by showing only its origin, but by showing that it never could have had a legal origin." And Willes, J., said: "I am of the same opinion. What was done here was in fact this: It was shown that the enjoyment commenced in 1810, so that it could not give rise to the right

(¹) *John*, 705; 29 L. J. (Ch.), 785. (²) 13 C. B., 60; 25 L. J. (C.P.), 212.

claimed, and that it was impossible that any legal grant of the right could have existed." This case, it is true, was decided on the 1st section of the act, but the reasoning is just as applicable to a case arising on the 2d.

It is scarcely necessary to point out that the rule established by *Pickard v. Sears* (') and *Freeman v. Cooke* (') can have no application in a case where not only no assent was in fact given, but as no assent was necessary, none can be implied; in addition to which any opposition on the part of the adjoining owner would have been useless. Nor can the doctrine as to implied grants apply, as at the time of the plaintiff's factory being built the premises belonged to different and independent owners.

For the foregoing reasons I am of opinion that any presumption arising from length of enjoyment, as respects the easement of *lateral support to houses or other [130 buildings, is one which, both at common law and since the act of 2 & 3 Wm. 4, s. 71, is open to be rebutted; and that if the fact that no grant was ever made is established, or from the circumstances none can be implied, the presumption fails. It is beyond all question in this case that no grant was ever made, or assent ever given. It is equally certain that there are no circumstances from which any grant, or agreement to make a grant, or assent in any form, can be implied.

I am, therefore, of opinion that judgment must be given for the defendants.

MELLOR, J.: I have not thought it necessary to prepare a separate judgment, as I have had an opportunity of reading the judgment of the Lord Chief Justice and that of my Brother Lush. I admit that the case is not free from great difficulties, but I am satisfied that the conclusion at which my Lord has arrived is the only one consistent with the principles of our law and of ordinary justice, and I entirely agree with it.

The rule will be absolute to enter the verdict for the defendants.

Judgment for the defendants.

Solicitors for plaintiffs: *Shum, Crossman & Crossman*, for Stanton & Atkinson, Newcastle-upon-Tyne.

Solicitors for Commissioners of Works and Public Buildings: *The Solicitors for the Treasury, Raven & Hare*, agents.

Solicitors for the defendant Dalton: *Prior, Bigg, Church & Adams*, for T. Dalton, Leeds.

(') 6 A. & E. 469.
28 ENG. REP.

(') 2 Ex., 654; 18 L. J. (Ex.), 114.
16

See 25 Eng. Rep., 774 note; *Moak's Underhill on Torts*, 423 *et seq.*

Without a contract or some relation of privity as to the uses of land sold, the vendee stands to his vendor just as he does to others, and the maxim, *Sic utere tuo ut alienum non laedas*, applies.

Where land is injured by negligence in mining coal underneath it, or the crops and vegetation thereon are injured by the heat and smoke from coke ovens, the owner is entitled to a verdict for such damages as the jury believe, from the evidence, he has thereby sustained: *Brown v. Torrence*, 88 Penn. St. R., 186, 6 Weekly Notes, 280.

The party having the right, under a reservation in a deed, to remove the coal underlying property conveyed to another owner, is held to the exercise of ordinary care in removing the coal, and if such care requires that pillars or ribs of coal be left in order to protect the property of the surface owner, their removal would be negligence, entitling the owner of the surface to damages for loss caused thereby: *Livingston v. Moingona Coal Co.*, 49 Iowa, 369.

Where the surface of land belongs to one and the minerals to another, no evidence of title appearing to regulate or qualify their rights of enjoyment, the owner of the minerals cannot remove them without leaving support sufficient to maintain the surface in its natural state.

The rule is well settled, that where one owning the whole fee grants the minerals, reserving the surface to himself, his grantee is entitled only to so much of the mineral as he can get without injury to the superincumbent soil.

While it is doubtless true the party owning the minerals under the land of another, or having a lease to remove the same, is only bound to leave support for the superincumbent soil in its natural state, and is not required to leave support for additional buildings erected on the surface, yet the mere presence of a building or other structure upon the surface will not prevent a recovery for injuries to the surface, unless it is shown that the subsidence would not have occurred from the act,

if no buildings existed upon the surface. The act creating the subsidence is wrongful, and renders the owners of the mine liable for all damages that result therefrom, as well as to the buildings as to the land.

The act of removing all support from the superincumbent soil is *prima facie* the cause of its subsequently subsiding; but if the subsidence is in fact caused by the weight of buildings erected on the surface, after the execution of a lease to the defendant authorizing him to take the minerals beneath the surface, that may be shown in defence as contributory negligence.

Where a mining lease stipulated that no pillars should be withdrawn within 600 feet of the shaft, and the whole clause relates to the manner of working the mine and the condition in which it should be left, it was held that the lessees were not, by implication, authorized to withdraw pillars or supports not within the prescribed distance, so as to cause a subsidence of the superincumbent soil: *Wilms v. Jess*, 94 Ills., 464.

In 1802 a proprietor sold certain lands to one purchaser, and the minerals beneath them to another. In the disposition of the former subject, power was reserved to the purchaser of the minerals to win and work them on paying "All surface damage, if any shall be thereby occasioned to the ground of the lands," and a power, conceived in the same terms, was given to the purchaser of the minerals in his disposition. At that time the lands were entirely an agricultural subject, except for a few small cottages scattered over them. Subsequent to 1802, and about sixty years before 1878, a house and offices were built upon part of the lands in question. In 1878 the workings of the lessees of the proprietor of the minerals caused a subsidence which injured the house and offices. Held, that such damage was "surface damage" in the sense of the disposition of 1802, and that the obligation was not to be restricted so as to be applicable only to the ground as it existed at that date—when the landed and mineral estates were divided.

Opinions reserved on the question whether, in the event of the proprietors of the surface unduly increasing the

burden of support laid upon the pro- prior of the minerals, by fencing the ground out for streets, a claim of dam- ages would be sustained by the court : *Wiell v. Dixon*, 17 Scottish Law Reporter, 496.

[8 Queen's Bench Division, 181.]

Jan. 19, 1878.

[CROWN CASES RESERVED.]

*THE QUEEN V. READ.

[131

Wild Animals, Property in—Embezzlement—Master and Servant.

A gamekeeper, not authorized to take or kill rabbits for his own use, took and killed some wild rabbits upon his master's land, and converted them dishonestly to his own use by selling them. The taking, killing, removing, and selling, were parts of one continuous action:

Held, that a conviction of such gamekeeper for embezzlement of the rabbits could not be sustained.

CASE stated by the chairman of the Berks Quarter Sessions.

The prisoner was indicted for stealing eighteen rabbits the property of Arthur Smith his master.

The evidence showed that the prisoner was the gamekeeper of Smith, and was employed to look after a wood in which the game and rabbits and rights of sporting had been granted to Smith by the owner. The prisoner was not at liberty to kill or take rabbits in the wood for his own use. He did take and kill and remove eighteen wild rabbits in and from the wood, and had bargained to sell them when they were seized in the possession of the purchaser's agent. The capturing, killing, removing, and selling, were parts of one continuous action.

Counsel for the defence required the court to stop the case, because there was not any evidence to go to the jury that the rabbits had ever, as subjects of larceny, been in the possession of Smith, and therefore the prisoner could not be guilty of stealing or embezzling them.

Counsel for the prosecution insisted that when the rabbits were captured and killed by the prisoner they were, by that act, reduced into the possession of his master, and became subjects of larceny or embezzlement.

Reg. v. Townley (*) and *Reg. v. Cullum* (*) were cited.

The case was left to the jury, the court telling them that the criminal offence of the prisoner (if any) was embezzlement, and not larceny, and that if in their opinion the prisoner being the *servant of Smith captured and [132

(*) Law Rep., 1 C. C. R., 315.

(*) Law Rep., 2 C. C. R., 28; 5 Eng. R., 397.

1878

The Queen v. Read.

killed the rabbits, although against the orders of his master, they so came into the possession of the prisoner for or on behalf of his master, and the prisoner converting them to his own use was guilty of embezzlement.

The jury found the prisoner guilty of embezzlement, and he was sentenced to four months' imprisonment with hard labor.

The question reserved was, whether the prisoner, by capturing and killing the rabbits against his master's orders, did so bring them into the possession of his master that he could by appropriating them be guilty of embezzling them.

P. Howard Smith, for the prisoner: Embezzlement is merely a species of larceny. It is a statutory crime created and defined for the purpose of meeting cases where the property stolen has never been in the actual possession of the master, except so far as the possession of the dishonest servant could be considered the possession of the master. The case of *Reg. v. Townley* (*) is an authority that wild rabbits are not the subject of larceny. It follows, therefore, that they are not the subject of embezzlement. Bovill, C.J., there says: "In animals *feræ naturæ* there is no absolute property. There is only a special or qualified right of property—a right *ratione soli* to take and kill them;" and then goes on to say: "But before there can be a conviction for larceny for taking any thing not capable in its original state of being the subject of larceny, as for instance, things fixed to the soil, it is necessary that the act of taking away should not be one continuous act with the act of severance or other act by which the thing becomes a chattel." In the same case Blackburn, J., says: "Even in the case of *Blades v. Higgs* (*), in which it was held that game when killed becomes the property of the owner of the land upon which it was raised and killed, it was expressly pointed out that it by no means followed that an indictment for larceny would lie." In the present case, as in that, the action was continuous. In the present case it is found, and that furnishes a sufficient ground of itself for quashing the conviction, that the prisoner was not at liberty to kill or take rabbits, and consequently they were not received or taken into possession by him for or in the name of or on [33] account *of his master or employer; and therefore the offence of embezzlement, as defined by 24 & 25 Vict. c. 96, s. 68, has not been committed.

H. D. Greene, for the prosecution: It is not necessary for the purpose of upholding this conviction to question the

(*) Law Rep., 1 C. C. R., 315.

(*) 11 H. L. C., 621; 34 L. J. (C.P.), 286.

decision in the case of *Reg. v. Townley* ('); the offence charged against the prisoner in that case could not be larceny, because there was no taking of the rabbits out of the possession of the prosecutor. In order to constitute a larceny there must be a felonious taking of a chattel out of the possession of the person in whom the property is laid in the indictment. Wild rabbits when killed are the property of the owner of the land upon which they are killed, they are when dead the subject of property unquestionably, and if so, why should they not be the subject of larceny? The true ground for the decision in *Reg. v. Townley* (') is that the prosecutor there never had been in possession of the rabbits. In the present case this difficulty does not arise, since in order to constitute embezzlement it is not requisite that the master from whom the property is embezzled should have been in possession, indeed, it is that very fact, that the master has not been in possession, which marks the distinction between the crime of embezzlement and that of larceny. *Spear's Case* ('), and *Reg. v. Reed* ('). The cases of *Blades v. Higgs* ('), and the *Earl of Lonsdale v. Rigg* ('), are authorities in favor of the prosecution.

[HAWKINS, J., referred to *Reg. v. Roe* (').]

The case of *Blades v. Higgs* (') is an authority that game when killed by a trespasser vests in the owner of the soil, that is the view expressed by Lord Westbury, and is the foundation of the decision in that case. Lord Chelmsford also says: "It is much more reasonable to hold that, the trespasser having no right at all to kill the game, he can give himself no property in it by his wrongful act; and that as game killed or reduced into possession *is the sub- [134] ject of property, and must belong to somebody, there can be no other owner of it, under these circumstances, but the person on whose ground it is taken, or killed."

[COCKBURN, C.J.: How can it be said that the prisoner received the rabbits for or in the name or on account of his master?]

Just as a dishonest collecting clerk, who collects the money meaning to misappropriate it, is said to collect for or on account of, the master, so the prisoner killed the rabbits in his master's name, acting, though acting wrongly, as his master's servant.

(') Law Rep., 1 C. C. R., 315.

Crimes, 5th ed., p. 313; 6 Cox's C. C.,

(') 2 Leach, 825; 2 East, P. C., c. 16, 284; 23 L. J. (M.C.), 25.

s. 16, p. 568; Russ. on Crime, 5th ed., p. 312.

(') 11 H. L. C., 621; 34 L. J. (C.P.), 286.

(') Dears. C. C., 168, 257; Russ. on (') 11 Ex., 654; 26 L. J. (Ex.), 196.

(') 11 Cox's C. C., 557; 22 L. T. (N.S.), 414, 415.

1878

The Queen v. Read.

[COCKBURN, C.J.: The words of the statute are, "who-soever being a clerk, or servant, &c., shall fraudulently embezzle any chattel, money, or valuable security, which shall be delivered to, or received, or taken into possession by him, for or in the name or on the account of his master or employer," &c. It is impossible to bring the present case within those words.]

THE COURT (Cockburn, C.J., Cleasby, B., Lindley, Manisty, and Hawkins, L.JJ.): This conviction cannot be upheld.

Conviction quashed.

Solicitor for prosecution: *J. T. Dodd*, Reading.

Solicitor for prisoner: *R. A. Ward*, Maidenhead.

This case seems to have gone upon the ground either that the gamekeeper was not a clerk or servant, or that the game was neither "a chattel, money, or valuable security." The precise ground on which it was decided is not given, though, from the case cited by court and counsel, *Reg. v. Townley*, L. R., 1 C. C. Res., 815, 12 Cox, 59, the principal case would seem to have gone upon the ground that the rabbits when living were *feræ naturæ*, and did not become the property of the master until they were killed and came to the possession of the master. Though, by the peculiar law of England, game killed upon one's land becomes his property if it remain dead, *upon his land*, a sufficient length of time, that the wrongdoer have not abandoned his wrongful possession. Yet in the principal case at issue the killing and conversion were so far one continuous act that the master did not become seized of a property in the animals as personal property, which could become the subject of larceny or embezzlement, as the master's *personal property*. The theory of the principal case was that the master never had any possession of the game as personal property.

See *Regina v. Petch*, 14 Cox's Cr. Cas., 116, to appear in present or next volume.

In *Blades v. Higgs*, 11 H. L. Cas., 631, Lord Cranworth said: "When it is said by writers on the common law of England that there is a qualified or special right of property in game, that is in animals *feræ naturæ*, which are fit for the food of man,

whilst they continue in their wild state, I apprehend that the word 'property' can mean no more than the exclusive right to catch, kill, and appropriate such animals, which is sometimes called by the law a reduction of them into possession.

This right is said in law to exist *ratione soli* or *ratione privilegii*, for I omit the two other heads of property in game, which are stated by Lord Coke, namely, *propter industriam* and *ratione impotentia*, for these grounds apply to animals which are not, in the proper sense, *feræ naturæ*. Property *ratione soli* is the common law right which every owner of land has to kill and take all such animals *feræ naturæ* as may from time to time be found on his land, and as soon as this right is exercised, the animals so killed or caught becomes the absolute property of the owner of the soil.

Property *ratione privilegii* is the right which, by a peculiar franchise anciently granted by the crown in virtue of its prerogative, one man had of killing and taking animals *feræ naturæ* on the land of another, and in like manner the game, when killed or taken by virtue of the privilege, became the absolute property of the owner of the franchise, just as in the other case it becomes the absolute property of the owner of the soil."

See 1 Whart. Crim. Law (8th ed.), §§ 867-875; 1 Bish. Cr. Law (6th ed.), §§ 577-8; 2 id., §§ 761-6; Moak's Underhill on Torts, pp. 577-581.

A con comes under the denomination of animals *feræ naturæ*, and is not

the subject of larceny: *Warren v. State*, 1 *Greene's Iowa Rep.*, 106.

See *Regina v. Edwards*, 16 *Eng. R.*, 607, 608 note.

As to oysters: *Reg. v. Downing*, 11 *Cox*, 580; *State v. Cozzens*, 2 *R. I.*, 561.

As to fish: *State v. Krider*, 78 *N. C.*, 481.

Drifted and ungathered seaweed cast on the shore, between high and low water mark, of him who has the exclusive ownership of said shore, is not the subject of larceny: *Queen v. Clinton*, *Irish Rep.*, 4 *C. L.*, 6.

Though the owner of the soil might maintain trespass *quare clausum*, for entering and taking it: *Brew v. Haren*, *Irish*, 11 *C. L.*, 198, affirming *Irish R.*, 9 *C. L.*, 29, and distinguishing *Queen v. Clinton*, *Ir. R.*, 6 *C. L.*, 6, and *Mulholland v. Killen*, *Ir. R.*, 9 *Eq.*, 471.

The taking and carrying away of articles which formed part of the freehold,—i.e., silver ore,—will not constitute a larceny unless an interval of time has elapsed between the acts of severance and asportation; but it seems only such an interval is necessary as that the two acts shall not constitute one transaction: *State v. Berryman*, 8 *Nev.*, 262.

Copper pipes annexed to the realty are not the subject of larceny: *State v. Hall*, 5 *Harr. (Del.)*, 492.

As to lead of gutters, under the English statute: *Reg. v. Rier*, 9 *Cox's Cr. Cas.*, 119.

Things savoring of the realty, by severance from the freehold, become personal property, and therefore the subject of larceny. When property is so severed by a thief, who leaves it on the ground, goes off, and after the lapse of an interval, returning carries it away, the severance and asportation being two distinct acts, the offence is larceny. But where the severance and asportation constitute one continuous act, without cessation, until the one as well as the other is completed, as where one "digs potatoes or cuts cabbages" from another's premises and instantly removes them, it is

trespass only: *Bell v. State*, 4 *Baxter (Tenn.)*, 426.

A person being charged with the theft of eleven doors, it was proved that the doors when taken from the owner were fastened by hinges to her unoccupied house, and that the accused soon afterward sold them in a neighboring village. There was no evidence as to the person by whom they were taken from their hinges. Held, on *habeas corpus*, that though the doors were part of the realty and not the subject-matter of theft as long as they were attached to the house, yet when severed from the house they became personal property, and as such they were the subject-matter of theft; and even if it had been proved that they were taken from their hinges by the accused, yet his subsequent asportation and conversion of them without the owner's consent, and with the intent to deprive her of their value, constituted theft in a legal as well as a moral sense—and not a mere trespass: *Ex parte Willke*, 84 *Texas*, 155.

Chandeliers attached to the freehold are held to be the subject of larceny.

For feloniously taking and carrying away four chandeliers, which the proof showed were attached to the house of their owner, by being screwed into a gas pipe attached to the ceiling, the appellant was convicted of grand larceny in this case.

The rule of law making such appendages a part of the realty, as between vendor and vendee, and personality as between landlord and tenant, should not be allowed to shield the thief from punishment.

It is immaterial whether the carrying away was immediate and continuous, or the removal at different times: *Smith v. Commonwealth*, 14 *Bush (Ky.)*, 81.

As to what is obtaining sufficient possession of a cow by a thief to constitute larceny: *Lundy v. State*, 60 *Geo.*, 148.

And what not: *State v. Butler*, 65 *N. C.*, 309; *Com. v. McMillan*, 2 *Quarterly L. J.*, 371.

1877

Evershed v. London and North Western Railway Co.

[3 Queen's Bench Division, 184.]

Nov. 29, 1877.

[IN THE COURT OF APPEAL.]

EVERSHED V. THE LONDON AND NORTH WESTERN RAILWAY COMPANY (¹).

Railway Company—Undue Preference—Gratuitous Carting—Loading and Unloading of Customer's Goods in order to prevent Traffic from passing over other Railway—Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), ss. 8, 90—Railway and Canal Traffic Act, 1854 (17 & 18 Vict. c. 31), s. 2.

The plaintiff was a brewer carrying on business at B., where the defendants, a railway company, and the M. Company, another railway company, had stations. Three firms of brewers also carried on business at B., and their premises respectively were connected with the M. Railway. The plaintiff's were not connected with either the M. Railway or the defendants' railway. In order to prevent the traffic of the three firms from passing wholly over the M. Railway and to divert some portion of it to their own line, the defendants agreed to cart goods gratuitously between their station at B. and the premises of the three firms respectively, and they also allowed [135] certain deductions from the rates charged to the three firms for the carriage of their goods, the effect of which was that their goods were loaded and unloaded by the defendants gratuitously. The defendants did not cart gratuitously for the plaintiff between his premises and their station, and they did not allow to him deductions similar to those allowed to the three firms. After carting the goods for the three firms gratuitously and allowing them the deductions before mentioned, the defendants derived a profit from the traffic, and they had not any intention to prejudice the plaintiff:

Held, affirming the judgment of the Queen's Bench Division, that the gratuitous carting, loading and unloading of the goods for the three firms was an inequality in favor of them and an undue preference granted to them by the defendants, and was in contravention of 8 & 9 Vict. c. 20, s. 90, and 17 & 18 Vict. c. 31, s. 2, and that the plaintiff was entitled to maintain an action to recover the amounts paid by him to the defendants, which represented the cost of carting his goods between his premises and their station at B., and of loading and unloading the same.

APPEAL by the defendants against the judgment of the Queen's Bench Division.

The case is reported 2 Q. B. D., 254; 20 Eng. Rep., 323, where the facts are fully set out, and it will be sufficient here to make the following short statement of them.

The plaintiff was a brewer carrying on business at Burton-on-Trent, in which town the defendants and the Midland Railway Company had stations for goods. The plaintiff's premises were not connected with either railway. In the case of those brewers whose premises were not connected with either railway the defendants and the Midland Railway Company charged for the carriage of goods between Burton and any other town upon their respective lines a station-to-station rate; in addition to this rate, when they carted the goods between their respective stations and the premises of the brewers at Burton, they charged 1s. per

(¹) Affirming 20 Eng. Rep., 323.

ton. In the case of those brewers whose premises were connected with either railway the trucks containing goods for them did not enter the goods station, but were hauled along sidings near or into the premises of the brewers for whom they were intended; the trucks were then unloaded by the brewers at their own cost. The defendants and the Midland Railway Company were thus saved the cost of unloading the goods and of the necessary accommodation in the station, and they allowed a rebate or deduction of 9d. per ton from the station-to-station rate to the brewers, whose premises were connected with their respective lines. The defendants always charged the plaintiff 1s. per ton whenever they carted his goods for him; and never made him any [136 rebate or deduction from the station-to-station rate. At Burton were three firms of brewers whose respective premises were connected with the line of the Midland Railway Company, which accordingly charged them nothing in respect of cartage, and allowed them the rebate or deduction of 9d. a ton. The defendants had not communication with the premises of the three firms; but when they did cartage for the latter they did not charge 1s. per ton or any other sum, and they also allowed to them the rebate or deduction of 9d. per ton, although in fact they unloaded the goods for them and afforded them the ordinary accommodation of their goods station. If the defendants had not so carted gratuitously and had not made such rebate or allowance of 9d. per ton, the three firms would have sent their traffic by the Midland Railway. The defendants carted gratuitously, and allowed the rebate or deduction of 9d. to the three firms with the view of securing a share of their traffic, which yielded a profit, after allowing the 9d. per ton and doing the carting gratuitously, and had no intention of prejudicing the plaintiff. If the defendants had not so carted gratuitously, and had not allowed the rebate or deduction, the plaintiff would have gained no positive advantage, inasmuch as his traffic would not have been carried at a cheaper rate, but the three firms would have lost the advantage of being able to have their traffic carried by either railway on the same terms, and the defendants would have substantially lost the traffic of the three firms.

From the year 1863 down to March, 1874, the plaintiff employed a man named Ball to settle and adjust their freightage accounts with the defendants. Ball was aware that the defendants were carrying for the three firms of brewers on the terms above mentioned, but for reasons of his own, and contrary to his duty to his employer, he con-

1877

Evershed v. London and North Western Railway Co.

cealed such knowledge from him, and the plaintiff did not get reliable information of what the defendants were doing until August or September, 1874. On the 7th of January, 1875, the plaintiff and other brewers wrote to the defendants complaining of the free cartage so done, and the rebate and allowance so made by them to the three firms of brewers, and asking for the repayment of the various amounts which they had overpaid to the defendants, and on the 30th of January following they made an application to the Rail- [37] way Commissioners under the *Regulation of Railways Act, 1873, in which they complained that the defendants carried for the three firms upon the terms above stated, and asked for an order that the defendants should desist from such practice, which they alleged to be an undue preference. On the 10th of March, 1875, the Railway Commissioners granted the injunction applied for. Thereupon the defendants ceased on the 31st of March, 1875, to cart gratuitously for and to make the above-mentioned rebate or allowance to the three firms, and the consequence was that they lost substantially the whole of the traffic of the three firms. The question for the opinion of the court was, whether the plaintiff was entitled to recover the whole or any part of the sum of 1s. 9d. per ton upon goods carried by the defendants for him under the circumstances described, and upon which he had paid cartage during six years before the commencement of this action.

The court was to have power to draw inferences of fact.

The Queen's Bench Division held (') that the plaintiff could not recover in respect of the payments made whilst Ball was in his service, and in respect of those made between September, 1874, and the 7th of January, 1875, for during the former period Ball was the plaintiff's agent to settle accounts with the defendants who were guilty of no fraud, and during the latter period the payments made by the plaintiff must be deemed voluntary; but the Queen's Bench Division held that he was entitled to recover in respect of the payments made between the time when Ball quitted his service and September, 1874, and in respect of those made between the 7th of January, 1875, and the date of the writ; for during the former period the plaintiff was ignorant of the facts, and during the latter he paid under compulsion.

Nov. 28, 29. *J. W. Mellor*, Q.C., and *J. S. Dugdale*, for the defendants: The present action cannot be maintained, for the plaintiff claims to be put upon the same footing with the three firms, although they have certain advantages

(') 2 Q. B. D., 263, 268; 20 Eng. Rep., 323.

of situation over him. Suppose that their breweries had been built upon the banks of a navigable river: this would be a natural advantage of which they could not be deprived, and which would enable them to obtain *better terms [138 for sending their traffic over the defendants' railway than the plaintiff could do: *Re Ransome and Eastern Counties Ry. Co.* ('). The same principle applies here. It is lawful for a railway or canal company to agree to carry the traffic of large traders at a lower rate than that of small traders: *Re Nicholson and Great Western Ry. Co.* ('); *Strick v. Swansea Canal Co.* ('); and yet the latter are more injured by an agreement of that kind than the plaintiff in the present case is by the agreement between the defendants and the three firms. There is no inequality within the meaning of the Railways Clauses Consolidation Act, 1845, s. 90, and no undue preference contrary to the provisions of the Railway and Canal Traffic Act, 1854, s. 2 ('). There may be a difference in principle between the charge of 1s. for cartage, and the rebate or allowance of 9d.; for the former cannot in any view be a "toll" as interpreted by the Railways Clauses Consolidation Act, 1854, s. 3, as it relates to something which is not done upon the railway. The preference shown to the three brewers is not undue with regard to them: they only reap the benefit of their proximity to the Midland Railway, and it is this advantage of locality which distinguishes the present case from *Re Harris and Cocker-mouth and Workington Ry. Co.* ('). The charges made by the defendants to the plaintiff were in themselves reasonable, and therefore it is clear he cannot rely upon the common law, for according to it the charges of a common carrier need not be uniform, although they must be reasonable, per Blackburn, J., *Great Western Ry. Co. v. Sutton* ('); and the statutes above mentioned do not prevent this rule from applying to the present case. The defendants have acted *bona fide*; they have had no wish either to favor the three firms or to prejudice the plaintiff: they only desired to increase their traffic. The defendants also rely upon the 63d section of the statute incorporating them (9 & 10 Vict. c. cciv), which in effect empowers them to charge [139

(') 4 C. B. (N.S.), 135; 27 L. J. (C. P.), 166.

(') 5 C. B. (N.S.), 366; 28 L. J. (C. P.), 89.

(') 16 C. B. (N.S.), 245; 33 L. J. (C. P.), 240.

(') The Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), ss. 3,

90, and the Railway and Canal Traffic Act, 1854 (17 & 18 Vict. c. 81), s. 2, will be found set out in a note to the report of the proceedings before the Queen's Bench Division (2 Q. B. D., 254, at p. 261).

(') 3 C. B. (N.S.), 693; 27 L. J. (C. P.), 162.

(') Law Rep., 4 H. L., 226, at p. 237.

1877

Evershed v. London and North Western Railway Co.

"a reasonable sum for loading, covering, and unloading of goods, and for delivery and collection" (1).

The defendants also contend that even if a breach of either or both of the statutes above mentioned has been committed, no action will lie at the suit of the plaintiff, because he has not sustained any damage. The alleged breach of the statutes relied on consists in performing services for the three firms without remuneration; but if they had been charged at the same rate as the plaintiff, he would have gained nothing. The Railway Commissioners may grant an injunction, but no action is maintainable: *Hozier v. Caledonian Ry. Co.* (2).

The Queen's Bench Division have held the defendants liable for two out of four periods to which the present action relates, namely, the period between the last settlement of accounts by Ball, and September, 1874, and the period between the 7th of January, 1875, and the commencement of the action. It may be admitted that if the action is maintainable at all, the plaintiff is entitled to recover in respect of the former of these two periods, on the ground that he paid the sums charged by the defendants in ignorance of their terms of dealing with the three firms: but as regards the latter period, the case does not clearly state that the plaintiff, who then was well aware of all the facts, protested against the charges made by the defendants, and a protest at time of payment is necessary to enable him to recover back whatever he paid with knowledge of the facts (3).

[140] **Alfred Wills*, Q.C., and *C. Gould*, for the plaintiff: In any point of view the rebate or allowance of 9d. was a contravention of the Railways Clauses Consolidation Act, 1845, s. 90; for it was made in respect of the conveyance

(1) By 9 & 10 Vict. c. cciv, s. 2, the Railways Clauses Consolidation Act, 1845, is made to apply to the defendants' company.

By s. 3 the defendants are constituted a body corporate.

By s. 63 it is, amongst other things, provided as follows: "And with respect to the conveyance of goods, the maximum rates of charges to be made by the company for the conveyance thereof along the railway, including the tolls for the use of the railway, and wagons or trucks and locomotive power, and every expense incidental to such conveyance, except a reasonable sum for loading, covering and unloading of goods, and for delivery and collection, and any other services incidental to the business or

duty of a carrier, where such services or any of them are or is performed by the company, shall not exceed the following sums." The section then contains a table of charges for the conveyance of goods.

(2) 17 Sc. Dec., 2d Ser., 302.

(3) Mellor, Q.C., stated to the court that he did not now rely upon the argument advanced before the Queen's Bench Division (2 Q. B. D., pp. 264 and 267) that the principle of the Railways Clauses Consolidation Act, 1845, s. 90, only applies to tolls for the use on the railway of carriages not belonging to the railway company: see *North British Ry. Co. v. Carter* (8 Sc. Dec. (3d Series), 998); *Caledonian Ry. Co. v. Guild* (1 Sc. Dec. (4th Series), 198); *Peebles v. Caledonian Ry. Co.* (2 Sc. Dec. (4th Series), 346).

upon the defendants' railway of goods belonging to the three firms. Then the abatement of 1s. made to them does not apply simply to the cartage in Burton; for it is a deduction from the whole rate: its effect as regards the plaintiff is to increase indirectly and improperly the station-to-station rate. The collection of goods is part of a carrier's business, and therefore the remuneration paid for it to the defendants by the plaintiff must be a "toll;" and further, if the cartage be not a "toll," the defendants are acting *ultra vires* and illegally in taking it. Inequality of charge always creates undue preference, except where a particular circumstance renders certain traffic cheaper. It is unlawful for a railway company to lower their rates in order to give a preference to any particular traffic, *In re Oxlade* ⁽¹⁾; nor can they regulate their rates with a view to their own interests, if they thereby inflict a disadvantage upon any of the public: *In re Baxendale v. Great Western Ry. Co.* ⁽²⁾.

It is clear that a railway company is liable to repay the charges which they have improperly made, *Great Western Ry. Co. v. Sutton* ⁽³⁾; and as the defendants have illegally exacted sums of money from the plaintiff, he is at liberty to reopen the accounts settled by Ball, and to recover even voluntary payments.

Mellor, Q.C., in reply: No case has been decided with facts exactly like those stated in this special case, and therefore this court may found its judgment upon general principles, and is not fettered by the decisions of inferior tribunals.

BRAMWELL, L.J.: I am of opinion that the judgment of the Queen's Bench Division should be affirmed. The principles upon which our decision turns seem to us [141] very clear, and therefore although the question before us is of importance, and although we desire to state our reasons with accuracy, so that they may be a guide in future cases of a like kind, we will proceed to deliver judgment at once.

I do not think that if the goods of the three firms were in point of substance carted gratuitously by the defendants, the sum of 1s. charged to the plaintiff for cartage would fall within the word "toll," as defined in s. 3 and as used in s. 90 of the Railways Clauses Consolidation Act, 1845; to my mind that word does not include a charge for cartage or collection; it only includes charges for receiving upon, transit along, and delivery from the railway of the goods intrusted to the company. I am further of opinion that the 63d

⁽¹⁾ 1 C. B. (N.S.), 454; sub nom. *In re Oxlade v. North Eastern Ry. Co.*; 26 L. J. (C.P.), 129.

⁽²⁾ 5 C. B. (N.S.), 336; 28 L. J. (C.P.), 81.

⁽³⁾ Law Rep., 4 H. L., 226.

1877

Evershed v. London and North Western Railway Co.

section of the statute incorporating the defendants (9 & 10 Vict. c. cciv), does not make the charge of 1s. a "toll," within the meaning of the Railways Clauses Consolidation Act, 1845. That section forbids the defendants to charge for the conveyance of goods more than certain rates, "including the tolls for the use of the railway, and wagons or trucks and locomotive power, and every expense incidental to such conveyance, except a reasonable sum for loading, covering, and unloading of goods, and for delivery and collection, and any other services incidental to the business or duty of a carrier." I do not think that the exception in this clause enables the company to make a charge for cartage, if they are not otherwise empowered so to do; it is merely inserted *ex abundanti cautela*. It has been argued that the collection of the goods is part of the defendants' business as carriers, and therefore that the remuneration for it must be a "toll;" and a further objection has been suggested that if it is not a toll, it is *ultra vires*, and therefore illegal in the defendants to take it. I think it is not *ultra vires*, it is incidental to a business they may carry on. On this doctrine, first introduced in the common law courts in *East Anglian Ry. Co. v. Eastern Counties Ry. Co.* (1), Brice on *Ultra Vires*, p. 434 (2d ed.), may be read with advantage. But whether *ultra vires* or not, I think it beyond doubt that the charge for collection is not a "toll" within the Railways Clauses Consolidation Act, 1845, s. 90.

[42] *On the other hand, I am clearly of opinion that the sum of money charged to the three firms does include a charge for collecting, and loading, and unloading their goods. It is stated in the case that the defendants did the cartage for the three firms gratuitously; but we are empowered to draw inferences of fact, and I come to the conclusion that this statement is not strictly accurate. If the defendants had *intended* to prejudice the plaintiff by an unequal rate, they could not effect that object by making no charge to the three firms for a portion of the services rendered. The Railways Clauses Consolidation Act, 1845, s. 90, enacts that no reduction or advance "shall be made either directly or indirectly in favor of or against any particular company or person." The word "indirectly" may not of itself have much force, but it helps to show the intention of the Legislature; and the legal maxim, *dolus circuitu non purgatur*, is in point. I have no doubt that the defendants intended to act *bona fide*, but I am satisfied that the charge made to the three firms for carrying their goods did

(1) 11 C. B., 775.

include a charge for the cartage. Let me apply the following test: suppose that the defendants' servants whilst employed in carting goods for one of the three firms lose or injure them, can it be doubted that the defendants will be liable as common carriers? and yet common carriers do not act gratuitously. In reality the defendants receive from the three firms one sum, which includes payment for carriage upon the railway, and also payment for cartage. It is perfectly clear that the rebate or allowance of 9d. is a deduction from the "toll," as that word is interpreted in the Railways Clauses Consolidation Act, 1845, s. 3, and therefore as to it the question does not really arise which I have just disposed of, as to the charge of 1s. Therefore, as the total charge made by the defendants to the three firms for carrying their goods includes payment for the cartage, and as the sum of 9d. is likewise deducted therefrom, it is plain that the defendants charge the three firms less for "tolls," that is, for conveying their goods on the railway, than they receive from the plaintiff for the same service. This amounts to a contravention of the 90th section of the Railways Clauses Consolidation Act, 1845, and the action is maintainable for breach of that section alone.

But, further, I am in favor of the plaintiff also as to the *construction of s. 2 of the Railway and Canal Traffic [143 Act, 1854. Undoubtedly it seems a little hard at first sight that by deciding in favor of the plaintiff the defendants will probably lose the whole traffic of the three firms; but after further consideration it will be found that the hardship is scarcely real, for the defendants can keep a share in the traffic of the three firms provided they carry the plaintiff's goods at the same rate as those of the three firms.

Cases were cited to show that a benefit may be given to one person which another has not in his dealings with a railway. That is true, but the principle of those cases does not apply. I am not going to attempt to lay down a precise rule, but, speaking generally and subject to qualification it is open to a railway company to make a bargain with a person, provided they are willing to make the same bargain with any other, though that other may not be in a situation to make it. An obvious illustration may be found in season tickets; a man is taken a daily journey for a 1s., for which his neighbor who takes it once a month pays 5s. He is entitled to the same benefit, but it is one of which he cannot avail himself. So as to goods. If a million tons are carried for A. at a certain rate, B. may demand the same rate for the same quantity though he never will nor can, because his dealings

1877

Evershed v. London and North Western Railway Co.

are too small. It is reasonable this should be so; a large business can be done at a cheaper rate than small; nothing like that exists here. It was also urged that the three firms had something in the nature of a natural advantage to the benefit of which they were entitled in their dealing with the defendants. I am of opinion that is not so. They have indeed an advantage which enables them to put a pressure on the defendants, but if the defendants yield to it they must give an equal advantage to the plaintiff. If the three firms were a mile nearer than the plaintiff to the defendants' station, doubtless the defendants might charge the plaintiff a larger sum for carriage. But the only advantage here that the three firms have, is that they have easy access to another railway. So they might have to a canal, or ordinary highway. But these considerations though a reason for the diminished charge do not justify the extra charge to the plaintiff.

[144] *I feel sure that our decision carries into effect the intention of the Legislature. It was manifest that railway companies would enjoy almost a monopoly of traffic, and it was thought right that all persons dealing with them should be put upon an equality. The plaintiff, therefore, has a right to complain that the goods of the three firms should be carried at a charge of 1s. 9d. less per ton than his. I think that in the words of the Railway and Canal Traffic Act, 1854, the defendants made and gave an "undue and unreasonable prejudice and advantage to and in favor of" the three firms, and subjected the plaintiff to an "undue and unreasonable prejudice and disadvantage." The language of this statute is relative, and although the charges made to the plaintiff may not in themselves be wrong, yet they become unlawful by reason of the lower charges made to the three firms; therefore the plaintiff is entitled to recover under either of the statutes upon which he relies.

I wish to say a few words as to the damages. Under the Railways Clauses Consolidation Act, 1845, s. 90, the plaintiff is entitled to recover the wrongful charge of 1s. 9d. a ton as money received to his use. Under the Railway and Canal Traffic Act, 1854, s. 2, the same conclusion is arrived at, although possibly by different means. If the plaintiff is to be considered as having suffered a tort at the hands of the defendants, the measure of damages will be the difference between the amount that he has actually paid and the amount which he ought to have paid: if he is to be deemed to have paid the sum of 1s. 9d. per ton without consideration, he is entitled to sue for money received for his use. In every point of view the result is the same.

The Queen's Bench Division have divided into four periods the time to which this action relates and have held that the plaintiff is entitled to recover as to two of those periods, and is not entitled to recover as to the other two ('). I think that in this respect also the decision of the Queen's Bench Division is perfectly correct, and I agree with the reasons which they have assigned.

BRETT, L.J.: I am of opinion that the judgment of the Queen's Bench Division should be affirmed in every respect.

*In my opinion the question to be decided depends [145 solely upon the nature of the transactions between the plaintiff and the defendants, and the only circumstances at which we are entitled to look are those arising between them. Great stress has been laid upon the relations of certain firms of brewers with the Midland Railway Company, and the existence of those relations may have given rise to the motives which induced the defendants to act with regard to those firms in the manner described in the case. But the motives of the defendants seem to me to be immaterial. The question is whether they made any distinction between the plaintiff and any other persons, who were under the same circumstances as he was with regard to themselves. Now it seems to me that the plaintiff and the three firms of brewers in their relations with the defendants were under the same circumstances in every material respect. The defendants did the same things for both the plaintiff and the three firms of brewers: in each case they collected and carted the beer through the town, they took it to their station, they then put the beer into similar trains and conveyed it over the same lines of rails, and, as may be assumed for the purposes of this discussion, the quantity carried for the plaintiff and the three firms was the same. Between what the defendants did for the plaintiff and what they did for the three firms, no difference exists; but the charges which the defendants made to the plaintiff and the charges which they made to the three firms in respect of the same services were different. In my opinion, by adopting this course the defendants have committed a breach of both the Railways Clauses Consolidation Act, 1845, s. 90, and the Railway and Canal Traffic Act, 1854, s. 2, and upon the facts before us the plaintiff can maintain an action to recover certain sums which the defendants have received in contravention of those statutes.

During the argument before us a distinction has been attempted to be drawn between the sum of 1s. and the sum of 9d.; it is unfortunate that this distinction was not sug-

(¹) 2 Q. B. D., 263, 268; 20 Eng. R., 323.

1877

Evershed v. London and North Western Railway Co.

gested during the hearing in the Queen's Bench Division, and that, therefore, we are without the benefit of the opinion of the judges of that division as to this contention.

I cannot bring myself to doubt that the sum of 9*d.*, which [146] was *allowed by the defendants to the three firms, was part of the toll which they were entitled to charge, and to be paid by the three firms for the conveyance of their goods upon the railway. The defendants were entitled to charge and to be paid by the plaintiff the same amount of toll; but they allowed no part of it as a rebate to the plaintiff. Therefore, in respect of that 9*d.*, it seems to me that there was a manifest inequality.

With regard to the 1*s.*, I confess myself to be under considerable doubt whether that also is not to be considered as part of the "toll" paid to the defendants, within the meaning of the Railways Clauses Consolidation Act, 1845, s. 3. A railway company undertake to do more than merely carry the goods intrusted to them; it is impossible that this should be the only duty which is imposed upon them. As a necessary incident of carrying the goods they must both receive and deliver the goods; they may or may not receive the goods at the very edge of the rails, but, as it seems to me, from the time when they take the goods into their possession for the purposes of conveyance, they are carriers of the goods, they are entitled to charge and do charge in respect of the conveyance of the goods from that moment and thenceforward until the goods are delivered at their destination. Sometimes the company do not receive the goods at the edge of the rails, but at station houses belonging to them; sometimes they take in the goods at receiving houses, or, as appears to be done at Burton, the companies collect them at the very place of business of their owner. In my view, wheresoever the goods may be received, from the moment when they are received the company are liable as common carriers, and have the rights of common carriers; and I think that they can be considered common carriers only because they are then conveying the goods. If the collecting were not part of the receiving for conveyance, possibly the company would be carrying on a business without authority, unless 9 & 10 Vict. c. cciv, empowers them so to do. But I cannot doubt that they are empowered to carry it on, and I apprehend that they might carry it on although they are not authorized to do so by that act; because the receiving is a necessary incident, and therefore a part of the carrying, and nothing prevents the company from receiving at one place rather than another, and collect-

ing is only one mode *of receiving, and the company [147 are entitled to charge for the conveyance of the goods. It is true that the 1s. is not charged as part of the toll; but, for the reasons which I have given, I have a strong impression that it is part of the charge for conveyance, and, as I have before said, I very much doubt whether it is not a "toll" within the Railways Clauses Consolidation Act, 1845, s. 3. I should have thought this conclusion tolerably clear if it were not for what has fallen from Lord Justice Bramwell. If the charge cannot be strictly called a toll, I think it is a charge for a service which is a necessary incident towards earning the toll, and if the defendants exact payment of it from one person, and not from others, they are at least indirectly favoring the persons from whom they do not exact it, and, therefore, do that which falls within the prohibition of the Railways Clauses Consolidation Act, 1845, s. 90.

Whatever may be the true construction of that statute, I cannot doubt the defendants have committed a breach of the Railway and Canal Traffic Act, 1854. They have received, and collected, and conveyed the beer of the plaintiff, and also of the three firms, rendering to them exactly similar services, but charging a higher rate to the plaintiff, and a lower rate to the three firms. This is a preference within that statute, and an undue preference.

The plaintiff has been subjected to overcharges. Some of those overcharges he has paid, without knowledge of the terms of dealing between the defendants and the three firms: these he can recover back as money paid, which he was not bound to pay either by law or by contract. Others of the overcharges he has paid with knowledge, but after a sufficient protest: these likewise he can recover back, because although at the time of payment he had knowledge, a compulsion was put upon him. These are the reasons given by the Queen's Bench Division, and I think them right. But others of the overcharges were paid upon settlements of accounts which were made by the plaintiff or his agent after the goods were carried, and when no compulsion could be put upon him, and which were settled by him or his agent with knowledge of the facts. It seems to me to be in accordance with the general law to hold that a settlement of accounts made under such circumstances *as these is [148 final, and that no part of the money then paid can be recovered back.

I am therefore of opinion that the judgment of the Queen's Bench Division was right in every respect, and I have only

1877

Evershed v. London and North Western Railway Co.

to add that our judgment is entirely in accordance with the authorities cited during the argument.

COTTON, L.J.: I am of the same opinion. The first question is whether an unequal charge has been made against the plaintiff contrary to the prohibition of the Railways Clauses Consolidation Act, 1845, s. 90. Now the beer of the plaintiff was carried over the same portion of the defendants' railway under the same circumstances as the beer of the three firms. On looking at the construction of this section, it seems plain that the only circumstance to be looked at is as to whether any material difference exists between the terms upon which the goods of various owners are carried. In order to render lawful an inequality of charge the goods must be carried under different circumstances, and goods are carried under the same circumstances when the cost to the railway company of carrying them is the same. In the present case it is unnecessary to say whether the sums of 1s. and 9d. are "tolls," but here they represent what may be considered a bonus given to the three firms of brewers for allowing the defendants to carry their beer, and therefore these sums constitute a deduction from what the three firms pay for the conveyance of their goods from station to station. It has been argued before us that, according to the principle of several decisions, the sender of goods by a railway company is not to be deprived of the benefits which he may enjoy, and that the three firms of brewers have a natural advantage of which they are entitled to the full benefit. The effect of these decisions has been misunderstood: they may show that the senders of goods are not to be deprived of any advantage which they may have for using the railway; but here the three brewers have no natural advantage for sending their goods over the defendants' railway, although they enjoy facilities for transmitting their goods along the Midland Railway: as regards the defendants the three firms have simply facilities for making a good bargain, and they have not a natural facility for sending their goods [49] over *the defendants' railways in the sense, in which that expression is used in the cases relied upon during the argument. Therefore I am of opinion that the defendants have been doing that which is forbidden by the Railways Clauses Consolidation Act, 1845, s. 90.

Then, as to the question arising upon the construction of the Railway and Canal Traffic Act, s. 2, in my opinion there is an undue preference as regards the three firms, and an undue disadvantage as regards the plaintiff and those who are in a similar position with him. The defendants are

bound to afford all reasonable facilities for receiving, forwarding, and delivering the traffic upon and from their railway, and they are bound to show no undue preference. The defendants are not bound to have receiving houses in the town of Burton, or to send round their carts to collect goods for transmission; but this in point of fact they do; and they do what is within the prohibition of the Railway and Canal Traffic Act, 1854, s. 2, if they show any preference towards some of their customers and impose any undue disadvantage upon others. It seems to me that here an undue preference clearly exists, because the defendants collect the beer of both the three firms and the plaintiff, and perform the same services for both: yet they make no charge for cartage to the three firms, and oblige the plaintiff to pay for it; and they make a rebate of 9*d.* to the three firms, and make no allowance to the plaintiff. I think this an undue preference. I take it that when a railway company receives goods to be carried over the same line under circumstances involving the same cost and the same risk to themselves, and in respect to these goods render the same services, there is an undue preference if a higher charge is made to some customers than to others. Those decisions stand upon a different footing, in which it has been held lawful for a railway company to allow a deduction to customers who have entered into an engagement to send a large quantity, or to send constantly consignments of goods; and the reason of those decisions is that the company can carry at less cost to themselves large quantities of goods sent in regular consignments than small parcels sent at irregular intervals.

Therefore, under whichever statute we view the proceedings of the defendants, it is plain that they have done that which they are not entitled to do. The sums which [150] the plaintiff has paid in excess of the sums paid by the three firms are overcharges; and those which he has paid, either in ignorance of the facts or under protest, he is entitled to recover back.

Judgment affirmed.

Solicitors for plaintiff: *Robinson, Geare & Son.*

Solicitor for defendants: *R. F. Roberts.*

See *Pierce on Railways* (ed. 1881), 498-9; 2 *Redf. on Railways* (5th ed.), 86, 470; *Com. v. Worcester, etc.*, 124 Mass., 561.

Neville and Macnamara Railway and Canal Cases are almost exclusively devoted to cases of alleged "undue preference" as to freights: *Hersh v.*

Northern, etc., 74 Penn. St. R., 181; *Chicago, etc., v. People*, 77 Ills., 11; *Camblos v. Philadelphia, etc.*, 4 Brewster, 563; *Fuller v. Chicago, etc.*, 81 Iowa, 187; *Chicago, etc., v. Ackley*, 94 U. S., 179; *Knox v. R. R. Co.*, 5 S. C. Rep., 23.

A railroad company being a common

1877

Ward v. Hobbs.

carrier is bound to receive and carry the goods of all persons alike, without injurious discrimination as to terms and rates. It must receive and carry for express companies the articles known as express matter, without discrimination in favor of itself or any other express

company. If the railroad company engages in the business of express carriage itself, it must do so on terms of perfect equality with all other express carriers: *Southern Express v. Memphis, etc.*, 18 Cent. L. J., 68, U. S. Circuit, East. Dist., Ark., McCrary, J.

[3 Queen's Bench Division, 150.]

Dec. 7, 1877.

[IN THE COURT OF APPEAL.]

WARD V. HOBBS (*).

False Representation—Contagious Disease, Animals affected with—Sale in Market—Implied Representation that Animals not suffering from Disease—Conditions of Sale—Contagious Diseases (Animals) Act, 1869 (32 & 33 Vict. c. 70), s. 57—Vendor and Purchaser.

The defendant sent for sale to a public market pigs which he knew to be infected with a contagious disease; they were exposed for sale subject to a condition that no warranty would be given and no compensation would be made in respect of any fault. No verbal representation was made by or on behalf of the defendant as to the condition of the pigs. The plaintiff having bought the pigs, put them with other pigs, which became infected; some of the pigs bought from the defendant and also some of those with which they were put died of the contagious disease. The plaintiff having sued to recover damages for the loss which he had sustained:

Held, reversing the judgment of the Queen's Bench Division, that, although the defendant might have been guilty of an offence against the Contagious Diseases (Animals) Act, 1869, he was not liable to the plaintiff, for that his conduct in exposing the pigs for sale in the market did not amount to a representation that they were free from disease.

APPEAL from the judgment of the Queen's Bench Division in favor of the plaintiff (*).

The statement of claim, amongst other things, alleged that the plaintiff was a farmer and the defendant a cattle dealer, and that by warranting certain pigs to be free from any infectious disease, the defendant sold thirty-two of such pigs to the plaintiff for £44; and that even if the defendant did not warrant the pigs, the defendant either knowingly, or [151] having good reason for believing *that the pigs were suffering from an infectious disease, exposed the same for sale at a public market, and sold thirty-two of the same to the plaintiff; and that the defendant knew that the plaintiff was a farmer, and that the pigs would be placed with other pigs, and would also be turned into stubble fields, and that though the plaintiff was not aware of the fact, and bought them as sound, the pigs at the time of the sale to the plaintiff were suffering from a certain infectious disease, and thirty of them died therefrom. That the pigs were placed with other

(*) Reversing 21 Eng. R., 140.

(*) 2 Q. B. D., 331; 21 Eng. R., 140.

healthy pigs and infected the same, and that the pigs were turned out into certain stubble fields, and infected the fields.

The statement of defence traversed all the allegations of the statement of claim.

At the trial before Brett, J., at the Berkshire Summer Assizes, 1876, the following facts were proved. The defendant being possessed of a herd of pigs, many of which were dying of typhoid fever—a disease very infectious and fatal to animal life—sent the remainder of the herd to the Newbury cattle market to be sold by auction. Of these pigs the plaintiff bought thirty-two. They had been examined by the government inspector before they were admitted into the market, and at the time of sale showed no outward symptoms of disease. The sale took place, amongst others, on the following condition: "That no warranty will be given by the auctioneer with any lot, and as all lots are open for inspection previous to the contract of sale, no compensation shall be made in respect of any fault or error of description of any lot in the catalogue." After the sale the pigs were taken to the plaintiff's farm, where thirty out of the thirty-two pigs died of typhoid fever, and the diseased pigs infected other pigs of the plaintiff on the farm, many of which also died.

On these facts the learned judge left the following questions to the jury. 1. Did the pigs die of a contagious fever? 2. Had they a contagious disease when sold? 3. Did other pigs of the plaintiff catch the disease from the pigs the plaintiff bought? 4. Did the defendant know that the pigs had a disease dangerous to them, and were worthless when he sold them? The jury having answered these questions in the affirmative, a verdict was thereupon entered for the plaintiff for £66, with leave to the *defendant [152 to move to enter a nonsuit, on the ground that there was no evidence that the defendant at the time of the sale of the pigs (the subject-matter of the action) had warranted the pigs, or had been guilty of any fraud in relation thereto, or was aware that the pigs were infected as alleged.

Nov. 30. *Powell, Q.C.*, and *H. D. Greene*, for the defendant: The question is whether the defendant by exposing pigs for sale in a public market impliedly represents that the pigs have no infectious disease⁽¹⁾. The plaintiff cannot rest his case on a warranty, for there is no evidence

⁽¹⁾ The defendant's counsel also contended that in fact there was no evidence that the defendant knew that the pigs were infected with a contagious disease, but as to this point the court intimated that they were satisfied there was such evidence.

of any warranty: neither is this an action for deceit, for the statement of claim does not contain any allegation of fraud. The action appears to be brought for the violation of the provisions of 32 & 33 Vict. c. 78, s. 57. It is said inasmuch as the statute prohibits the exposure of cattle suffering from disease in a public market, the defendant by exposing his pigs for sale impliedly represents that they have no infectious disease. The action being in the nature of a false representation, the plaintiff must establish that there was, in point of fact, some representation intended to be acted on, and false to the knowledge of the person making it, and that the damage was the result of the representation. It is quite clear that there was no representation by words: the plaintiff's case must be that there was a representation by conduct. But there was no evidence of any representation. And it is doubtful whether a representation by conduct alone is sufficient to support an indictment for obtaining money by false pretences. *Rex v. Barnard* (*) is usually cited as an authority establishing a contrary rule; but when the facts are looked at it will be found that the prisoner did make a false representation by words, for he stated that he belonged to Magdalen College. A dealer by exposing pigs for sale in a market does not represent that they are free from disease. Possibly an inference may be drawn from such an act that the owner did not know that they were diseased, because it may be inferred from the ordinary conduct of a man that he is not then committing a crime, but he does not thereby represent that he is innocent of a breach of the law. But an inference drawn by a man's conduct is something very different from a representation conveyed by words. A man may not act with a view that a false conclusion may be drawn from his conduct; if he acts in such a way that a false conclusion may be drawn, but he does not intend that it shall be drawn, he is not to be held liable if another person draws that conclusion, acts upon it and thereby suffers injury.

There is no authority for the proposition that an indictable offence is committed by bringing into a market animals in a known state of disease, which endangers the health of other animals in the market if they are such as are destined for human food. *Rex v. Vantandillo* (*) is an authority for saying that exposing a person having a contagious disorder publicly to the endangering the health and lives of the rest of the Queen's subjects is indictable, and *Rex v. Burnett* (*) is to the same effect, and so exposing a glandered horse in

(*) 7 C. & P., 784.

(*) 4 M. & S., 73.

(*) 4 M. & S., 272.

a public place is indictable, *Reg. v. Henson* ⁽¹⁾; but the gist of the offence in all these cases is the danger that the disease may be communicated to persons. There can be no *nocu-mentum* unless there is danger to persons; injury to property is not sufficient. The analogy drawn in the judgment of the Queen's Bench Division between acts causing danger to the health of the Queen's subjects, and exposing animals known to be diseased is fallacious, and therefore the ground of the judgment cannot be supported.

Matthews, Q.C., and Bros., for the plaintiff: The defendant was aware that his pigs were infected with a contagious disease, and yet he sold them to the plaintiff, and thereby allowed them to come into contact with other pigs, to which the disease was communicated; this alone renders the present action maintainable, for the liability of the owner of an animal infected with a contagious disease is the same as that of the owner of a mischievous animal: this is plain from the remarks of Bramwell, B., in *Cooke v. Waring* ⁽²⁾; in either case the owner, knowing of the defect, *must prevent [154 the animal from doing injury to other persons. Moreover, it has been decided that the seller of a diseased animal is liable to compensate the buyer if it communicates the disease to other animals belonging to him: *Smith v. Green* ⁽³⁾.

[BRETT, L.J.: In that case the plaintiff sued for breach of warranty, and the question raised was whether the damages were not too remote.]

The main question is, did the defendant by his conduct represent that he did not know that the pigs had a contagious disease. From the defendant sending the pigs to market, it is reasonable to draw the inference that the pigs are his, that he has a right to sell them; and further it may be inferred that he would not send diseased pigs to market for sale, for the statute 32 & 33 Vict. c. 70, forbids his doing so, therefore the defendant by his conduct represents that the pigs so far as he knew were not diseased. A representation may be made by conduct as well as by words. In *Eichholz v. Bannister* ⁽⁴⁾ it was held that the vendor of a chattel by his conduct gives the purchaser to understand that he is the owner, or in other words he affirms that he is the owner of the chattel. It is the legitimate conclusion to draw from the act of dominion the owner exercises. The acts and conduct of the prisoner without any representation have been held to be sufficient to support an indictment for

⁽¹⁾ 1 Dear. C. C., 24.

⁽²⁾ 1 C. P. D., 92; 16 Eng. R., 441.

⁽³⁾ 2 H. & C., 332, at p. 335; 32 L. J. (Ex.), 262, at p. 263.

⁽⁴⁾ 17 C. B. (N.S.), 708; 34 L. J. (C.P.), 105.

1877

Ward v. Hobbs.

false pretences: *Rex v. Barnard* (1); *Rex v. Coulson* (2). By analogy to the criminal law, it is legitimate to draw inference of a representation from conduct only. In *Bodger v. Nicholls* (3), Blackburn, J., expressed an opinion that the defendant by sending a diseased cow to a public market to be sold, although he gave no warranty, furnished evidence of a representation that so far as he knew the cow was not diseased. The presumption to be drawn from a man's conduct is that he is acting innocently; and where a dealer offers animals for sale at a public market, and the statute prohibits him from sending diseased animals there, those attending the markets are justified in assuming that he is guilty of no offence. But even if the defendant makes no representation by words, he is nevertheless liable, because [155] by *his conduct the plaintiff was reasonably induced to believe that the defendant represented that the pigs were free from disease, and whether the defendant's conduct amounts to fraud or not he remains liable to compensate the plaintiff. The Queen's Bench Division were right in holding the plaintiff liable in the action.

[BRETT, L.J.: In *Bagleole v. Walters* (4) the defendant offered a ship for sale which he knew had a latent defect, but he did nothing to conceal the defect. Lord Ellenborough held that the purchaser could not repudiate the sale (5).]

That case may be distinguished from the present, on the ground that here the vendor is prohibited by statute from sending diseased pigs to a public market, in that case the vendor was under no statutory obligation. In the present case the whole conduct of the defendant is evidence of representation which ought to have been left to the jury.

Greene, in reply: There was no duty on the defendant to disclose the real condition of the pigs. To send diseased cattle to market is not indictable or actionable unless it is an offence created by some statute: *Hill v. Balls* (6).

Car. ado. vult.

Dec. 7. The following judgments were delivered:

BRAMWELL, L.J.: In this case I cannot say that my mind is free from doubt. The facts are stated with admirable clearness by my Brother Lush in his judgment in the court below. The plaintiff bought a certain number of pigs at a

(1) 7 C. & P., 784.

(2) 1 Den. C. C., 592.

(3) 28 L. T., 441.

(4) 3 Camp., 154.

(5) As to the law in relation to conceal-

ment of defects by the vendor, see the judgment of Cockburn, C.J., in *Smith v. Hughes*, L. R., 6 Q. B., 597.

(6) 2 H. & N., 299; 27 L. J. (Ex.), 45.

public market at auction under certain conditions of sale, which stated that "no warranty will be given by the auctioneer with any lot, and as all lots are open for inspection previous to the commencement of the sale, no compensation shall be made in respect of any fault or error of description of any lot in the catalogue." The plaintiff, however, asserts that he was induced to enter into that contract by fraudulent representation on the part of the defendant, which led him to understand that the pigs were not infected by a contagious *disease to the defendant's knowledge, [156 but this they were, and the consequence was that the pigs were of much less value than they would otherwise have been, and also that they infected other pigs belonging to the plaintiff.

Now, I think I may assume that the defendant knew that the pigs were infected with a contagious disease; then if so, the only remaining question would be whether the defendant, knowing that to be the case, fraudulently represented the contrary, with a view to defraud the plaintiff, and whether the plaintiff was defrauded and deceived thereby.

The only evidence by which it was sought to make out that the defendant fraudulently represented that the pigs were to his knowledge free from disease, was that he exposed them for sale in a public market. It is unlawful to expose pigs infected with a contagious disease in a public market, and the defendant must be taken to have known that: and from this it was argued that, by the very fact of exposing pigs in a public market, the defendant must be taken to affirm that to his knowledge they were not infected with any contagious disease. But when to that argument it is objected that the defendant affirmed nothing, the line of argument is altered, though not substantially, and it is said that the defendant's conduct was such as would reasonably cause any person to believe that he represented that he did not know that the pigs were infected with a contagious disease. Then, when it is objected to that mode of putting the case, that the action could only be maintained on the ground of fraud, it is answered, it matters very little what the defendant's intention was, if he knew that his conduct would deceive other people, and that they would think that he was by his conduct asserting in effect that these pigs were not infected with a contagious disease; that is fraud on his part, because the defendant must expect that people will draw a natural and proper conclusion from his acts; and therefore, as it was put in the argument, there was evidence to be left to the jury from which they might find

that the defendant had made a fraudulent representation. The argument appears to me to be this: there is evidence that the defendant knew that the pigs were infected with disease; there is evidence that he knew that in that case he [57] ought not to bring them into a public market; *then it is said that there is evidence that the defendant must have known that persons might infer that he was not knowingly committing an illegality, and consequently there is evidence to show that his conduct was likely to deceive persons into the belief that to his knowledge these pigs were not infected with disease. Mr. Matthews limits his argument to the case of cattle being sent to a public market, but if the argument is well founded, the law must be that in all cases a man represents by his acts relating to a transaction between himself and another person that he is doing nothing unlawful. That proposition Mr. Matthews calls upon us to affirm. Now, I think an abstract proposition, that when a man does anything he represents that he is not to his knowledge doing anything illegal, cannot be maintained. I think an observation made by Mr. Greene is well founded; he said that a man may not conduct himself in such a way that he must know that a false conclusion is very likely to be drawn from it; but if he is not conducting himself with a view to that conclusion, it is the fault of the person who draws the conclusion and acts upon it. This observation may be more precisely stated thus: before a man can complain of a fraud he must show there is something done intentionally to deceive him as an individual, or as one of a class, or as one of the public; and it is not enough that he shows certain conduct not done with that view or intent, but which may have that consequence. Now sending infected pigs to market is not a deceit on the public. The person sending them is committing a breach of the law and is risking its consequences, but he is not making a representation of any sort or kind. How would a man innocent in the matter feel affected by such a general rule? A man sends pigs or cattle to market; he thinks that they have no disease, but to his astonishment he is charged with making a representation fraudulent and false to his knowledge. Of course it may be said, if the representation is not false and fraudulent the tribunal ought to decide in his favor; but I think the man has a right to complain that he should have been charged. I think, therefore, with all respect to the opinions that have been entertained elsewhere, that there is no evidence of such a representation as is necessary to maintain this action,

Suppose that an extravagant person, for the sake of display, *wears handsome rings and drives a brilliant [158 equipage; he purchases of a tailor a coat—the tailor draws the conclusion that he is a man of wealth, for he might reasonably argue no man in his senses would dress so extravagantly or drive such an equipage unless he were a rich man. The tailor readily supplies his customer on the strength of the appearance that he represents. Afterwards, the man does not pay, then the tailor alleges that the man by his conduct has made representations that are wholly false and fraudulent. This case somewhat resembles that. I do not think any person has a right to draw a conclusion from conduct which is not directed to him either as an individual, or as one of a class, or as one of the public, for the purpose of acting on it. I repeat, that I have throughout entertained great doubt on this case, and am not now free from doubt. I would wish to remark that the public in a case like the present, would be protected, because any person committing an act of this description would subject himself to a fine. And I cannot but think that any person who sends pigs to a market, or drives them on a highway, in such a state as to injure those of another by coming in contact with them, would be liable to an action, for there would be a violation of a duty on his part which would be an unlawful act causing the damage. But this would not, I think, help the plaintiff, for I do not think he can recover for the mischief done to his pigs by the defendant's diseased pigs, because they are not the immediate cause of the mischief. The immediate cause of the mischief is the plaintiff buying them and taking them home; if the plaintiff cannot complain of the sale neither can he complain of its consequence.

There is another point in this case. It was argued that the defendant was a fraudulent person, that he had dishonestly affirmed a thing which was false to his knowledge; that is to say, that he dishonestly affirmed that the pigs were not infected with a contagious disease to his knowledge. Now, when we examine the statement of claim that is not averred. The statement of claim states, "If the defendant did not warrant the pigs, the plaintiff says the defendant either knowingly or having good reason to believe that the pigs were suffering from an infectious disease, exposed the same for sale." There is no charge of fraud; no charge that either the defendant knew he was representing *an untruth, if he was representing it; no charge [159 that it was done with intent to deceive anybody, nor does it contain any charge that he did deceive the plaintiff. I do

1877

Ward v. Hobbs.

not find that any question was left to the jury or found by them as to there being any fraud in the defendant, or in what he did, unless the sale of the pigs with knowledge of the disease is itself a fraud. My Brother Lush says in his judgment: "there is nothing here which suggests to the buyer that the pigs were the remnant of a diseased herd, many of which had died; nothing inconsistent with the representation implied by the act of bringing them to market. If this implied representation were put into words, together with the condition, it would be no more in effect than this. 'I believe them to be free from infection, but I will not warrant that they are, and the buyer must take all risks.'" I do not find, therefore, that my Brother Lush put his decision upon the ground that the fraud had been intended, and had conduced to the purchase.

In the result, therefore, on both these grounds, I am of opinion that the defendant is entitled to judgment.

BRETT, L.J.: I have come to the same conclusion, but with reluctance. If I thought that at law such conduct as that of the defendant could make him liable to an action I should willingly so hold. But I have come to the conclusion that there was no evidence of a fraudulent representation, because there was no evidence that the defendant ever made any representation.

The case was originally tried before me, and as Lord Justice Bramwell has observed, in the statement of claim there is no allegation of fraud; moreover, there is no allegation of any representation, and therefore there is no allegation of any false representation. At the trial I felt myself embarrassed by this form of the statement of claim. I did not think it right to amend it by inserting a charge of fraud which the plaintiff himself had not made. I had great doubt at the time whether there was any cause of action; but I left such questions as I thought I was entitled to leave, under the circumstances, to the jury, in order that the court might afterwards consider whether there was any cause of action. But having left those questions, I gave leave to move to the defendant if there was no evidence to go to [160] *the jury. The defendant took advantage of that leave, and I found my judgment upon that assumption, that the defendant, in so acting upon that leave, gave the go-by altogether to the form of the pleadings. The question raised in the court below, and the question before us is, whether, without regard to the pleadings, there is evidence of any cause of action?

The injury of which the plaintiff really complains is

this: that he did buy from the defendant pigs which were by reason of disease in themselves entirely valueless: and, moreover, by reason of disease in themselves, were dangerous to other pigs with which they must almost necessarily be placed in contact. That is the ground of the complaint. The plaintiff has to make out that the law gives him a remedy for that injury.

Now the relation between the plaintiff and the defendant was that of vendor and purchaser, and there was no other relation. The pigs were sent by the defendant to a market, and they were put up for sale, not only without a warranty, but with an express notice that they were to be sold with all faults. The pigs were infected with a disease which did, in fact, render them valueless, and which did make them dangerous to other pigs with which they must, almost necessarily, come in contact. I think there was evidence which would have justified the jury in finding that the defendant knew of that disease in the pigs, that he knew the pigs by reason of that disease were themselves valueless, and that he knew that those pigs would be almost necessarily put in contiguity with other pigs, and that they would then infect other pigs. But the defendant made no express representation with regard to the pigs other than this: that he would not warrant them, and that they must be sold with all faults. Under those circumstances it is obvious to every one there was no warranty, and that the plaintiff cannot maintain an action for breach of contract.

Under what form of legal remedy can he maintain his action if there was no breach of contract? I apprehend, where the transaction is as between a vendor and purchaser simply, not between manufacturer and purchaser, the only formula under which the plaintiff can maintain his action for such an injury is, that the defendant made representations to him which were misrepresentations and fraudulent, by reason of the defendant knowing at the *time he [161] made them that they were untrue, and making them in order to deceive the plaintiff. The plaintiff must bring his case, if he can, within that formula. That the defendant made any express representation as to the condition or quality of these pigs must be dismissed. It is manifest that he did not.

Then the question is reduced to this: Did the defendant by his conduct make any representation with regard to the quality or condition of these pigs? If these pigs had not been sent to a market, and if there had been no crime in what the defendant did, and if the only defect relied on by

the plaintiff had been a defect in the quality of the pigs themselves so as to lessen their value, I apprehend that the cases show there was no implication of any representation by the defendant as to the quality and condition of the pigs. The defendant did nothing to conceal the defect in the pigs. There would have been nothing but the fact of his offering to sell them. Now, that an offer to sell does imply some representation, I think is true. I think that a person who offers things for sale does, by the mere offer, make a representation that he does not know that he has no title to sell them; and, by the mere offer of sale, and by the sale, if afterwards it were proved not only that he had no title, but that he knew he had no title, there would be a representation, and a false and fraudulent representation, on which a plaintiff might recover. I will not say by the mere offer of chattels, or goods, or merchandise, for sale, there may not be some other representation. I do not desire to shut myself out, in future, from considering whether there may not be a representation that he has not, knowingly, himself, done something to the article which he offered for sale which makes it entirely valueless—I do not say whether that is so, or not—but that the seller makes no representation as to the quality of the thing he sells by a mere offer of sale, and that he makes no representation that he himself does not know of a defect in quality is, I think, proved by the cases. The case which is usually cited for that purpose is *Baglehole v. Wallers* (¹), where a vessel was sold with all faults, but the seller knew of a latent defect which, I believe, amounted to making the ship unseaworthy. The seller knew of that, but made no representation in fact, and did [162] nothing to conceal or to *endeavor to conceal the defect. It was held that his knowledge of the latent defect, under such circumstances, gave no right to the plaintiff, the purchaser, to complain of the purchase. That must be on the ground that by offering the ship for sale he did not represent that he did know of a latent defect. But he did know of it, and yet it was held that that would give no valid cause of action. In the case of *Schnider v. Heath* (²) there was a similar right of sale, and a similar defect, and the same knowledge by the vendor of the defect, yet inasmuch as the seller had done something more than the vendor in the previous case had done, namely, he had done something to conceal the defect, it was held that that doing something to conceal the defect did amount to conduct that was in effect a misrepresentation, that is, it was putting a

(¹) 3 Camp., 154.

(²) 3 Camp., 506.

false appearance upon the defect which he knew of, and endeavored to conceal. There it was held that he did, by such conduct, represent that he did not know of the defect, whereas in point of fact he did, and took means to conceal it. In that case it was held there was a representation, and a misrepresentation. It seems to me that those cases show that the mere fact of offering a defective chattel for sale, where nothing is said about quality and condition, and nothing is done to conceal the defect, gives no cause of action, though the seller knows of the defect, and he knows that if the purchaser even suspected him of the knowledge he would not buy: such conduct seems to me to be immoral and dishonest, and dishonest to a high degree, yet there is no remedy because there is no representation.

If that is the law with regard to goods offered for sale not in a market, would there be any difference if the goods were offered for sale in a market? I cannot see any valid distinction between an offer to sell in or out of a market.

Is there a representation because the sale, under the circumstances, covers a crime? I cannot see that there would be any implied representation because the seller would be guilty of a crime, when there is no implied representation where the seller is guilty of an immoral or dishonest act. The distinction seems to me to be too refined.

It is said that every one has a right to suppose that a man would not run the risk of committing a crime, and the man must *know that it would be assumed that he would [163 not run that risk. I cannot agree to that; it eludes me. I think it is an illusory distinction to say that the seller must be taken to know that the purchaser assumes him not to be committing a crime, but that he is not to be taken to know that the purchaser assumes him not to be wilfully doing only a dishonest thing. Moreover, if the defect is only as to the quality of the thing itself and as to its value, it being assumed that there is no guarantee, it is strong to say that a representation is to be implied, although, as Lord Justice Bramwell has pointed out, the counsel for the plaintiff contended that there was only evidence of a representation, and did not contend that a representation could not legally be implied. I confess I cannot see how there can be evidence of a representation unless there is also a presumption of law. A presumption can only be made when almost every reasonable person, upon hearing the undisputed facts, would draw the same conclusion. If, therefore, the facts are evidence of a presumption, it would follow that the presumption must be made, and that a judge would have to

1877

Ward v. Hobbs.

direct the jury that if they believe the evidence they must find presumption. Now, if merely on the ground that the offering for sale upon the facts that are assumed to be true, and the knowledge of the defendant making himself criminally liable, would not prevent a presumption to be made that he intended it to be supposed that he was not guilty of dishonesty, does it make any difference that the defect is not only in the quality of the pigs affecting their own value, but that the defect will cause more pigs to do injury to other pigs? I cannot see that the presumption can be carried any further.

Now, as to the presumption that a man will not run the risk of being convicted of a crime: it is not true; it cannot be true. In this case it would not be true, because the defendant did actually run the risk, and he sent these pigs to market knowing that they were infected with disease. That was a crime, and if his act was known, I apprehend he was fined; but at all events he was liable to be punished. Therefore in this case the defendant did run the risk which it is said everybody had a right to assume he did not intend to run. I cannot see any importance in the fact that the sale was in the market, except that the fact of the pigs being sent to market with a knowledge of their condition constituted a crime; whereas if they had been sold under the same circumstances elsewhere, the vendor would not have been guilty of a crime, although he would have been guilty of a grossly dishonest act. Therefore, if we are to make this presumption, it comes to this: that if the defendant had sold the pigs at a farm, under the same circumstances, there would have been no remedy; but because he sent them to a market, and thereby laid himself open to a fine, there is to be the presumption that a representation was made, and the plaintiff is to have a remedy. I therefore think, with great respect, after an anxious consideration, a presumption ought not to be made that the vendor represents that he will not run the risk of committing a crime, neither do I think that a presumption can be made where the defect is not only in the quality of the thing itself as to its value, but also is a defect which will have an effect upon other things. I cannot see how that additional injury affects the question. Is there any more a representation than if that additional injury did not exist? I can see that there is a difference between the case of a thing being infectious and where the defect affects only its own value; but I think there is no legal distinction with regard to the point we have to consider. The decision of the Queen's Bench

Division I take to be as follows: that by offering for sale in the market pigs infected with disease, which is an offence owing to the disease, and not only affecting the value of the pigs themselves, but also being capable of extending the disease to other pigs brought in contact with them, there arises a presumption that a misrepresentation was made. I think this decision cannot be upheld. I think we should be introducing a new doctrine as to a presumption. I think that the judgment of the Queen's Bench Division must be overruled, on the ground that there was no evidence of representation, either express or to be implied, and therefore that there was no evidence to go to the jury of any cause of action.

COTTON, L.J.: I have arrived at the same conclusion. The only question is, whether or no this claim can be maintained as an action of deceit. The foundation of that action must be false representation. If the representation suggested was made here, *there was sufficient evidence [165 to show that the defendant knew the representation to be a false one. There was no representation by words. Of course there may be a representation otherwise than by words. There may be conduct which may be legally treated as having been pursued for the purpose of representing a certain state of things to exist. If conduct is pursued for that purpose, it is a representation, just as much as if the representation were made in words.

What is relied upon here as a representation is this: that the defendant, knowing the pigs had an infectious disease, sent them to market. Is that evidence on which a jury could find, properly, that the defendant represented that the pigs had not, to his knowledge, any infectious disease? Now, it is remarkable, and it is of importance when you come to consider whether, as a matter of fact, there was such a representation, that the pleadings in no way state that the plaintiff had any representation made to him that the pigs were not, to the knowledge of the defendant, suffering from any contagious or infectious disease; or, that from the pigs being in the market, the plaintiff presumed or inferred, that the defendant did not know that the pigs had any infectious or contagious disease. In the absence of any such statement in these pleadings, or any strong evidence to show that, as a matter of fact, there was any representation by the conduct of the defendant, ought we to presume that such a representation was made by the mere act of sending these pigs to market? I think it would be wrong to presume that such a representation was made, unless we can come to the conclusion that by sending them to market the

1877

Ward v. Hobbs.

defendant intended so to represent. Ought we to infer that the intention of the defendant in sending these pigs to market was to represent or to induce persons to believe (which would be equivalent to a representation), that he did not know they were infected with a contagious disease. Now, I should say that that was not the reasonable conclusion to draw from his sending them to market. That was the ordinary way of getting rid of pigs, and, although the defendant was doing a wrong act,—not only to his neighbor, but an act punishable under the act of Parliament, in sending these pigs to market,—I think we cannot come to the conclusion, from the mere circumstance of his sending the 166] *pigs to market, that he in fact did so with an intent to represent that, to his knowledge, there was nothing wrong with these pigs, and nothing that made it criminal for him to send them to market.

Ought we then, as a matter of law, to presume that the defendant made such a representation as suggested by the argument for the plaintiff? To do so would be to impute to the defendant a fraudulent representation when he never intended to make any representation. The plaintiff's argument was based on this, that everybody has a right to be presumed to be innocent until he is found guilty. That is true. But is anybody to be presumed to make a statement that in every act he does he is innocent, or to make a representation negating the the existence of every fact which would make his acts criminal or fraudulent? In my opinion there is no such rule; and I think it would be too great a refinement to imply, from the presumption of honesty, a representation by every one that there is nothing to his knowledge which makes his acts dishonest.

Judgment reversed.

Solicitors for plaintiff: *Abbott & Co.*

Solicitors for defendant: *Rickards & Walker.*

See 21 Eng. Rep., 143 note; Moak's Underhill on Torts, 358-9.

Courts of justice will not assist a party who has participated in a transaction forbidden by statute, to assert rights growing out of it, or to relieve him from the consequence of his own illegal act.

Where a plaintiff's own unlawful act concurs in causing the damage he complains of, he cannot recover compensation for such damage.

In a suit brought to recover damages on account of disease communi-

cated to the cattle of the plaintiff by Texas cattle, brought into this state by defendant in the month of July, it appeared that the plaintiff had put his cattle, among which were the Texas cattle, into his own pasture, and that soon afterward the plaintiff discovered that some of them were Texas cattle, and that he still kept the possession and control of them, and bought some of them, and kept them with his other cattle: Held, that he was only entitled to recover for such damage as was occasioned before he knew the chas-

Clarke v. Roche.

1877

acter of the cattle, and that he could not recover for any damages caused afterward : *Harris v. Hatfield*, 71 Ills., 298.

A written contract for the sale of provisions "with all faults," a sample being shown at the time of sale, but not referred to in the written contract, is not a sale by sample. Such a contract does not justify the inference that the provisions are fit for human food. In a sale by sample merely, there is no implication that the bulk is equal to the sample, but only that the sample has been fairly taken from the bulk : *Service v. Walker*, 3 Victorian L. R. (Law), 348.

Plaintiff purchased from defendants a Corbett's reaper and binder, of their manufacture, to be delivered in the neighborhood of his farm, an express warranty being refused. The defendants were aware that the plaintiff was a farmer and that the harvest season was approaching. Great delay was made in the delivery of the machine, and shortly after being put to work it broke down, in consequence of which plaintiff lost a material part of his crops. Held, that plaintiff was entitled to retain his verdict with damages for those injuries : *Corbett v. Taylor*, 5 Victorian L. R. (Law), 455.

[3 Queen's Bench Division, 166.]

Feb. 4, 1877.

Ex parte STORY.

Ship and Shipping—Certificate of Master, Suspension of—Stranding of Ship—Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104), ss. 242, 432—Merchant Shipping Act (39 & 40 Vict. c. 80), ss. 29, 32—Jurisdiction of Wreck Commissioner.

The Merchant Shipping Act, 1876 (39 & 40 Vict. c. 80), does not extend the jurisdiction to suspend or cancel the certificate of the master to cases not within the Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104), ss. 242, 432. There is, therefore, no power to suspend the master's certificate where a ship has merely been stranded without material damage to the ship or loss of life.

[3 Queen's Bench Division, 170.]

Nov. 7, 1877.

*CLARKE V. ROCHE and Others.

[170]

Stamp Duties—Appointment of New Trustee—Stamp insufficient at time of Execution, but sufficient at time of date of Deed—33 & 34 Vict. c. 97, ss. 15, 16, 17.

A deed, purporting to appoint a new trustee, appeared when tendered in evidence to be sufficiently stamped according to the law in force on the day when it was dated, but it was proved to have been executed some years previously, and the stamp according to the law then in force was insufficient:

Held, on the construction of 33 & 34 Vict. c. 97, ss. 15, 16, 17, that the deed could not be admitted in evidence.

Gatty v. Fry (2 Ex. D., 265), distinguished.

1877

Collingridge v. Royal Exchange Assurance Corporation.

[3 Queen's Bench Division, 173.]

Nov. 23, 1877.

173] *COLLINGRIDGE V. THE ROYAL EXCHANGE ASSURANCE CORPORATION.*Insurance against Fire—Interest of Plaintiff at time of Loss—Vendor in Possession—Intended Demolition of Premises under Compulsory Powers.*

The plaintiff insured his premises in the defendants' office by a policy which provided that their capital should be liable to pay to the assured "any loss or damage by fire to the buildings" not exceeding £1,600. The premises were afterwards required by the Metropolitan Board of Works under their compulsory powers, in order that they might be pulled down for the improvement of a street, and the amount of purchase-money payable to the plaintiff was assessed by arbitration, according to the Lands Clauses Act. After the board had accepted the plaintiff's title, but before he had executed a conveyance, the premises were destroyed by fire:

Held, that the defendants were liable to pay the plaintiff £1,500, the full value of the buildings at the time of the fire, and not merely the damage done to the buildings considered as old materials, for the dealings between the board and the plaintiff did not affect the defendants' contract.

ACTION to recover £1,600 on a policy of fire insurance effected by the plaintiff with the defendants. By consent the facts were stated for the opinion of the court in the following case:—

1. The plaintiff being seized in fee of the freehold premises 174] *Nos. 127 and 129, St. John Street, Clerkenwell, Middlesex, on the 1st of May, 1868, insured them in the defendants' office against loss or damage by fire in the sum of £1,600. By the policy it was declared that the capital, stock, &c., of the corporation should be liable to pay to the assured any loss or damage by fire to the buildings which should or might happen before the 25th of March, 1869, not exceeding £1,600, and should so continue and be liable from year to year, for so long as the assured should pay £2 8s. to the corporation within fifteen days from the 25th of March in each succeeding year, and it was provided that the insurers should have the option to reinstate buildings destroyed by fire.

2. The premises were at the time of the insurance, and thence until and at the time of their injury by fire as hereinafter mentioned, of the value of £1,500.

3. The plaintiff paid the defendants the sum of £2 8s., as in the policy mentioned up to Lady Day, 1876, but without any notice being given to the defendants of the dealings between the plaintiff and the Metropolitan Board of Works as hereinafter mentioned.

4. On the 19th of May, 1875, the insured premises were injured by fire.

5. The houses and the site thereof were situated within the limits of deviation marking out and defining the property which, by the Metropolitan Street Improvements Act, 1872, the Metropolitan Board of Works was authorized to take and acquire, for the purposes of the new streets and improvements by that act authorized.

6. On the 16th of December, 1872, the Metropolitan Board of Works, in exercise of their aforesaid statutory powers, gave the plaintiff a notice under s. 18 of the Lands Clauses Consolidation Act, 1845 (which is incorporated with the act of 1872), that they required to purchase and take the insured premises for the purpose of the act.

7. The Metropolitan Board of Works and the plaintiff not being able to agree as to the purchase-money and compensation to be paid by them for the purchase of his interest in the premises, the same were duly determined in the manner prescribed by the Lands Clauses Consolidation Act, 1845, by arbitration, and by the *award of an umpire, [175 duly appointed, the sum of £2,926 was on the 19th of May, 1873, assessed as the amount of such purchase-money and compensation.

8. In due course the plaintiff furnished to the Metropolitan Board of Works an abstract of his title to the premises, and the board accepted the plaintiff's title, and the draft of the conveyance was in course of preparation at the time of the fire.

9. The policy was never assigned by the plaintiff, and no notice of any change of interest was given to the defendants or allowed by them under the 6th article of the policy.

10. The defendants objected to pay the £1,600 or to rebuild, and alleged that if they were liable at all under the policy, which they disputed, as the premises had been required and taken and agreed to be sold by a binding contract, though not formally conveyed, for the purposes of the new street and other improvements by the act of 1872 authorized, and that as the premises would be pulled down after the conveyance to the Metropolitan Board of Works, the only sum payable under the policy would be the amount of the damage done to the buildings considered only as old materials.

12. The houses were purchased in order to carry out the street improvement, and they would have been pulled down by the Metropolitan Board of Works for that purpose.

13. The defendants contend that they are not liable to pay anything under the policy, but, if they are so liable, that

1877

Collingridge v. Royal Exchange Assurance Corporation.

the loss incurred is incurred by the Metropolitan Board of Works only, and not by the plaintiff, and is restricted to the value of the damage done to the old materials of the houses, which has been agreed upon for the purposes of this case as £125, and that this sum and no more is recoverable under the policy.

14. The plaintiff contends that the contract under the policy is one of indemnity, and that he is entitled to have the houses reinstated, or to be paid the full value of the houses at the time of the fire, viz., £1,500.

The plaintiff brings this action with the assent and concurrence of the Metropolitan Board of Works. The defendants claim, in the event of the judgment of the court being adverse to them, to exercise their option to reinstate, pursuant to clause 10 of the policy.

176] *The questions for the opinion of the court are:—

1. Whether the defendants are liable under the policy to pay anything to the plaintiff.

2. If the defendants are so liable, upon what principle and for what amount the defendants are liable.

Philbrick, Q.C. (Biron with him), for the plaintiff: The defendants are clearly liable. The notice to treat served on the plaintiff, the settlement of the amount of the purchase-money, and the acceptance of the plaintiff's title did not deprive him of the ownership of the property. He was in the position of unpaid vendor, with a lien for the purchase-money. The purchaser of property insured does not, in the absence of express agreement, acquire a right to the insurance money, *Paine v. Meller* ('); *Poole v. Adams* ('), the principle of which is recognized in *Reynard v. Arnold* ('). The plaintiff has therefore an insurable interest, and this is the only matter upon which any real question is raised. [He was then stopped.]

Day, Q.C. (Willis, Q.C., with him), for the defendants: The plaintiff has no sufficient insurable interest in the premises to entitle him to recover. He suffered no pecuniary injury by the fire. There was at the most a damage to the pledge or lien to which he was entitled as unpaid vendor; but this could only be material where there was any doubt as to the solvency of the purchaser, which in the present case could not possibly exist.

[LUSH, J.: The contract is not to make good any loss to the plaintiff, but any damage to the buildings.]

The main object of the contract is to indemnify the plaintiff.

Philbrick, Q.C., was not heard in reply.

(') 6 Ves., 349.

(') 33 L. J. (Ch.), 639.

(') Law Rep., 10 Ch., 386.

MELLOR, J.: I think that our judgment must be against the contention which Mr. Day has urged on behalf of the defendants. It appears that the plaintiff at the time of the fire was in the position of unpaid vendor, and had possession of his premises. Under these circumstances, I think there is nothing to prevent him from bringing an action to recover the amount which he has insured. *Whether when he [177 receives this money, supposing that the defendants do not choose to reinstate the premises, he will become trustee of it for the board of works, is another question, but I do not see why the unexecuted bargain between him and the board can affect his right to recover. If it were otherwise he would suffer great inconvenience, and would have to rely on the solvency of the purchaser of his property, and though in the present case this purchaser is a powerful corporation, and there is no reason to doubt that the purchase-money will be paid, this is a mere accident, which ought not to interfere with his right to take measures for the protection of his security. The defendants are quite mistaken in supposing that they have only to pay the plaintiff the amount of the loss which, as between him and third persons, he may ultimately sustain.

LUSH, J.: I am of the same opinion. The plaintiff is in the position of a person who has entered into a contract to sell his property to another. The fact that the vendee is so important a corporation as the board of works can make no difference. The contract will no doubt be completed, but legally the buildings are still his property. The defendants by their policy undertook to make good any loss or damage to the property by fire. There is nothing to show that any collateral dealings with the premises, such as those stated in the case, are to limit this liability. If the plaintiff had actually conveyed them away before the fire, that would have been a defence to the action, for he would then have had no interest at the time of the loss. But in the present case he still has a right to the possession of his property, and the defendants are bound to pay him the insurance money, whether he is trustee of it for third persons or not.

Judgment for the plaintiff.

Solicitor for plaintiff: *William Wyke Smith.*

Solicitor for defendants: *E. J. Rickards.*

An insurance to the "Estate of R." affirming 51 Barb., 647; *Savage v.*
 is a valid insurance of the interest of Long Island, etc., 43 How. Pr., 462,
 the heirs of R. and of his executors: affirmed 44 id., 40.
Clinton v. Hope, etc., 45 N. Y., 454, A condition in a policy of fire insur-

1877

Collingridge v. Royal Exchange Assurance Corporation.

ance that the insurer shall not be liable for loss if, without written consent, the property shall in any way become incumbered, applies only to incumbrances created by or with the assent of the assured, and to the creation of which he might apply to the insurer for consent. Where, therefore, after the issuing of such a policy, a mechanic's lien was filed against the property insured, and there was no claim that it was filed by the procurement of the assured, held, that it was not such an incumbrance as was contemplated by the condition, and did not avoid the policy: *Greene v. Homestead, etc.*, 82 N. Y., 517.

Where, by the terms of a fire policy, the sale or transfer of the insured premises, or a change in the title thereof by voluntary transfer or conveyance, cuts off all right of recovery upon the policy, a conveyance of the premises by the insured and his wife to S., who reconveys to the wife, operates to cut off such right of recovery, notwithstanding it appears that the conveyances were made as a substitute for a will devising property to the wife, and that it was not the intention to divest the insured of the entire title, but that he was to retain, and did retain, possession and control of the property after the conveyances as before: *Langdon v. Minnesota, etc.*, 22 Minn., 193; *Baldwin v. Hartford, etc.*, 12 Reporter, 116, Supreme Court, N. H.

A policy of fire insurance contained a provision declaring it void "if, without the written consent of the company first had and obtained, the said property shall be sold or conveyed, or the interest of the parties be changed in any manner, whether by the act of the parties or by operation of law."

The insured died leaving a will devising and bequeathing his estate, real and personal, and thereafter a loss occurred.

In an action upon the policy, held, that there was a change of interest, within the meaning of the provision, which avoided the policy: *Sherwood v. Agricultural, etc.*, 73 N. Y., 447, 29 Am. Rep., 180, 183 note, distinguishing *Wyman v. Wyman*, 26 N. Y., 253; *Burbank v. Rockingham*, 24 N. H., 550.

See *contra*: *Geo. Home Ins. Co. v. Kinnears*, 28 Gratt. (Va.), 88, where the policy insured the assured and his

representatives; also *Farmers Mutual, etc., v. Graybill*, 74 Penn. St. Rep., 17.

Where the company renewed the policy, after the death of the assured, in his name, held, that its act in so doing, with knowledge of his death, was a waiver of the condition therein, avoiding it in case of any transfer of the interest of the insured without the written consent of the company: *Robinson v. Pacific, etc.*, 18 Hun, 395.

An executory contract for the sale of premises, without change of possession, is not a breach of a condition in a policy forfeiting it in case of any sale or transfer, or any change in title or possession; such a condition applies only to a legal transfer, which divests the insured of title or to control over the property: *Beming v. Home Ins. Co.*, 71 N. Y., 508, affirming 6 Daly, 522.

Where the mother and guardian of certain infants made a contract to sell certain real and personal property belonging to them as soon as the guardian could obtain the requisite authority from the court, and the vendee entered into possession as tenant, paying rent, and the property was destroyed by fire; held, a company which had insured the "estate of R." were liable upon the policy: *Clinton v. Hope, etc.*, 45 N. Y., 454, affirming 51 Barb., 647; *Savage v. Long Island, etc.*, 43 How. Pr., 462, affirmed 44 id., 40; *Wood v. North Western, etc.*, 46 N. Y., 421.

The sale of real estate on a mortgage foreclosure, in partition, on a sale of infants' real estate, by order of the court, etc., before confirmation of the sale by the court, is not such an alienation as avoids a policy under a clause that "any alienation or sale" of the insured property shall avoid it. Until confirmation the transaction is *in fieri*: *Terpenning v. Agricultural, etc.*, 21 Hun, 299; *Steen v. Niagara, etc.*, 61 How. Pr., 144; *Farmers, etc., v. Graybill*, 74 Penn. St., 17.

See *Stimson v. Arnold*, 5 Abb. Pr., 377; 25 Eng. Rep., 71; *Fuller v. Van Geesen*, 4 Hill, 171, affirmed How. Ap. Cas., 240.

Though a sale and confirmation is a transfer which avoids a policy with such a condition: *Bishop v. Clay, etc.*, 45 Conn., 430.

A condition in a policy that the en-

try of a foreclosure of a mortgage shall be deemed an alienation of the property and avoid the policy, does not involve a sale under the decree of the court in a creditor's bill against the heirs, etc., which sale is set aside by the court: *Geo. Home Ins. Co. v. Kinnears*, 28 Gratt. (Va.), 88.

Where a policy of fire insurance upon partnership property contains a condition that a sale or transfer of the property, or any change in title or possession, will render the policy void, the policy is not avoided by the appointment, in an action to dissolve the partnership, of one of the copartners as a receiver *pendente lite* of the partnership property; such an appointment works no change in the title, nor does the exclusive control thus given the receiver over the property constitute a change of possession within the meaning of the policy: *Keeney v. Home*, etc., 71 N. Y., 396.

A fire insurance policy stipulated that if the property insured "be sold or transferred, or any change take place in title or possession, or if the interest of the assured in the property, as owner, trustee, mortgagee or otherwise, be not truly stated in the policy," then the policy should be void. The insured S. & N. were copartners; they subsequently admitted K. to the partnership, and before loss, S. sold his interest to N. & K., and took from them a chattel mortgage to secure the entire purchase-money. Held, that this was such a change in title and possession as to avoid the policy, and that the taking the mortgage to secure the entire purchase-money did not affect the question: *Card v. Phoenix*, etc., 4 Mo. App. Rep., 424.

Where a policy of fire insurance contains a provision declaring it void in case of a sale, transfer or change in

the title of the property, voluntary or by legal process, or judicial decree and adjudication of bankruptcy in involuntary proceedings against the insured, and an assignment by the register under and in pursuance of the bankrupt act, is a transfer and change of title by judicial decree within the meaning of the provision, and vitiates the policy.

The effect of such transfer is not changed by the fact that by the terms of the policy the loss is made payable to another who is a mortgagee of the property, as it is not his interest as mortgagee which is insured: *Perry v. Lorillard*, etc., 61 N. Y., 214, distinguishing *Starkweather v. Cleveland*, 2 Abb. U. S. R., 67.

See *Appleton, etc., v. British*, etc., 46 Wisc., 23.

Where a policy contained a provision that it should become void in case of a sale or conveyance of the insured property, or an assignment of the policy, without the consent in writing of the company; held, that a consent given after a sale of the property and an assignment of the policy was effectual to preserve it in force and save the forfeiture: *Buchanan v. Exchange*, etc., 61 N. Y., 26.

Though a deed and a mortgage concurrently executed may be part of the same contract, they are distinct instruments, and a third party's knowledge of one is not notice of the other. Notice of the execution of a mortgage upon insured property cannot be fastened upon the insurer by showing the latter's assent to an assignment of the policy to the purchaser of the property, who, instead of paying for the property, had given a mortgage for the entire purchase-money: *German*, etc., v. *Agricultural*, etc., 8 Mo. App. R., 401.

But see, however, *Brumfield v. Boutall*, 24 Hun, 451.

[3 Queen's Bench Division, 178.]

Feb. 20, 1878.

178]

*MOORE V. HALL.

Easement—Light, prescriptive right to—Quantum of Enjoyment—Right not to be measured by purpose for which Light actually used—Damages.

In an action for the obstruction of ancient lights, the judge directed the jury that they were to consider whether there had been a sensible diminution of light, so as to make the plaintiff's premises less available for the purposes of occupation or business, to which they were then, or *might thereafter*, be made applicable, and that the damages were to be estimated according to the diminution of value of the premises for such purposes:

Held, a right direction, on the ground that the purposes for which the premises had actually been used while the light had been enjoyed, were not the proper measure of the right.

Martin v. Goble (1 Campbell, 320), dissented from.

THIS was an action for obstruction of ancient lights. The case was tried before Cockburn, C.J., when it appeared that the plaintiff, as the owner of certain premises, was entitled by prescription to the access of light to certain windows in his premises. The defendant, by erecting a large building on the opposite side of the street, had sensibly diminished the light which found its way to the plaintiff's windows; but there was evidence to show that the plaintiff's premises being used for the purpose of a cook's shop and coffee house, and the windows that were darkened being those of rooms only used as bedrooms, the access of light was still quite sufficient for the purposes of the business then carried on. The defendant's counsel contended (*inter alia*) that the plaintiff was, at any rate, only entitled to nominal damages, and that the plaintiff was not entitled to any damages in respect of the diminution, by reason of the obstruction of light, of the value of the premises for any other purposes than that for which the plaintiff had actually been in the previous enjoyment of the light. The Lord Chief Justice, however, left it to the jury to say whether any sensible diminution of light to the plaintiff's premises had been occasioned by the erection of the defendant's premises, so as to make them less available either for the purposes of occupation or business to which they were then or might thereafter be made applicable. If so, he directed them that the plaintiff was entitled to the verdict; but if they should be of opinion that there was no probability that the premises [179] would ever be applied to other than *their present purpose, and that consequently there was not, practically, any diminution in their value, the damages should be nom-

inal only. If the jury were of opinion that there had been any sensible diminution of light sufficient to lessen or interfere with the use of the premises, or any part of them, for the purpose of occupation or business, then the damage should be substantial, according to the estimate of the jury of the diminution in value of the premises.

The jury found a verdict for the plaintiff, damages £50.

An order *nisi* had been obtained for a new trial, on the ground that the above ruling amounted to a misdirection.

H. D. Greene, and *Lake*, showed cause. They were stopped by the court.

A. Staveley Hill, Q.C., supported the rule. He contended that the Lord Chief Justice was wrong in telling the jury that they might take into consideration the purposes for which the premises might be thereafter made available, and that the measure of damages must be the actual enjoyment that there had been of the light. He cited *Jackson v. Duke of Newcastle* ⁽¹⁾; *Martin v. Goble* ⁽²⁾; *Lanfranchi v. Mackenzie* ⁽³⁾; *Yates v. Jack* ⁽⁴⁾; *Dent v. Auction Mart Company* ⁽⁵⁾; *Aynsley v. Glover* ⁽⁶⁾.

MANISTY, J.: I am of opinion that this order should be discharged. The facts appear to be as follows. The plaintiff had a building with certain windows, through which the light passed, and this state of things had continued for such a period of time as to entitle the plaintiff to a servitude as against the defendant, the owner of the opposite premises, in respect of such passage of light. That servitude would appear to be the right to have the light flow in the same quantity as theretofore through such windows uninterfered with by the defendant. The defendant did interfere with the flow of such light injuriously, and it is admitted that thereupon a cause of action arose. The question is as to what may be the measure of damages in respect of such cause of action.

The Lord Chief Justice told the jury that they might take into *consideration the character of the neighbor- [180 hood, the use to which the plaintiff's buildings were then applied, and also the use to which they might in future be applied. He left it to them to say, considering all the elements of the case, whether the damages were substantial or merely nominal. The only doubt I have is, whether the direction was not too favorable to the defendant. It appears

⁽¹⁾ 3 D. J. & S., 275; 33 L. J. (Ch.), 698.

⁽²⁾ 1 Camp., 320.

⁽³⁾ Law Rep., 4 Eq., 421, at p. 427.

⁽⁴⁾ Law Rep., 1 Ch., 295.

⁽⁵⁾ Law Rep., 2 Eq., 238.

⁽⁶⁾ Law Rep., 18 Eq., 544; 10 Ch., 283; 12 Eng. R., 726.

to me that the plaintiff was entitled to the same quantum of light as he had theretofore enjoyed, irrespective of the purpose for which he had enjoyed it. Take this case as an illustration. Suppose an upper room with a window through which the light had been accustomed to pass in a certain quantity and direction. It might be that for many years that room had been used as a bedroom, to which use the full amount of light which actually had passed through the window might not be essential. The owner afterwards lets the room to an artist who makes a skylight. The light so admitted vertically superadded to the light before admitted horizontally makes the room an excellent one for the purposes of an artist's studio. Why should the owner of the servient tenement, who had for many years been allowing a certain amount of light to enter through the window, be entitled to object to the alteration of the purpose for which the light was used? It is really quite immaterial to him for what purpose the light is used. It cannot be, in my opinion, that the servitude is greater or less according to the use of the light which is made by the owner of the dominant tenement. It appears to me that the real question for the jury was what the diminution in value of the hereditament was by reason of the interference with the access of light, and to ascertain that, I think that they were entitled to take into consideration the matters indicated by my Lord's direction.

MELLOR, J.: I am of the same opinion. It seems to me that the direction of my Lord to the jury was quite correct. With regard to the case of *Martin v. Goble* (¹), I agree with the Master of the Rolls in *Aynsley v. Glover* (²) in thinking that the actual mode of occupation of the dominant tenement is not the test. I am, therefore, of opinion that the test applied by McDonald, C.B., in *Martin v. Goble* (¹), was [181] not the correct test. It seems to me *that the owner of the dominant tenement is entitled to all the light that has been accustomed to come through the particular aperture or window without challenge on the part of the owner of the servient tenement. How is the owner of the servient tenement concerned with, or how can he know anything about, the mode of occupation of the dominant tenement? In *Lanfranchi v. Mackenzie* (³) an injunction was claimed on the ground that the access of light had been so far diminished that the room could no longer be used as a sampling room. The injunction was refused on the ground that it

(¹) 1 Camp., 320.

(²) Law Rep., 18 Eq., 544; 10 Ch., 283; 12 Eng. R. 726.

(³) Law Rep., 4 Eq., 421.

was not shown that the room had been so used for twenty years ; and it is said that the Vice-Chancellor in that case approved of the views expressed in *Martin v. Goble* ⁽¹⁾. I cannot agree with the Vice-Chancellor that the use of the room as a sampling room for twenty years would, in any other sense, have been material than as a test of the amount of light that had been accustomed to find access to the room during those years. The question what quantity of light actually obtained access through the window in respect of which the prescription is claimed is comparatively simple, but to determine what the extent of the enjoyment had been, with reference to the purpose for which the dominant tenement had been used, would require very different evidence. The purpose might vary from time to time, and there would be great difficulty in ascertaining the quantum of enjoyment tried by this test. The light in this case was in fact enjoyed for the purposes of a cook's shop and coffee house, but the use of it for this purpose is not the measure of what the plaintiff is entitled to. It is found that there is an actual diminution of light, and so the defendant's counsel admits that there must be a verdict against him, but he complains of the damages. For the reasons I have given I cannot think his complaint is well founded. I do not think the present actual condition of the premises is the measure of the amount of damage. In estimating the damages you ought not, in my opinion, to stereotype the existing condition of the premises, but to calculate the reasonable probabilities of a different application of them. The jury have estimated those probabilities, and have found a verdict for substantial damages. I have no doubt of the accuracy of that verdict.

*COCKBURN, J.C.: The real question appears to [182 be what the servitude is to which the servient tenement is subjected. It is, in my opinion, the right to the admission of a certain quantity of light by reason of certain apertures through which the light has for a certain period been accustomed to obtain access. The question for what purpose the owner of the dominant tenement has thought fit to use that light, to my mind, has nothing to do with the matter. To look at the matter by the light of the actual experience of life: a man builds a house or other building and opens a window in it. Does the owner of the tenement which, if the use of the window continues, will become the servient tenement consider to what purpose the light will be applied? Assuredly not. I quite concur in thinking that *Martin v.*

(1) 1 Camp., 320.

1878

Moore v. Hall.

Goble (1) was wrongly decided. The matter, in my opinion, to be considered is, whether there is any diminution of light for any purpose for which the dominant tenement may be reasonably considered available. The rooms may now be used as bedrooms, a purpose which may not require so much light as they actually had received, but at any moment they may be put to some other purpose requiring the full amount of such light. With regard to the question of the measure of damages, I apprehend that it must be the diminution in the value of the premises by reason of the diminution of the light. The later authorities appear fully to bear out the view we now take. Lord Cranworth, in *Yates v. Jack* (2), says, "The right conferred or recognized by the statute 2 & 3 Wm. 4, c. 71, is an absolute indefeasible right to the enjoyment of the light without reference to the purpose for which it has been used." Vice-Chancellor Wood, in the subsequent case of *Dent v. Auction Mart Co.* (3), took the same view, and the Master of the Rolls in the case of *Aynsley v. Glover* (4), after reviewing all the authorities, says, "Therefore I think it must be settled or considered settled, at all events, in a case where a reversioner is a party, that the mere change of use of a room will not deprive the party complaining of his right to the access of light; and conversely, that in considering the injury to the light the court is bound to consider that the room may be used for some [183] other *purpose than that for which it is used at the moment when the injunction is applied for." Apply the principle so laid down to the case when the jury have to estimate the damages. It is clear they may consider future probabilities as to the use of the rooms. They may consider not only the actual present use of them, but any purpose to which it may reasonably be expected that in the future they may be applicable. It would be a great injustice to the owner of the dominant tenement if it were otherwise. For these reasons I think this order must be discharged.

Order discharged.

Solicitors for plaintiff: *Tilley & Soames.*

Solicitor for defendant: *H. E. Brown.*

(1) 1 Camp., 320. (2) Law Rep., 1 Ch., 295, at p. 298. (3) Law Rep., 2 Eq., 238.

(4) Law Rep., 18 Eq., 544, at p. 551; 12 Eng. R., 726.

[3 Queen's Bench Division, 183.]

Feb. 20, 1878.

WATT V. BARNETT and Others.

Practice—Substituted Service, Effect of—Order ix, Rule 2—Absence of Notice of Proceedings—Setting aside Judgment—Discretion.

The plaintiff being unable to serve one of the defendants with the writ, obtained an order for substituted service against him under Order ix, Rule 2, and the action proceeded to judgment against all the defendants. The defendant, in respect of whom the order for substituted service had been made, applied to set aside the judgment as against him on affidavits alleging merits and that he had never had any knowledge of the action while it was pending:

Held, that the judgment signed was regular, even if the defendant had no knowledge of the proceedings, but that the court might in their discretion set the judgment aside, if it were shown that the defendant had no knowledge of the proceedings, and that he had merits. Thinking the defendants' affidavits not entirely free from doubt as to these points, they set aside the judgment on terms as to giving security for the amount of the judgment that remained unsatisfied, and for costs.

THIS was an application to set aside the judgment that had been signed against the defendant Barnett. It appeared that he had been sued with four other persons for torts alleged to have been committed by them as directors of a company. The plaintiff, being unable to serve the defendant Barnett with the writ, had obtained an order for substituted service under Order ix, Rule 2, upon a firm of solicitors who had acted for Barnett in another action arising out of the affairs of the same company. *These [184 gentlemen had refused to forward the writ to Barnett, and had sent it back to the plaintiff's solicitors. The action proceeded, and ultimately the plaintiff got a verdict against all the defendants, and judgment was signed against them. An application was made on behalf of Barnett to Field, J., at chambers, to set aside the judgment so far as it affected him, on affidavits alleging that he had had no notice or knowledge of the proceedings in the action while it was pending, and that he had a good defence on the merits. Field, J., refused to make any order, and the present application was by way of appeal against his decision.

Rolland, for the defendant Barnett, contended that the order for substituted service was not conclusive, if it were shown that notice of the proceedings never in fact reached the defendant, and that he was entitled to have the judgment set aside unconditionally.

Herschell, Q.C., and *R. Brown*, for the plaintiff, contended that the judgment being regular could not be set aside, or at any rate should not be set aside unless the affi-

affidavits satisfied the court that the defendant had merits and had never had notice of the proceedings. They contended that the defendant's affidavits did not satisfactorily establish these points.

The following cases were cited: *Hope v. Hope* ⁽¹⁾; *Hope v. Carnegie* ⁽²⁾; *Hesketh v. Fleming* ⁽³⁾; *Flower v. Allan* ⁽⁴⁾.

COCKBURN, C.J.: The question before us is one of some importance as involving the true effect of Order IX, Rule 2. In the present case it appears that, by reason of the solicitor of the defendant refusing to become the vehicle of service, the substituted service became ineffectual. The question therefore arises whether an order under Order IX, Rule 2, for substituted service is final and conclusive, so that, after the proceedings have gone on to judgment, it is not competent for the defendant to come before the court and, on the ground that the substituted service has failed, apply for leave to appear and defend the action. It is also argued that at any rate he can only do so if he can produce such an affidavit of merits as to satisfy the court that they are [185] not *setting aside the judgment fruitlessly, and that the justice of the case would not be better met by allowing it to stand. Now, in the first place, it cannot, I think, be said that the judgment was signed irregularly, inasmuch as the service was in accordance with the order of the court made under Order IX, Rule 2; but, on the other hand, I think the Legislature did not intend that the order for substituted service should be final and conclusive on the defendant, when it can be shown that the substituted service failed and the proceedings were never brought to the knowledge of the defendant. It is the essential foundation of the administration of justice that a person, against whom an action or other proceeding is brought, should have notice of the proceedings before he is concluded, and therefore I think that, when it is shown to the court that the substituted service has failed and the defendant has had no such notice, it is competent to the court to enable the defendant to come in and defend the action, as he would have been enabled to do if the substituted service had been effectual. At the same time I agree that the matter is one on which the court ought to exercise its discretion. It is not because the substituted service has failed and never came to the knowledge of the defendant that the court is absolutely bound to set the proceedings aside, for it may be, that though the action was not brought to the defendant's knowledge through the

⁽¹⁾ 4 D. M. & G., 328.

⁽³⁾ 24 L. J. (Q.B.), 255.

⁽²⁾ Law Rep., 1 Eq., 126.

⁽⁴⁾ 2 H. & C., 688; 33 L. J. (Ex.), 83.

substituted service, yet it has come to his knowledge in some other way. If he knew of the action and had an opportunity of coming in, but instead of doing so he allowed the proceedings to go on and took his chance of the other defendants defeating the plaintiff, then I think we ought to refuse to set aside the judgment, which is regular by virtue of the order for substituted service, and not to allow the defendant to reopen the litigation. All I hold is that the order for substituted service is not finally binding and conclusive, if the court are satisfied that through that order injustice will be done if the defendant is not let in to defend, he never having had any knowledge of the action. To apply this view to the present case. Before letting the defendant in to defend we must consider whether he gives us any grounds for thinking that he has a substantial case which he desires to try. If he does not we are not bound to set aside a judgment which we may think *ought in the interests of justice to stand. [186 Again, does he satisfy us that he had no knowledge of the proceedings? I cannot help thinking that the case made by the defendant is not altogether free from doubt on either of these points. We think, taking the doubt we feel on these points and the other circumstances into consideration, that the proper order to make will be that the defendant shall have liberty to come in and defend, but only on condition that he gives security for £500, the balance of the judgment remaining unsatisfied, and for the costs of the action to the satisfaction of the master.

MELLOR, J.: I come in the result to the same conclusion as my Lord. I think that the object of the 2d rule of Order IX was to obviate the difficulties that the plaintiff might be exposed to by reason of a defendant's going abroad and keeping abroad, and it being impossible to effect personal service, and to prevent the plaintiff's right being entirely defeated by reason of these difficulties. It was intended, in my opinion, in such cases to enable the court to order substituted service, and that when such substituted service is directed it should have all the effects of personal service. Under these circumstances the judgment in this case was perfectly regular; and though I think it is competent to us to let the defendant in to defend, the defendant can, in my opinion, only be so let in on satisfying us that he has merits, and that he had no knowledge of the proceedings. The proceedings being regular, if he had known of them, I think he would have been in the same position as if he had been served with the writ. With regard to the terms on

1878

Reg v. French.

which the defendant ought to be let in to defend, I entirely agree with my Lord.

Order accordingly.

Solicitors for plaintiff: *Linklaters.*

Solicitor for defendants: *Wynne.*

By the N. Y. Code of Civil Procedure (§ 445), where service is made by publication and the defendant does not appear, he may, upon good cause shown, be allowed to do so, except in divorce cases, or wherein the contrary is expressly prescribed by law, or if such notice has not been served within seven years after the filing of the judgment roll.

Under a similar provision of the former code, it was held that such provision did not deprive the courts of power to open a default in a divorce case where summons was so served. That the object of the provision was to enlarge, not to restrict, the powers of the court to relieve against judgments so obtained; and the power which the courts had over their own judgments prior to the code was not interfered with: *Brown v. Brown*, 58 N. Y., 609, reversing 1 Hun, 443, 3 Thomp. & Cook, 477.

If a defendant be misled by an error in the summons as published, he may be relieved on the merits: *Jacquerson v. Van Erben*, 2 Abb. Pr., 315.

A third person asking to come in or defend or contest the plaintiff's claim must do so *before judgment*. If a non-resident defendant is allowed to come in and defend, an order allowing him to do so does not of itself open the judgment, nor stay proceedings upon the execution: *Carswell v. Neville*, 12 How. Pr., 445.

As to the terms on which a party so applying will be let in to defend, see *Hartwell v. White*, 9 Falge, 368.

This statute does not apply to the case where a defendant, as required or allowed by statute, appoints an agent upon whom service may be made, and service is made upon such an agent: *Gibbs v. Queens, etc.*, 63 N. Y., 114.

[3 Queen's Bench Division, 187.]

Feb. 18, 1878.

187]

*REG. V. FRENCH.

Highway (Turnpike)—Contribution to Repair of, out of Highway Rate—4 & 5 Vict. c. 59, s. 1—Failure to complete whole System of Roads authorized by a Turnpike Act.

An act of Parliament authorized trustees to establish a ferry and make certain highways in connection therewith. The trustees were likewise empowered to take tolls, out of the proceeds of which the ferry and roads were to be maintained. No limit of time was specified by the act for the expiration of the trust. The act also provided that, in case the works thereby authorized should not be executed within the space of ten years, all the powers and authorities thereby given should cease and determine, save only as to so much of the work as should have been completed within that time.

The trustees established the ferry, and made all the roads specified by the act but one. The funds arising from the tolls becoming insufficient for the repair and maintenance of the roads so made, an application was made by the trustees to justices for an order for contribution to the repair of one of the roads so made out of the highway rate under 4 & 5 Vict. c. 59, s. 1:

Held, that the trust created by the act was a turnpike trust, within the meaning of 4 & 5 Vict. c. 59; and secondly (on the authority of *Reg. v. York and North Midland Ry. Co.* (1 E. & B., 858)), that inasmuch as the act merely authorized and did not compel the making of the roads thereby specified, and contemplated that all

the works might not be executed, the construction of the whole system of roads authorized to be made was not a condition precedent to the roads that were made becoming highways, and consequently that an order for contribution to the repair of the road in question might be made under 4 & 5 Vict. c. 59, s. 1.

Rez v. Cumberworth (3 B. & Ad., 108) not followed.

[3 Queen's Bench Division, 195.]

Dec. 21, 1877.

[IN THE COURT OF APPEAL.]

***LEWIS V. THE GREAT WESTERN RAILWAY CO. [195]**

Carriers—Railway and Canal Traffic Act, 1854 (17 & 18 Vict. c. 31), s. 7—Special Conditions—Wilful Misconduct—Alternative Rates.

The plaintiff, under a contract in writing signed by his agent, delivered to the defendants certain cheeses to be carried from L. to S. at "owner's risk." As the plaintiff knew, the defendants had two rates of carriage; a higher rate, when they took the ordinary liability of carriers, and a lower, when they were relieved of all liability, except that arising from the wilful misconduct of their servants. In using the words "owner's risk" the plaintiff intended that the cheeses should be carried at the lower rate, and subject to the conditions restricting the defendant's liability. The defendants' servants packed the cheeses in such a manner that during their transit upon the defendants' railway they were damaged, but the defendants' servants did not know that damage would result from the mode in which the cheeses were packed:

Held, that, as the defendants carried at alternative rates, the condition excepting them from liability when carrying at the lower rate was just and reasonable; and that the injury to the cheeses had not arisen from the wilful misconduct of their servants.

CLAIM: That certain cheeses of the plaintiff were delivered to be carried by the defendants, who so negligently packed and carried them that they were damaged.

Defence: That the cheeses were received and carried, under a special contract signed by the person delivering them, on terms which were just and reasonable, to the effect that they should be carried at "owner's risk," and that the defendants, in consideration of such terms, agreed to carry and carried the cheeses at a lower rate than the rate charged under ordinary circumstances where there was no special contract.

Reply: That the contract referred to in the defence as a special contract was the ordinary consignment note of the defendants' company, the material part being as follows:

"Great Western Railway. Consignment of goods to be carried at owner's risk. The Great Western Railway Company hereby give notice that they have two rates for the conveyance of certain articles; one the ordinary rate, when they take the ordinary *liability of the carrier; the [196 other a reduced rate, adopted when the sender relieves them of all liability of loss, damage, or delay; except upon

1877

Lewis v. Great Western Railway Co.

proof that such loss, damage, or delay arose from wilful misconduct on the part of the company's servants." "To the Great Western Railway Company. Station 187. Receive and forward the undermentioned goods to be carried at the reduced rate below the company's ordinary rate; in consideration whereof I undertake to relieve the Great Western Railway Company, and all other companies over whose lines the goods may pass, from all liability in case of damage or delay, except upon proof that such loss, detention, or injury arose from wilful misconduct on the part of the company's servants. I also agree to the conditions and regulations on the back of this note."

That the special contract had no application to the default of the defendants in not properly packing the said goods; and, as to their breach of duty as carriers, that the damage was occasioned by wilful misconduct on the part of the defendant company's servants.

Issue thereon.

At the trial before Lopez, J., without a jury, at the summer assizes, 1877, for the county of Salop, the following facts were proved. The plaintiff, a cheese factor, in business at Market Drayton, in Shropshire, having a quantity of Cheshire cheeses at a warehouse in London, directed one Hutchinson, his agent, to forward them to Shrewsbury, via the Great Western Railway. On the 8th of July, the cheeses, 156 in number, varying in size, weighing from 50 lbs. to 80 lbs. a piece, and, altogether, 3 tons 18 cwt., were delivered by Hutchinson to the defendants' carrier, with a forwarding note signed by Hutchinson in the following terms:—

"Great Western Railway Company.

"Please receive and forward to Mr. George Lewis's order,

"Market Hall, Shrewsbury."

[Here were specified the marks and numbers of the Cheshire cheeses,]

"'Owner's risk.'

"From W. J. Hutchinson, agent."

[197] *Hutchinson had been for some years in the habit of sending cheese by the Great Western Railway, and was aware that when sent at owner's risk the rate was less than when the company took the responsibility on themselves; he also knew the conditions in the consignment note used on the Great Western Railway, and that it contained the terms on which goods taken at "owner's risk" were carried; but that note was not in fact signed by him, or presented to him

for signature, in respect of the cheeses now in question. The ordinary rate was 60s., the sum fixed by Parliament. The reduced rate for cheese was 40s. The cheeses were despatched by the defendants from their Paddington station on the 10th, were conveyed along the Great Western Railway, and arrived at Shrewsbury on the 11th of July. They were packed, together with others belonging to another consignee, on their rims in two tiers, one above the other, in one open truck. By this mode of packing and the heat of the weather they were crushed and broken to pieces. Although smaller kinds of cheese of uniform size and from other parts of England might be and usually were packed on their edges and in tiers, yet the greater weight, thickness, and varying size of Cheshire cheeses rendered a different mode of packing necessary, and the cheeses of the plaintiff should have been placed on the flat side and in a single layer only; Cheshire cheeses were generally so conveyed along the Great Western Railway in the counties of Salop and Chester, and three trucks, at least, should have been used to carry the quantity conveyed in the one truck.

The defendants produced a form of the consignment note used on their railway to explain the words "owner's risk" on the receipt note signed by Hutchinson, who admitted his knowledge of the conditions of the consignment note, and it was given in evidence. On the other hand, the plaintiff asked leave to amend his replication, by striking out the allegation that the terms of the special contract were those therein stated, and argued, in the alternative, that if the terms on which the goods were carried were those specified in the consignment note, that there was evidence of "wilful misconduct." The learned judge ruled that the conditions were "just and reasonable" within the Railway *and [198 Canal Traffic Act, 1854, s. 7⁽¹⁾]; and that there was no evidence of "wilful misconduct" by the company's servants, and gave judgment for the defendants.

J. J. Powell, Q.C., and John Rose, for the plaintiff: The

(1) By 17 & 18 Vict. c. 31, s. 7, every railway company "shall be liable for the loss of, or for any injury done to, any . . . goods . . . in the receiving, forwarding, or delivering thereof, occasioned by the neglect or default of such company or its servants, notwithstanding any notice . . . limiting such liability. Provided always, that nothing herein contained shall be construed to prevent" the company "from making such condition with respect to receiving, forwarding,

or delivering of any of the . . . goods . . . as shall be adjudged by the court or judge before whom any question relating thereto shall be tried to be just and reasonable . . . Provided, also, that no special contract between such company and any other parties . . . shall be binding upon or affect any such party, unless the same be signed by him or by the person delivering such . . . goods . . . for carriage."

1877

Lewis v. Great Western Railway Co.

replication misstating the terms of the special contract should be amended in accordance with the truth. The forwarding note, containing the words "owner's risk," was the only document signed so as to be a special contract under the Railway and Canal Traffic Act. That, *per se*, is obviously unreasonable, *Peek v. North Staffordshire Ry. Co.* (1); and there is no reference in it to the consignment note whereby the two documents may be connected.

[BRETT, J.: But does not the evidence as to the course of business between the consignor and the railway company show what they meant by "owner's risk?"]

Even if such evidence is admissible, the contract would still be unreasonable. The defendants rely on the alternative rate, which, however, does not necessarily render an agreement reasonable. In *Robinson v. Great Western Ry. Co.* (2) and *D'Arc v. London and North Western Ry. Co.* (3) goods were carried at a lower rate than the ordinary charge, and yet the condition that they should be "at owner's risk" was held not to absolve the carriers from liability for delay. Improper package is equally outside the condition. What may the parties be assumed to have contemplated when making this agreement? On the one hand that the defendants would pack the cheeses in a proper number of trucks, [199] *and on the other hand that, in consideration of the reduced freight, the plaintiff would relieve the defendants from responsibility for those losses and acts of negligence incidental to the conveyance of goods. Surely he cannot be deemed to have voluntarily abandoned all right to have the ordinary means of conveyance provided. If so, the option of a reduced freight, which nevertheless was a high one, is not a reasonable alternative, and therefore would not make the agreement for such extensive risk reasonable. This is not a case in which the defendants offer the customer a *bona fide* practical choice, either to have his goods carried in the ordinary way for a reasonable remuneration, or at his own risk at a lower rate, which according to Blackburn, J., in *Peek v. North Staffordshire Ry. Co.* (4), might make the terms reasonable. Secondly, assuming that "owner's risk" means the terms stated in the consignment note, the plaintiff may claim the benefit of the exception. His cheeses were injured by the "wilful misconduct of the company's servants." "Wilful misconduct" means some conduct not necessarily amounting to a criminal act or a trespass,

(1) 10 H. L. C., 473; 32 L. J. (Q.B.), 241.

(2) 35 L. J. (C.P.), 123.

(3) Law Rep., 9 C. P., 325; 9 Eng. R., 417.

(4) 10 H. L. C., 473, at p. 513.

yet other than mere negligence. To save using two more trucks the defendants intentionally put the cheeses improperly into one truck only. That is not an act of mere negligence. Suppose they had purposely placed the cheese with coals in a truck, or carried them in some other unsuitable manner, would not that be "wilful misconduct?" It could not be said that under such conditions the company might carry a horse standing on an open truck, and yet claim immunity if the animal were injured. The defendants rely on *Glenister v. Great Western Ry. Co.* (1), where the Court of Queen's Bench held similar conditions reasonable. There, in order to prevent some cattle being all night in trucks, the railway company's servants humanely removed them into a yard, whence, however, they strayed on to the railway, and, in consequence, a train containing the plaintiff's goods ran off the line, and the plaintiff's goods were injured. But Blackburn, J., said: "It is admitted that there was no malice in what the servants did here, and I fully agree that there may be many cases of wilful misconduct without malice; for instance, if railway servants were to shunt trucks of cattle into a siding and leave them unattended for twenty-four hours; or if a *railway company were, for [200 economy, knowingly to expose cattle to a risk which they incurred thereby. Here, however, the circumstances do not, in my opinion, amount to wilful misconduct, and I think the judge was wrong in directing the jury that culpable negligence was necessarily wilful misconduct." The defendants knew how Cheshire cheeses should be packed. Evidence was given that they were usually placed on their flat sides in the Great Western trains. Then for the sake of economy of space and trucks, the defendants purposely abstained from adopting the proper means of conveyance.

H. Matthews, Q.C., and *F. A. Bosanquet*, for the defendants: There are three questions for discussion: 1. What is the contract? 2. Is it just and reasonable? 3. Does it exempt the defendants from liability for the damage of which the plaintiff complains? First. The parties meant to make a contract on the terms specified in the consignment note. The phrase "owner's risk" comprises those terms. It is enough that the condition limiting liability should be in writing signed, to satisfy the requirements of the act, and the surrounding facts may be regarded in order to construe the written condition. Amongst them is the fact that the consignor was aware of the two rates, chose the lower, and when sending the goods at "owner's risk" knew that he

(1) 29 L. T. (N.S.), 423; 22 W. R., 72.

was sending them on the terms stated in the consignment note. Interpreting the signed condition by the light of those facts, it is apparent that the contract actually made was that the cheeses should be carried on the terms stated compendiously in the forwarding note and fully set out in the consignment note. But even if "owner's risk" stood alone, the condition would be reasonable, *Stewart v. London and North Western Ry. Co.* (1); and would, where an alternative rate is offered, excuse all negligence except delay: *Robinson v. Great Western Ry. Co.* (2). The conditions "with respect to receiving, forwarding, and delivering" goods do not apply to delay.

[BRETT, J.: Those cases would cover even wilful misconduct or trespass. Do you say that, where there is an alternative, *any* terms may be imposed?]

That is the contention. The option of sending the goods 201] at the *ordinary rate, which in this case was the parliamentary rate, and therefore not exorbitant, renders the alternative contract offered by the company reasonable whatever the terms may be, whether they exempt from liability for accident, negligence, trespass, or felony. But "owner's risk" in the present case must be deemed to exclude "wilful misconduct" of the company's servants, and therefore was certainly reasonable. Reasonableness is a mixed question of law and fact. In *Beal v. South Devon Ry. Co.* (3) a condition excluding liability for loss from any cause whatever, other than gross neglect or fraud, was held reasonable. See also *Harrison v. London, Brighton and South Coast Ry. Co.* (4). In *Gregory v. West Midland Ry. Co.* (5) Bramwell, B., says: "Whether a condition be reasonable or not cannot be decided as a pure matter of law. It is a question which should be decided by the judge at the trial." And Lopes, J., has decided the question. The reasonableness of each condition must depend on the circumstances of the particular case, and the court cannot be called on to define abstract reasonableness. The existence of a *bona fide* alternative rate makes reasonable that which might otherwise be not so. Here a real freedom of choice was left to the consignor. The conditions are the same as those in *Glenister v. Great Western Ry. Co.* (6), which is a conclusive authority in favor of the defendants. Blackburn, J., in that case says that where there is a *bona fide* alternative *any* terms what-

(1) 3 H. & C., 135; 33 L. J. (Ex.), 199.

(2) 35 L. J. (C.P.), 123.

(3) 5 H. & N., 875; 29 L. J. (Ex.), 441; 3 H. & C., 337.

(4) 2 B. & S., 122; 31 L. J. (Q.B.), 113.

(5) 33 L. J. (Ex.), 155, at p. 157.

(6) 29 L. T. (N.S.), 423; 22 W. R., 72.

soever agreed to may be imposed. But here wilful misconduct is excepted.

[They also referred to *McCance v. London and North Western Ry. Co.* (1); *Rain v. Glasgow and South Western Ry. Co.* (2); *Carr v. Lancashire and Yorkshire Ry. Co.* (3); *Gallagher v. Great Western Ry. Co.* (4).]

Lastly, wilful misconduct may be defined as doing wrong knowing that it will cause damage: wilful omission might come within the definition; as, for instance, a wilful omission by a pointsman to turn the points on a railway. Here there was no wilful act. *At most the evidence only [202 shows that the cheese was improperly packed by persons in London who could not be expected to know the peculiarities of this class of cheese, and are not shown to have known them, or that the mode of packing was wrong. Even if they were to some degree careless, the company will be protected by the condition. The claim itself alleges only negligence.

Powell, Q.C., replied.

BRAMWELL, L.J.: This judgment should be affirmed. We would, if necessary, amend the replication as we are asked to do, but I think that the contract is correctly set forth in it. According to the decision of *Peek v. North Staffordshire Ry. Co.* (5), a special contract under the Railway and Canal Traffic Act, 1854, is not valid unless signed. We must therefore look at the document signed by Hutchinson, and interpret it. But we must interpret it by the rule which Parke, B., enunciated, and which is cited by Blackburn, J., in *Peek's Case* (6). This is the contract: "To the Great Western Railway Company. Please receive and forward to Mr. G. Lewis' order, Market Hall, Shrewsbury," certain goods enumerated. "Owner's risk. W. J. Hutchinson." Speaking with great strictness, the consignment note ought not, I think, to be looked at. It is not referred to in the statement I have read, nor is it incorporated with it, and, if the two were put together, no necessary reference to the consignment note would appear in the document signed by Hutchinson. But I think it is a rule of evidence or law that where words are used which would comprehend some other than one necessarily exclusive meaning upon which the judges are to put an interpretation, then, as Parke, B., said, all the surrounding circumstances,

(1) 31 L. J. (Ex.), 65.

(2) 7 Sc. Dec. (3d series), 439.

(3) 7 Ex., 707; 21 L. J. (Ex.), 261.

(4) 8 Ir. L. R. C. L. Rep., 326.

(5) 10 H. L. C., 473; 32 L. J. (Q.B.), 241.

(6) 10 H. L. C., at p. 516.

1877

Lewis v. Great Western Railway Co.

and the course of dealing between the parties, not only may, but must, be looked at to ascertain the meaning of those words when used in reference to those surrounding circumstances and that course of dealing; and therefore I cannot doubt that in this case there was a course of dealing between the consignor and the Great Western Railway Company, by which goods were sent and carried under two kinds of contract, and that, under the first kind, goods were carried 203] at one rate by the company with an *ordinary carrier's liability: the liability of insurers: and that under the second, goods were carried at another rate with what was compendiously termed "owner's risk," which, when the course of business between the parties is regarded, means at the risk of the owner in consideration of the lower rate, plus the liability of the company for the "wilful misconduct" of their servants. Now I think that is the proper interpretation of the document signed by Hutchinson,—an interpretation obtained, not by joining the consignment note to it, but by regarding the course of business between the consignor and company. To illustrate this: if the contract were for the sale of goods, and contained the words, "I buy of you so much goods at the price I mentioned yesterday," or, "I will pay you £50 for them, the credit to be that I mentioned yesterday," there would not be a contract in writing under the Statute of Frauds. But, suppose the words were, "I will buy the goods," and so forth, "at the usual credit," and then it had been shown that there had been a course of dealing between the parties for years, and there had been a usual credit, surely that evidence might have been given, and it could not be said that there was not a sufficient contract under the Statute of Frauds. Again, suppose a mercantile document had in it the words "prompt as customary," what that was might surely be shown, or "according to the Rules of the Liverpool Cotton Association," what those were also. On these considerations, I am of opinion that the course of dealing between these parties, not only may, but must, be regarded, and then there is abundant evidence to show the meaning of "owner's risk" to be that the goods are carried at the lower rate in consideration of the condition, on the one side, that the company will be bound, under the circumstances, to take the lower rate, and cannot demand more, while, on the other side, the consignor sends the goods at the risk of the owner, plus the liability of the company for the wilful misconduct of their servants. Such is the proper meaning of the term, and therefore I think that to alter the replication would not be

to amend, but to falsify it, whereas at present it is true. If so, we have next to consider the question whether this contract is just and reasonable? Now it has been decided that a contract of this kind, though in writing, must be just and reasonable under the statute. By that decision *of the House of Lords I am of course bound. But, [204 in the absence of it, I might almost go so far as to say that I never could bring myself to hold a contract, which the parties had agreed to, otherwise than just and reasonable. Possibly some terms might be so utterly preposterous that they could only have been entered into by a person in a state of hallucination, and therefore such a bargain would not be just and reasonable. But it would require the very strongest evidence to satisfy me that where such a contract as the one before us is made between a carrier and a man who was in the habit of employing that carrier, and had the option of entering into the contract as it stood, or of entering into another contract with the usual liability of a carrier, viz., insurance at a higher rate, the contract so made is not just and reasonable. *Peek v. North Staffordshire Ry. Co.* (') does not apply. The company there said in effect to the consignor, "We will not take your goods on reasonable terms as insurers, but we will take them upon other terms, not being insurers." So there was no real alternative offered. But here the plaintiff might at his option have had his goods carried by the defendants as insurers at the 60s. rate, a sum which their act entitled them to charge, whereas in *Peek's Case* (') the railway company had no right to demand the toll they sought to exact for carrying the goods with the ordinary liability of common carriers. The present defendants gave to the plaintiff an option by saying, "Send your cheese, if you please, at the rate we have a right to charge you, and we will take the liability of carriers, that is, we will be insurers, and undertake that your cheeses shall arrive in as good a condition as that in which they started, whatever may have caused any loss or damage to them, unless it be their own 'inherent vice.'" Those are one set of terms. The other set is, "Pay us a less sum, and take upon yourself the risk of damage, less that risk which arises from the wilful misconduct of our servants, and we will charge you that sum in consideration of your so doing." Now can it be said that that is an unreasonable contract? Even were the exceptions of the risk of wilful misconduct of the defendants' servants omitted from the terms, I should think it would be impossible to hold the

(') 10 H. L. C., 473; 32 L. J. (Q.B.), 241.

1877

Lewis v. Great Western Railway Co.

contract unreasonable. Do we not feel assured that if we 205] to-day held this *contract unreasonable and that the plaintiff was foolish to make it, he would to-morrow enter into a similar contract, saying to the railway company, "Pray carry my goods at the 40s. instead of the 60s. rate. I will run the risk." Then, if that contract came again before us, how could we hold that it was not just and reasonable? It would be impossible to do so. Then would it be unreasonable for a railway company to say to a man of business, and competent to judge for himself, "We are continually told that our servants are negligent, sometimes they are; we are also often told that they are guilty of wilful misconduct, sometimes they are; but we wish to avoid examining and contesting such assertions, so we will carry your goods at a lower rate, if you will spare us inquiry as to whether any damage that happens to them has been occasioned by either of those causes, and will take the consequences." Were such terms proposed, explained and accepted, I fail to understand how any court would hold they were not just and reasonable. But I think that the question in this case ought to have been dealt with upon the footing that the words "except for the wilful misconduct of servants" were in the agreement; although the observations I have made would have been equally made by me even if they were not; and I would further remark that the clause is not an absolute protection. I am much inclined to think that, if the directors of the railway company were to order that whenever goods came upon those terms they should be put in different trucks, and it turned out that the trucks were not the trucks appropriate to those goods, that would not be the wilful misconduct of the company's servants, because they would be only obeying orders, and not doing anything wrong, and the company might be held to be liable. Therefore, whichever interpretation is given to this—whether the terms are considered with or without the exception of wilful misconduct of the company's servants—I cannot but think the condition just and reasonable.

The burthen of proof is, I suppose, on the company. The proviso of the act is, "that nothing herein contained shall be construed to prevent the . . . companies from making such conditions . . . as shall be adjudged by the court or judge before whom any question relating thereto shall be tried to be just and reasonable. But to my mind 206] the most cogent evidence that the conditions are *just and reasonable is afforded by the fact that the plaintiff entered into this arrangement; he is a cheesefactor, who knows

how cheese will bear travelling, how it ought to be packed, and what its risks are, yet he consents to be bound by the contract, and trusts to the ingenuity of counsel to show that in some way or another the contract is not just and reasonable. I am of opinion that it is a just and reasonable contract, whether taken with or without the qualification I have discussed.

The next and only other question is, was this damage caused by the wilful misconduct of the defendants' servants? Mr. Powell's argument, when analyzed, is to this effect. "The conduct of which we complain was their conduct, and that conduct was misconduct, and it was not accidental, therefore it was wilful." So that, in the result, unless a thing is a pure accident, it is wilful. If a man were walking along and tripped over some goods which he did not happen to see, it would be said that the tripping was the result of his conduct, which was *misconduct*—not accidental but wilful—and that the wilfulness was in not looking out. I do not, however, think the question can be thus dealt with. There is such a mass of authorities to show what "wilful misconduct" is, that we should hardly be justified, as a Court of Appeal, in departing from them, even if we thought them to be wrong. "Wilful misconduct" means misconduct to which the will is a party, something opposed to accident or negligence; the *misconduct*, not the conduct, must be wilful. It has been said, and, I think, correctly, that, perhaps, one condition of "wilful misconduct" must be that the person guilty of it should know that mischief will result from it. But to my mind there might be other "wilful misconduct." I think it would be wilful misconduct if a man did an act not knowing whether mischief would or would not result from it. I do not mean when in a state of ignorance, but after being told, "Now this may or may not be a right thing to do." He might say, "Well, I do not know which is right, and I do not care; I will do this." I am much inclined to think that that would be "wilful misconduct," because he acted under the supposition that it might be mischievous, and with an indifference to his duty to ascertain whether it was mischievous or not. I think that would be wilful misconduct. Is there any evidence of such *wilful miscon- [207 duct here? I really think there is not. It is said that more cheeses were packed in this truck than there ought to have been, and that they were packed in the wrong way. Well, I think there is abundant evidence that if these cheeses had been packed at some place in Cheshire or

1877

Lewis v. Great Western Railway Co.

Shropshire, where they are commonly packed, in order to come to London, they would have been packed differently, and that the right conclusion for the learned judge to have drawn from the evidence would have been that men who were in the habit of packing them, and usually packing in a different manner, must have known that by packing them in this way they were packing them in an unusual, and therefore presumably wrong, way. But I cannot think that there was evidence in this case to show, or on which the learned judge could properly find, that the men who packed these cheeses—who were in London, a place from which much Cheshire cheese is probably not exported—knew that they were doing wrong, or, at all events, that they were aware that mischief might result, and that they, improperly, failed to inform themselves as to whether mischief would or would not result from it. The learned judge who tried the case has found to the contrary, and we ought not to reverse his decision unless we are satisfied that he was wrong. I think he was right, and that the appeal must fail.

BRETT, L.J.: I give no opinion as to whether an amendment was required or not, because if the pleadings did require amendment they ought to have been amended. I shall consider the case, therefore, without regard to the pleadings. Upon the real facts the first question is, whether the company have obtained such a document as gives them some exoneration at least from their ordinary liability as common carriers of these goods. That they did possess a document sufficient to give them some exoneration—if that document was reasonable—is beyond doubt. They have a paper containing conditions as to the carriage, which is admitted to be signed by the consignor, and unless it be unreasonable it is a sufficient writing signed by the consignor as to the conditions of carriage. Then what is the proper construction of that document? It has no words in it referring to any other document, therefore I apprehend that it [208] must be construed by itself, and, as has often been said, within the four corners of it, and that we could not introduce anything which is on the consignment note into it, for there are no words of reference in the one to the other, and therefore it cannot be considered as incorporated by reason of reference. I think we have to construe the signed document by itself, but that in construing it we have a right to avail ourselves of all the ordinary rules of construction, and of all the recognized aids which judges are entitled to make use of in order to construe a written document. Now

I apprehend that, in order to construe a written document, the court is entitled to have all the facts relating to it and which were existing at the time the written contract was made, and which were known to both parties. Certain facts existing at a time when a written contract is made are sometimes customs of trade, or the ordinary usages of trade; sometimes the course of business between the parties; sometimes they consist of a knowledge of the matter about which the parties were negotiating; the court is entitled to ask for those facts, to enable it to construe the written document; not simply because they are customs of trade, or the course of business between the parties, but because they are facts which were existing at the time, and which have a relation to the written contract, and which are things which must be taken to have been known by both parties to the contract. Here there were certain facts given in evidence which, I think, we are entitled to look at to enable us to construe the phrase "owner's risk." The facts known to both parties, as I take it, upon the evidence, were that the Great Western Railway Company had two rates of charge, and that when persons elected to send goods at the one rate the senders and the company understood that the goods were to be taken with the common carrier's risk, and that when they elected to send the goods at the other rate both parties knew that the company were taking them upon different terms; and more than that, it was proved here that the consignor and the Great Western Railway Company knew what those other terms were. They both knew that those terms were that the company should be absolved from all risk, except the wilful misconduct of their servants, and both parties knew that the phrase "owner's risk" was used commonly between them where one of those two liabilities was intended to be incurred. Those facts being known to *both parties, we have to construe the phrase "own- [209
er's risk." If the liability were inconsistent with either of those two contracts, we could not attribute it to that one with which it was inconsistent, notwithstanding any knowledge obtained as to the facts surrounding the transaction. But here "owner's risk" might be applied to the more limited liability of the company and to the form of contract under which, I say, both parties knew the company was in the habit of carrying; and, under those circumstances it seems to me that within the very terms of the document signed we should construe "owner's risk" as meaning, between these parties, that the company were to be absolved from all liability for damage in the carriage of these goods,

unless that damage was caused by the wilful misconduct of their servants. Now, that being the interpretation of the contract, the question arises whether such condition is just and reasonable? If there had been no real alternative rate which the consignor might elect to take, I should have said that the cases show that the condition which absolved the company from the negligence of their servants would be unjust and unreasonable; but it has been held, and I think that we ought and are bound to hold, that where there is a real alternative rate—and so a real power of choice left to the consignor as to the rate at which he can send his goods—that that is a power given to the consignor which may make conditions reasonable and just, which would be unjust and unreasonable if there was not that power of election. Therefore, so far, the contract having this exception in it of the wilful misconduct of the defendants' servants, I think we ought to say that the considerations here are just and reasonable, and I think there is authority in the cases which have been cited for declaring that to be the true construction. Although there is the alternative rate of carriage, if the exception as to the wilful misconduct of the defendants' servants had not been in the document, I confess I should at least have hesitated very much before I could have held, or consented to a judgment affirming, that the terms were fair and reasonable. I am not prepared to say that the agreement of the parties to specific conditions is conclusive proof that those conditions are just and reasonable, even although there is an alternative rate; and I regret that I cannot, as at present advised, agree with what Bram-210] well, L.J., *has said upon that subject, and I do not think that the agreement of the parties to specific conditions written into the contract is conclusive, so that the court must hold those conditions to be just and reasonable. On the contrary, the inclination of my opinion is that even though the parties had agreed to them, and the conditions were specified, and even if, as my Lord suggested, after a decision of the court, the consignors were again to agree to send their goods on the same terms, it would be for the court, notwithstanding, to say, when all the facts undisputed or found were laid before them, whether the conditions were just and reasonable, and if they were unjust and unreasonable on the first occasion, then, as far as I can see, on the second supposed occasion they would be equally unjust and unreasonable. The consent of the parties does not make that reasonable and just which in the opinion of the court is unjust and unreasonable, therefore I should hesitate to go so

far; but it is not necessary to do so for the decision of this case. Assuming the construction of the contract to be as I have said, it has in it the exception as to the wilful misconduct of the company's servants; there is a real alternative rate for the two contracts, and therefore I think that the contract into which those parties did enter, or, rather, the conditions into which they entered, must be held to be fair and reasonable. If that be so, the only question is whether it can be said that the learned judge was wrong, in finding that there was not wilful misconduct on the part of the railway company's servants. In a contract where the term wilful misconduct is put as something different from and excluding negligence of every kind, it seems to me that it must mean the doing of something, or the omitting to do something, which it is wrong to do or to omit, where the person who is guilty of the act or omission knows that the act which he is doing, or that which he is omitting to do, is a wrong thing to do or to omit; and it involves the knowledge of the person that the thing which he is doing is wrong; I think that if he knows that what he is doing will seriously damage the goods of a consignor, then he knows that what he is doing is a wrong thing to do; and also, as my Lord has put it, if it is brought to his notice that what he is doing, or omitting to do, may seriously endanger the things which are to be sent, and he wilfully persists in doing that against which he is warned, careless *whether he may be doing damage [211] or not, then I think he is doing a wrong thing, and that that is misconduct, and that, as he does it intentionally, he is guilty of wilful misconduct; or if he does, or omits to do something which everybody must know is likely to endanger or damage the goods, then it follows that he is doing that which he knows to be a wrong thing to do. Care must be taken to ascertain that it is not only misconduct but wilful misconduct, and I think that those two terms together import a knowledge of wrong on the part of the person who is supposed to be guilty of the act or omission. Such being the construction of the words, the question is, whether the learned judge was right or wrong in the decision to which he came; considering that these goods were sent from the Great Western Railway station in London and that there is no evidence of any peculiar knowledge on the part of the railway officials there as to the mode of loading these cheeses—there is really no evidence as to any knowledge on the part of the persons who packed these cheeses—I not only think that my Brother Lopes was right in the decision to which he came, but I confess it seems to me that there was no evidence

1877

Lewis v. Great Western Railway Co.

which could have been properly submitted to a jury as to any wilful misconduct on the part of those who packed these cheeses. I therefore think that the judgment of my Brother Lopes was right, and that our judgment must be for the defendants.

COTTON, L.J.: The question in this case is whether, having regard to s. 6 of the Railway Traffic and Canal Act, 1854, the company can make a contract or conditions between themselves and the plaintiff which relieve them of liability in the present case. The first question for us is what is the contract? It is conceded by the plaintiff's counsel that the document signed by Hutchinson must be considered as the contract. What are its conditions? We must construe it as we should any other written contract, remembering only that the act requires that there must be a valid contract in writing signed, and that the conditions of it must be reasonable. The only part of the present contract we need now consider is the term "owner's risk." The document signed by Hutchinson does not in any way refer to the consignment note, and I do not treat the document as if the note were 212] embodied *in it, nor do I refer to the consignment note as by itself enabling us to put a construction on the contract in the document signed by the plaintiff's agent. But in this, as in all other cases, we are entitled to look to the surrounding circumstances; we cannot look to the acts of the parties for the purpose of finding what their intention was, but we may look to the course of dealing of the parties to see whether they have given a conventional meaning to any terms used in the contract, and then the question becomes one simply of construction of the contract. From the evidence it appears that the plaintiff had sent goods to the railway company previously in exactly the same manner as in the present case, viz., under a consignment note, containing the words "owner's risk," and that it had been acted upon by the railway company sending the goods at the lower rate, and, in fact, with the condition that they were not to be liable except for wilful misconduct of their servants. The plaintiff knew that, and that he and the company had treated the words as meaning the same thing. Therefore we are justified in arriving at the conclusion that, upon a proper construction of that written document, it was a contract as between the plaintiff and the railway company by which the plaintiff contracted to send his goods subject to that condition under which they agreed to take them. It is a contract in writing therefore signed by him, containing the condition that the railway company carrying at the

lower rate shall not be liable, except for wilful misconduct on the part of their servants. Was that a just and reasonable condition within the meaning of the act? For although there is a signed contract we are bound by the decision of *Peek's Case* ⁽¹⁾, from which I do not for one moment dissent, to consider whether they are so. A thing cannot be said to be in the abstract reasonable. We must in dealing with it take into consideration the facts in reference to which it would be reasonable or unreasonable, and one of those facts is this, viz., whether or no the party who has signed the contract had it forced upon him without an option, or whether the railway company gave him the option of having his goods carried in some other way. So, no doubt, the alternative contract is a circumstance, and a most material circumstance, in considering *whether or no the con- [213] dition is reasonable; and in this case, having regard to the fact that there was an alternative contract into which he might have entered to have the goods carried at the parliamentary rate, with all the liability upon the company of common carriers, and having regard also to the decisions on this actual condition, I certainly think that we ought to hold that the condition is a reasonable condition. But I must not be deemed to assent to the proposition at one time pressed on us in argument, that if there is an alternative contract open to parties sending goods, no condition of the contract signed by him can be held to be unreasonable within the meaning of the act of Parliament. Were it necessary to decide any such question, I should certainly take time to consider it. But it is not, and I refrain from expressing any opinion on it. Then the sole question for decision is really this, viz., whether a condition in these terms does or does not protect the company, that is to say, whether there was or was not wilful misconduct on the part of the servants of the company. Now, I do not think there can be any doubt at all that wilful misconduct is something entirely different from negligence, and far beyond it, whether the negligence be culpable, or gross, or howsoever denominated. There must be the doing of something which the person doing it knows will cause risk or injury, or the doing of an unusual thing with reference to the matter in hand, either in spite of warning or without care, regardless whether it will or will not cause injury to the goods carried or other subject-matter of the transaction. It was asked by counsel in argument would it not be wilful misconduct on the part of the servants of the Great Western Railway Company to

(1) 10 H. L. C., 473; 32 L. J. (Q.B.), 241.

put a horse into an open truck? Certainly it would, because every one must be aware that putting a horse into an open truck, out of which he could jump, would, in all probability, lead to the consequence that as soon as the train started the horse would try to jump out and be seriously injured. We have now to deal with the servants of the railway company loading cheese, but it is not every one who knows that cheese of this description will be injured if packed as these cheeses were packed. Nobody could say that all cheese would be damaged by the mode of packing adopted in this case. It is in evidence that cheeses—which presumably may be a large proportion of the cheeses coming to *Paddington—are packed just as these cheeses were packed. Then it was said that cheeses—which it may be supposed come also to the Great Western at Paddington—of this particular class are packed in this particular way. Obviously the persons who would have to unpack the trucks do not look so carefully at the mode in which they are packed as when they pack them—I mean that if the attention of the servants of the railway company were called to the two modes of packing, I do not know whether they would at once observe that cheeses coming from one district were packed in one way, and those from another district were packed in another way. If they did, they would not necessarily know the reason, or that cheeses were improperly packed, or packed in such a way as to cause damage to them, when they were put on their edges one tier above the other. Persons in Shropshire and Cheshire would, of course, look upon the matter in a different light, and therefore to my mind the evidence of the witnesses from those counties who said that they would not have packed cheese in this way, does not really show that the servants of the company at Paddington—and they are the servants with whose conduct we have to deal—were guilty of misconduct, certainly not of wilful misconduct, when they packed the cheeses in the manner which is said to have led to the mischief. Therefore, not only do I hold that the learned judge was right in the decision to which he came after seeing and hearing all the witnesses, but so far as I can satisfy myself from the evidence, or on the portion of it which has been read to us, I myself should have arrived at the same conclusion.

Judgment affirmed.

Solicitors for plaintiff : *J. & F. Needham*, for Morris.

Solicitor for defendants : *R. R. Nelson*.

A common carrier cannot limit his common law responsibilities by any general notice, though the knowledge of such general notice be brought home to the consignor before or at the time he applied to have his goods transported: *Brown v. Adams*, etc., 15 West Va., 812; *Kerr v. Liverpool*, etc., 12 N. Y. Weekly Dig., 164.

That a carrier may contract for a limited or restricted liability is held in the following States (21 Eng. Rep., 68 note):

Connecticut: *Camp v. Hartford*, etc., 43 Conn., 333.

Illinois: *Chicago*, etc., *v. Hale*, 2 Bradw., 150; *Merchants*, etc., *v. Lysor*, 89 Ills., 43.

Missouri: *Rice v. Kansas*, etc., 63 Mo., 314.

New York: *Germania*, etc., *v. Memphis*, etc., 72 N. Y., 90.

But see *McKinney v. Jewett*, 24 Hun, 21, as to negligence by the carrier or its servants.

Ohio: *Gaines v. Union*, etc., 28 Ohio St. R., 418.

West Virginia: *Brown v. Adams*, etc., 15 W. Va., 812.

Wisconsin: *Morrison v. Phillips*, 44 Wisc., 405.

In some of the states it is held to be contrary to public policy to allow a carrier to contract for a restricted liability.

United States, Supreme Court: *Bank v. Adams*, 93 U. S., 174.

Otherwise as to the value of articles shipped: *Railroad v. Fraloff*, 100 U. S. R., 24, affirming 10 Blatchf., 16.

A clause of exemption must be clear, explicit and unequivocal: *Kinney v. Jewett*, 12 Weekly Dig., 42.

A clause in a receipt for goods by the carrier, exempting him from common law liability, is not binding on the shipper unless he knew of and assented to it, and the shipper's acceptance of the receipt does not bar him from showing he did not know of such clause: *Merchants*, etc., *v. Sheilbar*, 86 Ills., 71.

See *Hadd v. Express Co.*, 52 Verm., 335.

Possession by a shipper of a carrier's receipt for the property, containing special terms, is at least *prima facie* evidence of his assent to them, and in most cases may be conclusive: *Wilde v. Merchants*, etc., 47 Iowa, 272; *Germania*, etc., *v. Memphis*, etc., 72 N. Y., 90; *Hill v. Syracuse*, etc., 73

id., 351; *Morrison v. Phillips*, etc., 44 Wisc., 405.

In some states the contrary is held: **Illinois:** *Erie*, etc., *v. Dater*, 91 Ills., 195; *Bosconitz v. Adams*, etc., 93 id., 523.

Vermont: *Hadd v. American*, etc., 52 Verm., 335.

Where no receipt is given at the time a package is delivered to an express company for transportation, the company cannot limit its liability by a receipt afterwards given, when the proof negatives all presumption of any knowledge on the part of the shipper that the receipt contained a clause limiting the carrier's liability, or that the carrier claimed any such limitation: *Amer. Ex. Co. v. Spellman*, 90 Ills., 455.

Where the carrier sent the shipper a receipt, after the goods had left, containing a restricted liability clause or one different from an oral contract, and the shipper called the carrier's attention to the difference, when he was informed it would make no difference: *Held*, the prior agreement was not merged in the receipt: *Shiff v. N. Y. Cent.*, etc., 16 Hun, 278; *Wilde v. Merchants*, etc., 41 Iowa, 247; *Gaines v. Union*, etc., 28 Ohio St. R., 418.

The question whether a party accepted a receipt with notice of its contents, or with notice that it contained a restricted liability, is one of evidence to be determined by the jury, where there is any evidence tending to show he did not: *Madan v. Shepard*, 73 N. Y., 330; *Gaines v. Union*, etc., 28 Ohio St. R., 418; *Merchants*, etc., *v. Lysor*, 89 Ills., 43; *Merchants*, etc., *v. Joesting*, Id., 152; *Erie*, etc., *v. Dater*, 91 id., 195; *Bosconitz v. Adams*, etc., 93 id., 523; *Hadd v. Express Co.*, 52 Verm., 335.

Where a receipt for baggage, containing restricted liability, was handed to a passenger in a dimly lighted car where he could not well read it, without his attention being called to it, and the court refused to charge, as matter of law, that the delivery of the receipt created a contract for restricted liability, but submitted the question to the jury; held, no error. That defendant, in order to relieve itself from full liability, was bound to establish a contract upon the special terms contained in the receipt; that no such contract arose, as matter of law, from the accept-

1877

Lewis v. Great Western Railway Co.

ance of the receipt under the circumstances: *Madan v. Shepard*, 73 N. Y., 830; *Merchants, etc., v. Joesting*, 89 Ills., 152; *Erie, etc., v. Dater*, 91 id., 195; *Bosconitz v. Adams, etc.*, 93 id., 523.

The acceptance by the shipper of a receipt containing a restricted liability clause, will not bind the consignee without proof of authority from him by the shipper to make a contract for such restricted liability: *Merchants, etc., v. Joesting*, 89 Ills., 152.

Where the shipper accepted a receipt for property shipped at reduced rates with the words "O. R.," signifying "Owner's Risk," held that his testimony that he did not "see" those letters, but not that he did not understand their meaning. Held that the restricted liability clearly appeared by the plaintiff's evidence, and had not been overcome: *Morrison v. Phillips, etc.*, 44 Wisc., 405.

An instruction that unless the consignor assented, and knowingly intended to assent, to the restrictions in the contract, the defendant would not be relieved from its common law liability, and that the jury were to determine whether the consignor understood the terms of the receipt, is erroneous. Although this may be the rule where the consignor merely took a receipt containing conditions, yet where a contract is executed by the shipper, and there is no reason why it should not be held valid, it is not a question to be left to the jury to determine whether or not the consignor understood its terms: *C. B. & Q. R. R. Co. v. Hale*, 2 Bradw. Rep., 154.

One who ships his own goods consigned to a person who has special contract with the carrier for the carriage of goods at reduced rates, at the owner's risk, and afterwards accounts with his consignee for the freight charges paid by the latter on the goods at the reduced rates, will not be held to have ratified the contract as one for the carriage of such goods, at his risk, unless it appears that he had notice of such contract: *White v. Goodrich Trans. Co.*, 46 Wisc., 494.

Where, on delivery of property to a carrier, it gave him a shipping receipt, and afterwards a bill of lading, held that the bill of lading and not the shipping receipt embodied the contract of

the parties: *Wilde v. Merchants, etc.*, 47 Iowa, 272.

A common carrier which receives goods from a connecting line is not entitled to the benefit of any limitation upon its common law liability, contained in an express contract entered into between the latter and consignor, in its own behalf and for its own protection: *Bancroft v. The Merchants' Dispatch Trans. Co.*, 47 Iowa, 262.

The first carrier has no authority to bind the shipper by a contract for restricted liability with a connecting carrier: *Babcock v. Lake Shore, etc.*, 49 N. Y., 491.

A contract by the first carrier for a restricted liability does not enure to the benefit of a connecting carrier to whom the goods are delivered: *Ætna, etc., v. Wheeler*, 49 N. Y., 616.

An exception in its bill of lading "that the express company is not to be liable in any manner or to any extent for any loss or damage or detention of such package, or its contents, or of any portion thereof, occasioned by fire," does not excuse the company from liability for the loss of such package by fire, if caused by the negligence of a railroad company to which the former had confided a part of the duty it had assumed: *Bank of Kentucky v. Adams' Ex. Co.*, 93 U. S. Rep., 174.

An exemption from damage resulting from breaking of machinery does not exempt the carrier, if after machinery break, instead of putting in for repairs he keep on, and unnecessarily increase the length of the voyage, thus producing damage: *Sherman v. Inman, etc.*, 11 N. Y. Weekly Dig., 267.

So an exemption from damages while waiting delivery, if such damages result from negligence by the company in failing to deliver or notify the consignee: *McKinney v. Jewett*, 24 Hun, 19.

So as to an injury from unsafe machinery furnished by carrier in loading: *Potter v. Sharp*, 24 Hun, 179.

Where a carrier receives goods to be delivered to a connecting carrier, he is liable for it as carrier until he notifies the connecting carrier of its arrival and a reasonable time for its removal by the latter: *Ayres v. Western R. R.*, 14 Blatchf., 9; *Bancroft v. Merchants, etc.*, 47 Iowa, 262; *Faulkner v. Hart*, 82 N. Y., 413, reversing 44 N. Y. Supr. Ct., 471.

So a carrier, who delivers goods to a connecting carrier, is not usually liable for any injury to them after they leave his custody: *Pittsburg, etc., v. Morton*, 61 Ind., 539.

Where a common carrier stipulates in a bill of lading, issued to a shipper, that it will carry his goods to their destination without transfer, in cars owned and controlled by the company, it is bound to transport the goods to the terminus designated in the bill of lading, without change of cars, and if it fail to do so it cannot avail itself of any restriction upon its common law liability contained in the contract, in the event of the loss of the goods: *Stewart v. Merchants' Dispatch Trans. Co.*, 47 Iowa, 229.

Though where the "Red Line" was run by several connecting carriers, held, that the first carrier who had properly delivered the property to a connecting carrier, was not liable: *Shift v. N. Y. Cent., etc.*, 16 Hun, 278.

In some of the States it is held that a common carrier, who receives goods consigned to a point beyond the terminus of his own route, and does not, by express agreement, limit his own liability to losses or injuries over his own line, is liable for losses or injuries beyond his own line to the designated place:

Alabama: *Mobile, etc., v. Copeland*, 63 Ala., 219.

Missouri: *Grover, etc., v. Missouri*, etc., 70 Mo., 672.

In others, that in the absence of a stipulation by a carrier to transport freight beyond the terminus of its own route, it is not responsible for the fault of those it employs to convey the remainder of the distance; but if it make itself responsible by contract, or if an agreement to be so can be fairly inferred from the bill of lading, it will be liable for a misdelivery of the goods by another carrier to whom it has delivered by them to be carried to their ultimate destination.

Ireland: *Teats v. Dundalks, etc.*, Irish R., 6 C. L., 536.

Mississippi: *Crawford v. Southern*, etc., 51 Miss., 223.

New Hampshire: *Gray v. Jackson*, 51 N. H., 9, 12 Am. R., 40, 5 Am. Law Times, 438.

Pennsylvania: *Clyde v. Hubbard*, 88 Penn. St. R., 358; *Philadelphia, etc., v. Ramsey*, 89 id., 474.

Vermont: *Hadd v. Express Co.*, 52 Verm., 335.

As to the sale of tickets for passengers, in some States it is held that the company selling them is simply the agent of connecting lines, and is not liable for an injury inflicted upon a passenger in a connecting line:

Tennessee: *N. & C., etc., v. Spraguey*, 8 Baxter, 341.

A general freight agent has power to bind a railway company to carry freight beyond the terminus of its line, but a station agent has not: *Grover, etc., v. Missouri, etc.*, 70 Mo., 672; *Wait v. A. & S. R. R.*, 5 Lans., 475.

See *M'Comb v. London, etc.*, Irish, 8 C. L., 107, id., 462.

As to liability of a carrier for injury to stock, under a clause that no damages will be paid for injury to the cattle unless notice of the alleged injury is given before the cattle are unloaded, see *Rice v. Kansas, etc.*, 63 Mo., 314.

As to the liability of a carrier of live animals for injury from delay, and its duty to have appliances for unloading at the end of its route, see *Dunn v. Hannibal & St. Jo.*, 68 Mo., 268; *Penn. v. B. & E. R. R.*, 49 N. Y., 204; *Bills v. N. Y. Cent. R. R.*, 53 id., 608; *S. C.*, on second appeal, 11 N. Y. Weekly Dig., 559.

As to the amount or value of baggage for which a carrier of passengers is liable, see *Railroad v. Fraloff*, 100 U. S. R., 24, affirming 10 Blatchf., 16; *Baldwin v. Lackawanna, etc.*, 74 N. Y., 125.

Where the injury was caused by the breaking of a wheel under a freight car in the train, which threw the car containing plaintiff's horses from the track. The track was in good order; the wheel had been used for only a short time, and, upon inspection after the accident, showed no flaw or defect; and there was no evidence, except the mere fact of its breaking, which tended to show negligence of the company. Held, that there was no error in directing a verdict for the defendant: *Morrison v. The Phillips & Colby Construction Co.*, 44 Wisc., 405.

Shropshire, where they are commonly packed, in order to come to London, they would have been packed differently, and that the right conclusion for the learned judge to have drawn from the evidence would have been that men who were in the habit of packing them, and usually packing in a different manner, must have known that by packing them in this way they were packing them in an unusual, and therefore presumably wrong, way. But I cannot think that there was evidence in this case to show, or on which the learned judge could properly find, that the men who packed these cheeses—who were in London, a place from which much Cheshire cheese is probably not exported—knew that they were doing wrong, or, at all events, that they were aware that mischief might result, and that they, improperly, failed to inform themselves as to whether mischief would or would not result from it. The learned judge who tried the case has found to the contrary, and we ought not to reverse his decision unless we are satisfied that he was wrong. I think he was right, and that the appeal must fail.

BRETT, L.J.: I give no opinion as to whether an amendment was required or not, because if the pleadings did require amendment they ought to have been amended. I shall consider the case, therefore, without regard to the pleadings. Upon the real facts the first question is, whether the company have obtained such a document as gives them some exoneration at least from their ordinary liability as common carriers of these goods. That they did possess a document sufficient to give them some exoneration—if that document was reasonable—is beyond doubt. They have a paper containing conditions as to the carriage, which is admitted to be signed by the consignor, and unless it be unreasonable it is a sufficient writing signed by the consignor as to the conditions of carriage. Then what is the proper construction of that document? It has no words in it referring to any other document, therefore I apprehend that it [208] must be construed by itself, and, as has often *been said, within the four corners of it, and that we could not introduce anything which is on the consignment note into it, for there are no words of reference in the one to the other, and therefore it cannot be considered as incorporated by reason of reference. I think we have to construe the signed document by itself, but that in construing it we have a right to avail ourselves of all the ordinary rules of construction, and of all the recognized aids which judges are entitled to make use of in order to construe a written document. Now

I apprehend that, in order to construe a written document, the court is entitled to have all the facts relating to it and which were existing at the time the written contract was made, and which were known to both parties. Certain facts existing at a time when a written contract is made are sometimes customs of trade, or the ordinary usages of trade; sometimes the course of business between the parties; sometimes they consist of a knowledge of the matter about which the parties were negotiating; the court is entitled to ask for those facts, to enable it to construe the written document; not simply because they are customs of trade, or the course of business between the parties, but because they are facts which were existing at the time, and which have a relation to the written contract, and which are things which must be taken to have been known by both parties to the contract. Here there were certain facts given in evidence which, I think, we are entitled to look at to enable us to construe the phrase "owner's risk." The facts known to both parties, as I take it, upon the evidence, were that the Great Western Railway Company had two rates of charge, and that when persons elected to send goods at the one rate the senders and the company understood that the goods were to be taken with the common carrier's risk, and that when they elected to send the goods at the other rate both parties knew that the company were taking them upon different terms; and more than that, it was proved here that the consignor and the Great Western Railway Company knew what those other terms were. They both knew that those terms were that the company should be absolved from all risk, except the wilful misconduct of their servants, and both parties knew that the phrase "owner's risk" was used commonly between them where one of those two liabilities was intended to be incurred. Those facts being known to *both parties, we have to construe the phrase "own- [209
er's risk." If the liability were inconsistent with either of those two contracts, we could not attribute it to that one with which it was inconsistent, notwithstanding any knowledge obtained as to the facts surrounding the transaction. But here "owner's risk" might be applied to the more limited liability of the company and to the form of contract under which, I say, both parties knew the company was in the habit of carrying; and, under those circumstances it seems to me that within the very terms of the document signed we should construe "owner's risk" as meaning, between these parties, that the company were to be absolved from all liability for damage in the carriage of these goods,

1877

Hall v. Pritchett.

erned by the opinion expressed by the court in *Jones v. Thompson* (¹), an opinion in which we entirely concur.

Rule absolute.

Solicitors for garnishees: *Van Sandau & Cumming*, for Joseph Batley, Town Clerk, Huddersfield.

(¹) E. B. & E., 63; 27 L. J. (Q.B.), 234.

See Drake on Attachment (5th ed.), §§ 492-516.

As matter of public policy, the salaries of public officers cannot be attached or garnished even though due: *Ward v. Hartford*, 12 Conn., 404; *Rodman v. Musselman*, 12 Bush (Ky.), 354; *Keyser v. Rice*, 47 Maryland, 203; *Hathorn v. St. Louis*, 11 Missouri, 59; *Waldman v. O'Donnell*, 57 How. Pr., 215; *Remmey v. Gedney*, 57 id., 217 note, and cases cited; *Swepson v. Turner*, 76 N. C., 115; *Bank v. Dilrell*, 8 Sneed, 379; *Bradley v. Cooper*, 6 Vermont, 121.

See *Duncan v. Rief*, 3 Penn. (Penrose & Watts), 368.

The salaries due officers of towns and cities may be attached (in Kentucky), and subjected to the payment of their debts: *Rodman v. Musselman*, 12 Bush (Ky.), 354.

An assignment by a public officer of the future salary of his office is contrary to public policy, and is void: *Bliss v. Lawrence*, 58 N. Y., 442, distinguishing *Brackett v. Blake*, 7 Met., 335; *Mulhall v. Quinn*, 1 Gray, 105; *Macomber v. Doane*, 2 Allen, 541, and disapproving *State Bank v. Hastings*, 15 Wisc., 78; *Beal v. McVicker*, 8 Mo. App. R., 202.

A judgment creditor cannot, in proceedings supplementary to execution, reach the salary of the debtor for the month in which the order is served, even though served on the last day of the month. The salary is not due till the next day: *Bank v. Beardsley*, 8 N. Y. Weekly Dig., 7.

The tuition fees of a teacher, though payable in advance, are exempt as his earnings for the ensuing sixty days: *Miller v. Hooper*, 19 Hun, 394.

While the law protects the earnings of judgment debtors in so far as they are needed in the support of his family, it cannot be pretended that if such salary largely exceeds that limit, it cannot be reached by the creditor. In this case

the debtor lives in a furnished house rent free, being owned by his wife, and has only his wife, one child and himself to support, with a salary of \$3,500 a year. His testimony that he delivers his salary to his wife, who keeps a bank account, certainly shows that it does not go wholly to the support of his family. He is therefore ordered to pay to the receiver \$50 every month until the judgment, cost and expenses are fully paid: *Bishop v. Hornsberg Daily Register*, Aug. 2, 1881, p. 212.

So, money in the hands of a public officer to satisfy a demand which one has on him as a public officer, cannot be attached: *Chealey v. Brean*, 7 Mass., 259.

Money in the hands of school officers due to a teacher is not the subject of garnishment: *Bivens v. Harper*, 59 Ill., 21; *Millison v. Fisk*, 43 id., 112.

So money due from a county to a juror: *Williams v. Boardman*, 9 Allen, 570.

So of a seaman on a public vessel: *Buchanan v. Alexander*, 4 How. U. S., 20; 2 Cranch, 344.

So money awarded to one as damages in the laying out of a street over his lands: *Fellows v. Duncan*, 13 Metcalf, 332.

Where labor contracted for is performed, and nothing remains except to fix its amount and value, it may be attached, though by the contract an estimate and certificate of a third person is required. The obtaining of the certificate is not a contingency within the meaning of the law: *Ware v. Gowen*, 65 Maine, 534.

Money due from a municipal corporation to a judgment debtor, even though denied by the corporation, may be reached on proceedings supplementary to execution. A receiver may be appointed to sue for and collect it. The rule that a debt due from a municipal corporation cannot be reached by process of garnishment, has no application

to an order of this character: *Knight v. Nash*, 23 Minn., 452; *Rodman v. Musselman*, 12 Bush (Ky.), 854.

A state cannot be sued in its own courts without its consent, and therefore money in the hands of the state's treasurer due to a non-resident debtor cannot be attached at the suit of a creditor: *Loder v. Baker*, 89 N. J. Law, 49; *Rodman v. Musselman*, 12 Bush (Ky.), 354.

A United States voucher (property of a defendant), which has been given to him for personal (but not official) services rendered by him to the United States, may be a proper subject of garnishment: *Leighton v. Heagerty*, 21 Minn., 42.

The question whether a sheriff or constable who has collected money on an execution or attachment in favor of a party can, on receiving an execution or attachment against the party for whom the collection was made, levy upon the moneys so collected, or apply such moneys upon the process against the person for whom the collection has been made, is one of much confusion and perplexity. In the following cases it has been held he could:

Illinois: *Millison v. Fisk*, 43 Ills., 112.

Maine: *Hardy v. Tilton*, 68 Maine, 195, and numerous cases cited, 28 Am. Rep., 84, and note, p. 85.

New York: *Muscott v. Woolworth*, 14 How. Pr., 477; *Adams v. Welsh*, 43 N. Y. Superior Ct. R., 52.

See *Baker v. Kenworthy*, 41 N. Y., 215; *Betts v. Hoyt*, 19 Barb., 412; *Dunlop v. Patterson*, 74 N. Y., 152.

United States, Supreme Court: *Turner v. Fendell*, 1 Cranch, 117.

Gold and silver coin collected by an attorney-at-law on a claim due his client cannot be attached in the ordinary way, in his hand, as the property of the client since the obligation of the attorney to pay it over is but a chose in action, and the specific coin has not been vested in the principal: *Maxwell v. McGee*, 12 Cush., 137.

Where a constable by virtue of an execution levied on the property of A., by virtue of a subsequent attachment against A. on the same property, sold it by virtue of the execution, and subsequently received an execution in the attachment suit: Held, the latter execution became a lien on the surplus

arising from the sale of the property under the first execution: *Wheeler v. Smith*, 11 Barb., 845.

Money due on a decree of a court of chancery is not the subject of attachment: *Black v. Black*, 32 N. J. Eq., 74. See *Dunlop v. Patterson*, 74 N. Y., 151.

Money deposited with the clerk of a court, in lieu of an undertaking on appeal, is liable to an attachment in an action by a third person against the depositor. The right of the latter in the deposit is not contingent. The ultimate title remains in him, subject to the claim of the respondent on the appeal: *Dunlop v. Patterson*, etc., 74 N. Y., 145, distinguishing *Freeman v. Howe*, 24 How. U. S., 450; *Turner v. Fendell*, 1 Cranch., 117; *Baker v. Kenworthy*, 41 N. Y., 215; *Spinner v. Zimmerman*, 23 N. J. Law (3 Zab.), 150; *Chealey v. Brewer*, 7 Mass., 259; *Bulkley v. Eckert*, 3 Penn. (Penrose & Watts), 368; *Coppell v. Smith*, 4 T. R., 312.

Where, after a constable had levied on property, a deputy sheriff also levied upon and sold it for more than enough to pay the constable's execution, held, the deputy was liable to the constable for the amount of his execution: *Betts v. Hoyt*, 19 Barb., 412.

If a sheriff have a surplus in his hands arising from a sale on an execution, the court will order it to be paid over on a *fi. fa.* issued at the suit of another plaintiff: *Ball v. Ryers*, 8 Caines, 84, Col. & Caines' Cas., 435; *Armisted v. Philpot*, 1 Doug., 231.

See *Dunlop v. Patterson*, etc., 74 N. Y., 152.

A sheriff, under a writ of *fi. fa.*, seized and sold a term of years, and after satisfying the claim of the execution creditor a balance remained in his hands. Held, that the sale having been of an entire chattel, such balance was a debt due by the sheriff to the execution debtor, capable of being attached under the garnishee clauses of the Common Law Procedure Act: *Woulfe v. Minihane*, L. R., 4 Ireland, 822, approving *O'Neill v. Cunningham*, Ir. Rep., 6 C. L., 503.

Moneys in the hands of a sheriff, raised by him in pursuance of a decree of the Court of Chancery, are liable to seizure by virtue of a writ of attachment: *Conover v. Ruckman*, 33

1877

Hall v. Pritchett.

N. J. Eq., 303, reversing 82 id., 685, explaining *Spinner v. Zimmerman*, 23 N. J. Law (8 Zab.), 150; *Hill v. Beach*, 12 N. J. Eq. (1 Beas.), 81, and approving *Crane v. Freese*, 16 N. J. Law (1 Harr.), 305, and *Davis v. Mahany*, 38 N. J. Law, 104.

Money in the hands of a receiver of a court, a portion of which will ultimately become due to a party, cannot be attached: *Drake on Attachment* (5th ed.), §§ 509a; *Goldzier v. Young*, 1 City Courts Rep., 84.

Though, after the court has ordered the receiver to pay a definite certain sum to one, it may be attached: *Drake on Attachment* (5th ed.), § 409a; *Williams v. Jones*, 38 Md., 555.

But see *Matingley v. Grimes*, 48 Md., 102; *Earley v. Dorsett*, 45 id., 462.

Whether money paid to an officer of a court in satisfaction of a judgment can be attached, see *Bland v. Andrews*, 45 U. C. Q. B., 431; *Dolphin v. Layton*, 4 Com. Pl. Div., 130.

Where a judgment has been recovered against an assignee in bankruptcy, an order cannot be made, under section 204 of the code, requiring a bank, a depository of United States funds, to pay over to the judgment creditor money belonging to the estate of the bankrupt, deposited by the assignee with it: *Havens v. National City Bank of Brooklyn*, 4 Hun, 131.

Where a banker voluntarily, and without authority from the depositor, counted out the amount of the deposit, in bank notes and specie, and handed it to a sheriff holding an execution against the depositor, and the sheriff levied upon the money and sold it:

Held, that the money thus separated by the banker from the contents of his

vault was his property, and not that of the depositor, and was not liable to levy under an execution against the latter: *Carroll v. Cone*, 40 Barb., 220.

Where property is in the possession of an officer of a State court, an officer of a Federal cannot attach it: *Ship Orpheus*, 3 Ware, 143.

A sheriff, holding an execution issued against the property of a debtor who has made an assignment in trust for the benefit of creditors, which execution he is unable to collect, after having attached moneys deposited by the assignee in a trust company, being a part of the assigned property, or the proceeds thereof, may maintain an action against the debtor, his assignees, and the trust company, to have the assignment adjudged fraudulent and void as against the attaching creditor, and for the payment of the execution out of the money in deposit: *Kelly v. Lane*, 42 Barb., 594.

An assignment of moneys in the hands of a sheriff or constable, collected by him, is good as against a subsequent levy thereon and payment to a creditor of the person for whom the collection was made, even though the officer had no notice of the assignment: *Baker v. Kenworthy*, 41 N. Y., 215; *Williams v. Jones*, 38 Md., 555.

An officer, having a joint execution against two whose several property he attached on the original writ, is not bound to levy equally, so far as may be practicable, on the property of each, but may levy on any of the property attached, without regard to a second attachment made by him at the suit of a creditor of one of the same defendants: *Parker v. Dennie*, 6 Pickering, 226.

[3 Queen's Bench Division, 217.]

Nov. 28, 1877.

THE LONDON TRAMWAYS COMPANY, Limited, Appellants;
BAILEY, Respondent.

Tramway Company—Agreement with Conductor—Manager of Company sole Judge between Company and Conductor—Jurisdiction of Magistrate, how far affected.

The complainant became conductor of a tramway company under an agreement by which he was to pay them £5, to be retained, together with his wages for the current week, as security for the discharge of his duties and the observance of the rules of the company, &c.; the company to have power, in case of any breach by the conductor of the rules, to retain the £5 and his wages for the current week as liquidated damages for such breach; and it was provided that "the manager of the company should be the sole judge between the company and the conductor whether the company was entitled to retain the whole or any part of the £5 and wages for the current week as liquidated damages; and that the certificate should be binding and conclusive evidence in all courts of justice, civil and criminal, and before all stipendiary and police magistrates, &c., that the amount thereby certified as the amount to be retained was the true amount to be retained, and should bar the conductor of all right to recover it." The complainant having summoned the company before a police magistrate, under 6 & 7 Vict. c. 86, to recover his deposit and wages:

Held, that the agreement was not illegal, and the complaint being substantially a civil proceeding, the manager's certificate that the deposit and wages had been forfeited was conclusive evidence of the fact, precluding the magistrate from making any further inquiry.

CASE stated by a metropolitan magistrate, under 20 & 21 Vict. c. 43.

On the 29th of June, 1877, a summons was issued from the Southwark Police Court, on the complaint of George Bailey, *herein called the complainant, to the Lon- [218
don Tramways Company, herein called the defendants, under 6 & 7 Vict. c. 86, s. 22 (1), for the purpose of having determined by the magistrate what, if any, sum was due from the defendants to the complainant in the matter of his complaint.

A tramway car is a metropolitan stage carriage, and the

(1) By 6 & 7 Vict. c. 86, s. 22, it shall be lawful for any justice of the peace to hear and determine all matters of complaint between any proprietor of a hackney carriage or metropolitan stage carriage, and the driver or conductor of the same respectively, and to order payment of any sum of money that shall appear to be due to either party for wages or for the earnings in respect of any such carriage, or on account of any deposit of money, and to order compensation to the proprietor in respect of damage or loss which

shall have arisen through the neglect or default of any driver or conductor to the property of his employer intrusted to his care, or in respect of any sum of money which such proprietor may have been lawfully ordered by a justice of the peace to pay, and which has been actually paid pursuant to such order, on account of the negligence or wilful misconduct of his driver or conductor, and to order such compensation to either party in respect of any other matter of complaint between them, as to such justice shall seem proper.

complainant was a conductor in the service of the defendants. He was by them discharged on the 21st day of June after about three months' service. On entering the service he had received a copy of the company's rules, and had signed an agreement, copies of both of which accompanied 219] the case ('), and had paid into the *defendants' hands the sum of £5 as deposit under the fifth clause of the agreement. On the day of his discharge, besides this deposit

(') By the second clause of the agreement between the company and the respondent, the contract of service and hiring might be terminated and the conductor discharged by the company on any day, and at any hour of any day, by a notice, either verbal or written, from the company or any manager—and without stating any cause of discharge.

By clause 5, "The conductor will, on the signing hereof, pay to the company £5, to be retained by the company, together with any such interest thereon as is hereinafter mentioned, and with all wages for the current week, as security for the due discharge of his duties as conductor, and for the due accounting for and paying over to the company all money received by him for or on behalf of the company, and for the due observance by him of the rules and regulations aforesaid, and all alterations thereof, for payment of all damages and loss occasioned to the company or their property, and all damages, fines, and penalties to which the company may become or be made liable by reason of anything wrongfully or negligently done, omitted, or suffered by the conductor, and for the payment of all moneys for which he is made responsible by any of the clauses of any of the said rules and regulations, or any alterations therein."

By clause 6, "In case of any breach by the conductor of any of the said rules and regulations, or any alterations therein, the company may retain the whole of the said £5, and any interest thereon, and the conductor's wages for the current week, as liquidated damages for such breach. In any other case the amount for the payment or satisfaction of which the said £5 and any interest thereon, and the conductor's wages for the current week, are hereby made a security, may also

be retained out of the same sum, and interest and wages, by the company as liquidated damages.

By clause 7, "The manager of the company shall be the sole judge between the company and the conductor whether the company is entitled to retain the whole or any part of the said £5, and interest and wages for the current week, as liquidated damages. And his certificate in writing, that the same or any given part thereof stated in such certificate are to be so retained, and of the cause of such retention, shall be binding and conclusive evidence between the parties in all courts of justice, civil and criminal, and before all stipendiary and police magistrates and justices of the peace, both that the amount thereby certified as the amount to be retained is the true amount to be retained, and has become and is liable to be so retained by the company, and that that has happened which in such certificate is certified to be the cause, and that it is a lawful and sufficient cause for such retention, and such certificate shall bar the conductor of all right under any circumstances to recover the moneys so certified to be retained, or any part thereof."

By the 157th rule of the "Rules and Regulations for the Officers and Servants of the London Tramways Company," it is provided that on receiving fares of certain rates the conductor must, before collecting any other fare, and in the immediate view of the party paying, punch from a single journey ticket for the rate of fare received.

By rule 174, a breach by any conductor of any rules will ensure his instant dismissal and the retention by the company of all money held by the company as security, according to the agreement.

money, there had accrued as wages due to him the further sum of 25s. This entire sum of £8 5s. the manager of the company declared forfeit to the defendants (clause 6 of the agreement), and informed the complainant that he was discharged for omitting duly to punch or register fares received by him from passengers, in violation of rule 157. The manager refused to inform the complainant on what information he grounded his charge, or in any way to support it.

At the hearing before the magistrate the complainant denied on oath that he had ever omitted to punch or register the fares, or in any way violated the company's rules. He further swore that although the agreement had been read over to him, it had been *read so fast that he did [220 not understand its full force and effect at the time of signing it.

For the defendants no evidence at all was offered. They put in at the opening of the case and entirely relied on the certificate (1) bearing their manager's signature, objected to the magistrate receiving any evidence outside of it, and urged that he was precluded from deciding the case otherwise than in accordance with clause 7 of the agreement.

The magistrate was of opinion that it was not competent to the parties, by contracting themselves out of the provisions of an act of Parliament, to preclude a justice of the peace from exercising the full jurisdiction therein conferred upon him, and that he ought not to be bound by the contract, which seemed to him to be opposed to the general policy and intent of the statute, and therefore illegal and invalid. He accordingly declined to accept the certificate as evidence of the facts therein stated.

He also considered the agreement unreasonable and inequitable, and that the possible operation of it had not been fully understood by the complainant, and accordingly ordered the defendants to pay the sum claimed, with costs.

Kemp, Q.C. (Humphreys with him), for the appellants: The magistrate was wrong. Under the agreement in question, the certificate of the manager is conclusive as to the right of the company to keep back as damages part of the conductor's wages. It is no more unreasonable than the provision as to the architect's certificate in the ordinary build-

(1) This certificate was to the effect that the company was entitled to retain as damages the £5 paid by the complainant to the company, and £1 5s., the amount of his wages for the current week, and that the cause of such retention was that he had committed a breach

of the rules and regulations mentioned in the agreement, by receiving from passengers their fares and not punching from single journey tickets for the rate of fares received the figures denoting such fares.

1877

London Tramways Company v. Bailey.

ing contract. The agreement cannot be said to oust the magistrate of his jurisdiction; it merely provides that until a third person has decided upon any difference between the parties, there shall be no remedy in a court of law, a provision which, ever since *Scott v. Avery* (*), has been considered legal. The *complaint before the magistrate is a civil, not a criminal proceeding. As to the objection that the defendant never understood the meaning of the agreement, it is not suggested that he was unable to read, and he cannot take advantage of his own negligence in not paying proper attention to that which he signed.

Willey Wright (*Safford* with him), for the respondent: The agreement ought not to bind the respondent, for it is an attempt to prevent him from proving the real facts of the case in a proceeding before a magistrate.

[LUSH, J.: If this certificate had been put in evidence at the trial of an indictment for embezzlement, I think it ought not to have been taken as conclusive proof; but the proceeding before the magistrate is much the same as if an action had been brought.]

Even in civil proceedings the courts have always been unwilling to allow one of the parties to an agreement to be deprived of his rights by a stipulation like the present one: *Scott v. Avery* (*); *Brown v. Overbury* (*).

MELLOR, J.: Our judgment must be for the appellants.

In the first place, it must be taken that the man could read and write, and we cannot listen to his statement that he never understood what he was signing, as, for anything that appears, he had every opportunity of making himself acquainted with it. The next objection is that the provision making the certificate conclusive is an attempt to deprive the magistrate of his jurisdiction. But this is not so. If two persons choose to agree that neither of them shall have any right of action under an agreement until a third person has given his decision upon the matter in question, as in the case of a wager, &c., the agreement is binding. It is quite reasonable that people should endeavor as far as possible to avoid the necessity of having recourse to courts of law. The present agreement is very like the stipulation that the certificate of an architect or engineer shall be conclusive; the only difference is that, with regard to the £5 claimed by the conductor, the company have the further security of the money being kept with them as a deposit. 222] Making the manager sole judge of what is due *from the company is not contrary to the policy of the law, and

(*) 5 H. L. C., 811; 25 L. J. (Ex.), 308. (*) 11 Ex. Rep., 715; 25 L. J. (Ex.), 169.

if the parties choose to make an agreement containing such a provision, they must be bound by it.

LUSH, J.: I am entirely of the same opinion. We are called upon to interpret this agreement in the same manner as if the complainant had brought an action upon it instead of going before a magistrate, and we have only to inquire what was the bargain which the parties made. There can be no doubt that the complainant signed the agreement, and probably had a copy of it in his possession, so that he had every opportunity of reading and understanding it. Secondly, it cannot be denied that, under the agreement, he has consented to submit entirely to the rules of the company. It has been said that this clause is harsh and unjust, but it was a matter for his consideration before he gave his consent. In the case of building contracts, I have often been surprised that as regards extras the builder should agree to be wholly bound by the certificate of an architect retained by his employer. But this is every-day practice, and I see no greater injustice in the present case. Though made before a police magistrate, the complaint is practically a civil proceeding.

Judgment for the appellants.

Solicitor for appellants: *H. C. Godfray.*

Solicitor for respondent: *T. J. Moss.*

See 24 Eng. Rep., 651 note.

Where parties definitely agree in their contract, to submit all differences which may arise thereunder to arbitration, this stipulation is binding, and either party appealing to the courts, before submitting to or tendering arbitration, will be dismissed. Such a defence, however, is waived where the party sued appears and presents his defences, without specially pleading this objection: *Alford v. Tiblier*, 1 McGloin, 151.

Under a condition that, in case of dispute, the parties should enter into a written agreement for arbitration, and that if either party should neglect, for a week after being required in writing so to do, to appoint an arbitrator, the other party should appoint one for him; and that if either party should not, on being required so to do, execute such agreement, he should pay £50 by way of liquidated damages,—the defaulting party is not liable for such amount unless the agreement tendered for execution contains an ap-

pointment of an arbitrator for him: *Thackerray v. Winter*, 6 Victorian L. R. (Law), 128.

Where one is authorized to decide a question between two parties, notice of the time and place of hearing, and an opportunity to be heard is necessary to entitle him to make a binding decision: *Strachan v. Brown*, 39 Mich., 168.

Where one by contract agrees to pay for work and labor such sum as shall be certified to by an architect or engineer, the obtaining of such a certificate is a condition precedent to a recovery: *Canty v. Clark*, 44 U. C. Q. B., 222; *Young v. Ballarat*, 4 Victorian L. R. (Law), 306.

An engineer or architect has no right to certify that the work is satisfactory to him, except in certain particulars for which he has made a reduction: *Canty v. Clark*, 44 U. C. Q. B., 222.

Where, from the terms of a contract for the construction of a dam, it appears that the parties have agreed upon and adopted the decision of an engi-

neer therein named, as a final and conclusive arbitrament of all disputes and litigations that should arise in respect to the kinds or quantity of the several parcels or kinds of work to be done, and have, by express stipulation, made the certificate of the engineer a condition precedent to the right of the contractor to demand and recover, and to the liability of the other party, to pay the compensation therein provided, and such certificate is, in the absence of fraud or bad faith, final and conclusive, and it cannot be attacked or impeached on the ground that the engineer erred in deciding the questions submitted to him: *Whiteman v. Mayor*, 21 Hun, 117.

Where the contract provided that payments should be made on the certificate of the architect—who was required by the contract, among other things, to certify that all the work of the mechanics, laborers, and others employed by the original contractor, had been paid—his certificate is conclusive of the rights of all parties concerned, unless it can be shown that it was obtained by the owner by collusion or fraud: *Dingley v. Greene*, 54 Cal., 333.

A clause in a contract of sale, that the measurement shall be by a person named, is obligatory, in default of fraud or error alleged, such as would justify rescission. A simple averment in the answer to a suit upon such a written contract that the measurement is not correct, according to a particular rule or method not specified in the agreement, will not warrant the introduction of evidence to contradict, annul or amplify the contract: *Danner v. Otis*, 1 McGloin, 137.

Under a contract with a public body, for the construction of certain works to the satisfaction of the engineer of such body, the engineer is not an arbitrator, but a skilled agent of the employer, his certificate being by mutual agreement a condition precedent to the contractor's obtaining final payment; he owes a duty to the contractor as well as to the employer, and is bound to act fairly towards both parties.

Though a final certificate has been refused by the engineer, it is competent for a jury, upon evidence of his acts and conduct, to find that the works have been completed to his entire satis-

faction. But the contractor cannot recover from the employer for matters within the contract, unless it is alleged and proved that the certificate was refused by the engineer in collusion with the employer. In such case, the proper measure of damages is the value of the certificate which the engineer ought to have given; and, under a condition that all measurements are to be made according to the most approved and accurate methods, the contractor is not concluded by the progress measurements on which payments have been made. The employer is liable for damage occasioned by the engineer not employing such methods of measurements. The engineer cannot bind the employer to pay for extras outside the contract, unless they have been ordered in the manner provided by the contract. Under a condition for payment of damages for suspension of works beyond a certain period, the employer is liable for damage resulting from such suspension, though the engineer required it under the form of an "order of works."

Actions may be maintained for such suspensions before the termination of the contract.

A final certificate cures the want of previous orders in writing for extras, and other like conditions which are merely ancillary to the grant of such final certificate; and the result is the same if, under a count for wrongful refusal of the final certificate by the engineer in collusion with the defendant, the jury find that the works were satisfactorily completed, and that the certificate ought to have been given: *Young v. Ballarat*, 5 Victorian L. R. (Law), 503.

Where a building contract provided that upon a certificate of the architect that the work had been completed to his entire satisfaction, the contractor should be paid such a sum as with any previous payment would amount to 97½ per cent. on the contract price; and that upon a further certificate to the same effect, but further stating the final balance due, such balance should be paid within a time named: held, that the two certificates might be combined in one; but if such combined certificate was qualified, stating that the contractors were entitled to receive a certain sum (the balance), less a sum

retained as security for reparation of any defects, such certificate could not be treated as the final certificate, entitling the contractor to payment of the final balance: *Walker v. Black*, 5 Victorian L. R. (Law), 77.

Under a contract for the performance of certain work which is to be measured in a certain way, the employer is liable in damages to the contractor if the work is not measured in the prescribed way: *Young v. Ballarat*, etc., 4 Victorian L. R. (Law), 502.

The employer will not be liable for the withholding of the certificate by an engineer, unless such withholding is fraudulent, and the engineer is acting in collusion with his employers: *Young v. Ballarat*, 4 Victorian L. R. (Law), 502.

If the engineer refuses to certify, and the employers remain passive, and by that means retain a large sum from the contractors, that may afford evidence of collusion: *Young v. Ballarat*, 4 Victorian L. R. (Law), 502.

Where an engineer or architect wilfully and improperly refuses to grant a certificate, and application is made to the employer to compel him to give one, or assign valid reasons for not so doing, or if he fails to do so, to dismiss him and appoint another, and the employer declines to comply with the request, he will be liable to the contractor: *Young v. Ballarat*, 4 Victorian L. R. (Law), 306.

Under a contract making the certificate of the employer's engineer a condition precedent to the contractor's right to payment, an action will lie at the suit of the contractor against the engineer for fraudulently withholding a certificate; and it is not necessary for the plaintiff to allege, in his declaration,

that the certificate was withheld by the engineer in collusion with the employers: *Young v. Bagge*, 4 Victorian L. R. (Law), 516.

Where a building contract, under seal, contains a condition that no works beyond those included in the contract will be allowed or paid for, without an order in writing from the architect, the employer may still be liable to pay for extras not so ordered, for which he himself has given a verbal order to the contractor: *Thackeray v. Winter*, 6 Victorian L. R. (Law), 128.

Where a contract provided that if any changes or extras were made or called for, not included in the original contract, such changes and their cost should be determined by a supplemental contract between the parties; held, that no claim for extras, except the same were specified in writing, or a waiver of that provision of the contract was shown, could be sustained: *Trustées, etc., v. Platt*, 5 Bradwell, 567.

Where a contract for the execution of certain works contained a provision that the contractors should, on receiving written notice from the engineer, suspend the whole or any portion of the works, and should have no claim for loss or damage on this account until thirty days from the date of such suspension: Held, that if the works were suspended for more than thirty days, the employers were liable to compensate the contractors for such suspension: *Young v. Ballarat*, etc., 4 Victorian L. R. (Law), 502.

For the law of a case where the party was entitled to retain fifteen per cent., and in case of non-performance, to forfeit it, see *Grassman v. Bonn*, 32 N. J. Eq., 43.

[8 Queen's Bench Division, 223.]

March 8, 1878.

223]

*STRAKER V. KIDD & Co.

PORTEUS and Others v. WATNEY and Another.

Ship and Shipping—Demurrage—Bill of Lading—Charterparty—Consignee prevented from clearing Ship by the Default of other Consignees.

A cargo of wheat was shipped on board the plaintiff's ship under eight bills of lading which contained the following clause: "Three working days to discharge the whole cargo or £30 sterling per day demurrage." The defendants, the indorsees of one of the bills of lading, were prevented from completely unloading their portion of the cargo within the lay days, because it lay at the bottom of the hold under the portions of cargo belonging to the other consignees, and such other portions of the cargo were not unloaded in time to enable the defendants to clear the ship of their portion within the lay days. The master was ready and willing to discharge the defendants' portion of the cargo as soon as it could be reached, and the defendants to receive the same, and the discharge of it in due time was only prevented by the before mentioned circumstances:

Held, that under the above mentioned stipulation of the bill of lading the consignee, as between himself and the shipowner, undertook to bear the risk of being prevented from discharging his portion of the cargo from the ship within the lay days by the default of his fellow consignees, and the defendants were therefore liable for demurrage.

In a second case the charterparty under which the ship was chartered stipulated that fourteen working days were to be allowed for loading and unloading at the port of discharge, and ten days on demurrage at £35 day by day. The bills of lading, one of which, for a part of the cargo, had been indorsed to the defendants, contained the words, "paying freight for the same goods and all other conditions as per charterparty." In other respects the facts were precisely similar to those of the first case:

Held, that the defendants were liable for demurrage.

THESE were cases reserved by Lush, J., from sittings at Nisi Prius in London for further consideration.

The nature of the actions, the facts of the cases, and the arguments sufficiently appear from the judgments.

In the first case *Russell*, Q.C., and *McLeod*, appeared for the plaintiff.

Watkin Williams, Q.C., and *J. C. Mathew*, for the defendants.

In the second case *A. L. Smith*, and *R. T. Reid*, appeared for the plaintiffs.

Butt, Q.C., and *J. C. Mathew*, for the defendants.

Cur. adv. vult.

224] *On the 8th of March the following judgments were delivered:

STRAKER V. KIDD & Co.

LUSH, J.: This is an action for two days' demurrage of the steamer *Charles Mitchell*, which had been chartered by

Messrs. Gisbone & Co. for the conveyance of a cargo of wheat from Dantzic to London. Eight bills of lading were given by the master for various portions of the wheat shipped by the charterers, one of which had been indorsed to the defendants. Each of them contained the following clause: "Three working days to discharge the whole cargo, or £30 sterling per day demurrage." The vessel arrived on the morning of the 23d of May, was reported at the Custom House at eleven o'clock, and was ready to discharge at noon of the same day. None of the consignees, however, were ready to receive delivery on that day, and the discharge did not commence till the morning of the 24th.

One question raised at the trial was, whether the lay days commenced at noon of the 23d or on the following day. In the view which I take of the contract it becomes immaterial to decide this question.

It happened that the defendants' portion of the cargo, except a comparatively small quantity which lay in the bunker and upon which no question arises, was part of a larger bulk stowed at the bottom of the hold, which belonged to the defendants and to another consignee in given proportions. This bulk was not reached till between two and three o'clock on Saturday the 26th. The barges of the other consignee being alongside first, his portion of the bulk was first delivered, and the defendants, though their barges had been in readiness the whole day, were unable to get any part of their cargo till after five o'clock. The discharge was, therefore, only commenced that afternoon, and was not completed till the Monday, whereby the vessel lost two days' sail.

The defendants contended that as they could not get their goods in time to clear the ship on that day, they were entitled to a reasonable time on the Monday to complete; that the default, if any, was that of the master, who was unable, and therefore was not ready, to deliver in time to enable them to discharge the ship within the lay days.

*On the other hand it was argued that the plain- [225
tiffs were always ready and willing to discharge the cargo, and that the risk of being prevented from getting their goods by the delay of other consignees is a risk which falls on the consignees and not on the shipowner.

The first question is, what is the contract which is implied by the acceptance of a bill of lading containing the stipulation in question. It cannot be said that the words have no meaning, or that they were not intended to be binding to some extent. For the obvious purpose of the shipowner in inserting them was to secure the payment of a stipulated

1878

Straker v. Kidd.

sum per day for demurrage, in case his ship should be detained in the process of unloading beyond three days, and the only meaning of which the words are fairly capable is, that if the whole cargo is not discharged within three days, demurrage at the rate of £30 per day shall be paid. This is the alternative which the bill of lading presents, and which the consignee impliedly agrees to by taking the benefit of it.

The objection raised against this rendering of the clause is undoubtedly striking. It virtually makes each holder of such a bill of lading answerable for the others as well as for himself, though he has no control over their acts. But no other construction can be put upon the clause, without doing violence to the words or introducing a qualification which destroys their force. If the words had been, as the defendants contend they should be read, "Three days to discharge the goods in this bill of lading or demurrage," the defendants would have been in no better position; for the words must have been construed as an absolute contract to clear the goods within that time. The argument on the part of the defendants requires the insertion of a proviso, making the liability to demurrage conditional on their not being delayed by the acts or defaults of the other consignees. That would make it an entirely different contract, and defeat the obvious intention of the shipowner, which was to put pressure upon all the consignees, and make it the interest of all of them to clear the ship within the stipulated period, under the penalty of their having to pay £30 per day, leaving it to them to settle between themselves how, by whom, and in what proportions the demurrage account should be paid.

226] *It seem to me, therefore, impossible to construe this clause otherwise than as a contract to pay the stipulated demurrage if the ship is not cleared within three days.

There is, of course, an implied condition that the shipowner shall be ready and willing to deliver. If he wrongfully refuses to give over the goods, or if by reason of any default of his or of any obstacle for which he is responsible the consignee is unable to get his goods, this would afford a good answer to the claim, and this is the substance of the defence which is pleaded.

Now, the only thing which prevented the delivery in the present case was the inability of the master to get at the goods, because they were stowed at the bottom of the hold, and because the owners of the superincumbent goods had neglected to take those goods away in proper time. Can this neglect of the other consignees be said to be the default of the master? If not, it is immaterial whose fault it was;

for the defendants undertook that, whether they were able to get away their goods or not, they would pay demurrage if the ship was not cleared within the stipulated period, the contract being, as I have said, an absolute and not a conditional contract. The defendants are therefore liable, unless they can show that some act or default of the owner, or of some one for whom he is responsible, prevented them from performing their contract. Now, it is clear that the master was not in default, he was ready and anxious to deliver. The leaving those goods in the ship which overlaid the defendants' goods was not his act, but was the act of third persons, not with his consent, but against his will. The case therefore falls within the principle laid down in *Thiss v. Byers* (*), and the cases there cited, that when the vessel has arrived at the place of discharge, and the master is ready to commence and complete the delivery, the lay days begin to run, and the consignee must bear the risk of any ordinary casualty or obstruction which might occur to interrupt the process of discharge. The cases on this particular point are but few, and they are conflicting. In *Leer v. Yates* (*), the Court of Common Pleas held, after taking time to consider, under a similar bill of lading that the consignee was liable for demurrage, though he was prevented from getting his goods by the delay of other consignees *whose [227 goods lay above his. But Lord Tenterden, in two subsequent cases, *Rogers v. Hunter* (*) and *Dobson v. Droop* (*), dissented from this doctrine, and directed the jury in a similar case that if a consignee cannot get his goods because some other person's goods prevented him, he is not liable for the detention of the vessel. I do not find that this ruling was questioned by motion to the court, nor do I find any subsequent decision on the point. *Leer v. Yates* (*) has, however, been repeatedly quoted as an authority, and is, I think, upon principle, a sound decision. Lord Tenterden's dictum describes the position of a consignee whose bill of lading mentions no specific time for unloading, but it overlooks the nature and effect of such a stipulation as was contained in the bill of lading in those cases, and as is contained in the bill of lading now in question. My judgment is, therefore, for the plaintiff for two days' demurrage at £30 per day, and costs.

Judgment for the plaintiff.

Solicitors for plaintiff: *Hollams, Son & Coward.*

Solicitors for defendants: *Stocken & Jupp.*

(*) 1 Q. B. D., 244; 16 Eng. R., 308.

(*) M. & M., 68.

(*) 3 Taunt., 387.

(*) M. & M., 441.

1878

Porteus v. Watney.

PORTEUS and Others v. WATNEY and Another.

LUSH, J.: The circumstances under which the defendants in this case are sought to be made liable to demurrage are precisely the same as those in *Straker v. Kidd & Co.* The only distinction between the two cases is in the form of the bill of lading. In the present case the ship was chartered to convey a cargo of grain from Cronstadt to this country, and to be delivered here as directed by bills of lading. The charter stipulates that fourteen working days were to be allowed for loading and unloading at the port of discharge, and ten days on demurrage at £35 day by day.

The bills of lading, one of which for a part of the cargo was indorsed to the defendants, contained the words "paying freight for the same goods and all other conditions as per charterparty." Seven days had been consumed at the port of loading, so that seven working days remained for 228] unloading at the port of discharge. *It was argued that the words of reference in the bill of lading import into it only so much of the stipulation in the charterparty as applies to these particular goods, that is, that it gives the consignee such a proportion of the seven days for discharging them as his part of the cargo bears to the whole. But this is not the natural meaning of the words, nor can it have been the intention of either party.

The object of the shipowner obviously was to place the consignees under the same obligation as to payment of demurrage as the charter imposed on the charterer, and any consignee knows before he reads the charter that if lay days are provided for they are given for discharging the whole cargo. The bill of lading must therefore be read as if instead of the words referring to the charterparty it had contained the entire stipulation, expanded so as to be adapted to the facts. "Seven working days are to be allowed for unloading the ship at the port of discharge, and ten days on demurrage at £35 day by day." This puts the present case exactly on a parallel with that of *Straker v. Kidd & Co.*, and I therefore, for the reasons given in the judgment in that case, hold that the defendants are liable for the three days' demurrage claimed by the writ, making £105, and give judgment accordingly with costs.

Judgment for the plaintiffs

Solicitors for plaintiffs: *Hollams, Son & Coward.*

Solicitors for defendants: *Plews, Irvine & Hodges.*

See 13 Eng. R., 291 note; 18 Eng. R., 260 note; *Falkenburg v. Clark*, 11 R. I., 278.

[3 Queen's Bench Division, 229.]

Dec. 1, 1877.

LESLIE and Others, Appellants; FITZPATRICK, [229 Respondent.Infant—Employers and Workmen Act, 1875 (38 & 39 Vict. c. 90), s. 4—Validity of Agreement—Power of Employer to terminate Contract.*

Under the Employers and Workmen Act, 1875 (38 & 39 Vict. c. 90), which enables a dispute between an employer and workman to be heard and determined by a court of summary jurisdiction, an agreement, by which an infant undertakes to serve an iron shipbuilder and boiler maker as plater and riveter for a term of five years at weekly wages, with a proviso that—should the employers cease to carry on their business, or find it necessary to reduce the operations of their works, either temporarily or permanently, from their being unable to obtain materials, or in consequence of any accident, or in consequence of strikes or combinations of workmen, or from any cause over which they should not have any control—they shall have power to terminate the agreement, and discharge the infant upon giving him fourteen days' notice, is not void on the face of it so as to prevent it from being enforced against him according to the act; the question, whether the provision is or is not inequitable as regards the infant, depending upon whether it was at the time of the agreement common to labor contracts, or was in the then condition of trade such as the master was reasonably justified in imposing as protection to himself, and also upon whether the wages were a fair compensation for the services of the infant.

CASE stated by justices under 20 & 21 Vict. c. 43.

On the 25th of May, 1877, the appellants entered a plaint under the Employers and Workmen Act, 1875⁽¹⁾, against the respondent, an infant, for £1 12s. damages for breach of contract for loss of his services under a contract dated the 15th of November, 1876, which was put in and proved by the appellants. The contract was in the words following:—

“Memorandum of agreement, entered into this 10th of November, 1876, between Andrew Leslie, Arthur Coote, and Joseph Henderson, of Hebburn, in the county of Durham, iron shipbuilders, boiler makers, and general blacksmiths, carrying on business under the name or firm of Andrew Leslie & Co. of the one part, and John Fitzpatrick, of Hebburn, aforesaid, of the *other part. The said John Fitz- [230 patrick, in consideration of the said Andrew Leslie, Arthur Coote, and Joseph Henderson agreeing to employ him on the terms and subject to the proviso hereinafter mentioned,

(¹) By the Employers and Workmen Act, 1875 (38 & 39 Vict. c. 90), s. 4, a dispute under this act between an employer and a workman may be heard and determined by a court of summary jurisdiction, and such court, for the purposes of this act, shall be deemed to be a court of civil jurisdiction, and in a proceeding in relation to any such dispute the court may order payment of any sum which it may find to be due as wages or damages, or otherwise, &c. . . .

1877

Leslie v. Fitzpatrick.

agrees with the said Andrew Leslie, Arthur Coote, and Joseph Henderson, to faithfully serve them as plater and riveter, and general assistant, for the space of five years from the 10th of November, 1876, and to abide by and conform to the rules and regulations for the time being of the said Andrew Leslie, Arthur Coote, and Joseph Henderson, in force for regulating the conduct of those working in their employment; and the said Andrew Leslie, Arthur Coote, and Joseph Henderson, on their part, in consideration of his agreeing to serve as hereinbefore mentioned, agree with him that they shall, subject to the conditions contained in the proviso hereinafter mentioned, employ the said John Fitzpatrick, and pay him fortnightly for the work and services which shall have been actually performed and rendered for the said Andrew Leslie, Arthur Coote, and Joseph Henderson, at the following rates of wages, that is to say, 9s. per week during the first year of service, and 10s. per week during the second year of service, and 11s. per week during the third year of service, and 13s. per week during the fourth year of service, and 16s. per week during the fifth year of service. Provided always, and it is hereby further agreed by and between the said parties hereto, that should the said Andrew Leslie, Arthur Coote, and Joseph Henderson cease to carry on their said business, or find it necessary to reduce the operations of their works either temporarily or permanently, from their being unable to obtain materials, or in consequence of any accident, or in consequence of strikes or combination of workmen, or from any cause over which they shall not have any control, the said Andrew Leslie, Arthur Coote, and Joseph Henderson shall be at liberty and have power, on their giving to the said John Fitzpatrick fourteen days' notice of their intention so to do, to terminate and put an end to this agreement, and to discharge the said John Fitzpatrick from their service, and the said service shall thereupon determine."

The justices considered the contract could not be enforced against the respondent, an infant, inasmuch as it contained 231] a very *stringent provision for the master's exclusive benefit, enabling them under various circumstances to determine the contract and liability to pay the infant his wages; accordingly, acting upon the authority of *Reg. v. Lord* ('), they dismissed the complaint.

If the court should be of opinion that the contract was binding upon the respondent, the case was to be remitted

(1) 12 Q. B., 787; 17 L. J. (M.C.), 181.

back to the justices in order that judgment might be given for the appellants.

J. Edge, for the appellants: There is nothing upon the face of this agreement to make it unreasonable or invalid. In *Reg. v. Lord* (') the agreement was of a wholly different character, for while it bound the infant to serve during the whole term it practically enabled the employer to stop his works and the wages of the infant when he pleased. The present contract, which requires the infant to serve for a term at fixed wages, is for anything that appears to the contrary, beneficial to him, and it is not unreasonable that the employer should have power to determine it. The authorities upon the subject are collected in *Cooper v. Simmons* ('), where it is said by Wilde, B.: "A contract is not binding on an infant if it is manifestly to his prejudice, or at least so plainly that the court can say it is to his prejudice."

No counsel appeared for the respondent.

Cur. adv. vult.

Dec. 1. The judgment of the Court (Mellor and Lush, JJ.) was delivered by

LUSH, J.: We are of opinion that this case must be remitted to the justices for their further consideration.

The agreement in question is not open to the objections which were held to be fatal in *Reg. v. Lord* ('). According to the construction put upon the contract in that case, it bound the infant not to engage in any other service or business during the whole term, while it reserved to the master the right to stop the work *and the wages* whenever he pleased. Moreover, it rendered the infant liable to be dismissed for any misconduct or disobedience, and upon dismissal to forfeit all his wages which should then be due and unpaid. That contract was manifestly void on the face *of it. Either stipulation was of itself sufficient to [232] invalidate it. The first was inequitable, the second violated a settled rule of law, by which an infant is incapable of contracting himself out of his acquired rights, or subjecting himself to a penalty.

No such objection is apparent on the face of the agreement which we are dealing with. Its unilateral provisions, which the justices considered unfair, do not necessarily make it so. Whether they are inequitable or not depends on considerations outside the contract. If such provisions were at the time common to labor contracts, or were in the then condition of trade such as the master was reasonably

(') 12 Q. B., 757; 17 L. J. (M.C.), 181.

(') 7 H. & N., 707; 31 L. J. (M.C.), 138.

1878

Great Yarmouth v. City of London.

justified in imposing as a just measure of protection to himself, and if the wages were a fair compensation for the services of the youth, the contract is binding, inasmuch as it was beneficial to him by securing to him permanent employment, and the means of maintaining himself. If on the other hand advantage was taken of him to exact conditions which were unusual and unreasonable, or to secure his services for wages which were unreasonably low and inadequate, the infant is not bound. This is the question arising on this agreement, and the one which the justices have to decide.

Case remitted.

Solicitors for appellants: *John Scaife*, agent for Duncan & Duncan, South Shields.

[8 Queen's Bench Division, 232.]

Jan. 24, 1878.

PARISH OF GREAT YARMOUTH, Appellants; CLERK OF THE PEACE OF THE CITY OF LONDON, Respondent.

Poor Law—Divided Parishes Act (39 & 40 Vict. 61), s. 35—Abolition of Derivative Settlements—Child under Sixteen—Husband and Wife.

By 39 & 40 Vict. c. 61, s. 35, no person shall be deemed to have derived a settlement from any other person, whether by parentage, estate, or otherwise, except in the case of a wife from her husband, and in the case of a child under the age of sixteen, which child shall take the settlement of its father or of its widowed mother, as the case may be, up to that age, and shall retain the settlement so taken until it shall acquire another If any child in this section mentioned shall not have acquired a settlement for itself, or being a female shall not have acquired a settlement from her husband, and it cannot be shown what settlement such child or 233] female derived from the parent without inquiring into the derivative settlement of such parent, such child or female shall be deemed to be settled in the parish in which he or she was born :

Held, that the wife of a man who had, while under the age of sixteen and before the passing of the act, derived a settlement from his father, took this derivative settlement of her husband, and not his birth settlement; for the settlement which a son while under the age of sixteen derives from his father is excluded from the operation of the section so far as it abolishes derivative settlements.

CASE stated under 12 & 13 Vict. c. 45, s. 11.

1. On the 5th of February, 1877, Hannah Louisa Fisk was indicted at the Central Criminal Court for the wilful murder of James Day.

2. Upon her being arraigned evidence was given of insanity, and she was found by the jury not to be in a fit state of mind to plead to the indictment, whereupon the court ordered her to be kept in strict custody until her Majesty's pleasure should be known.

3. On the 8th of December, 1872, the said Hannah Louisa Fisk, then Hannah Louisa Day (spinster), married James Fisk.

4. James Fisk was born on the 9th of December, 1843, at Great Yarmouth, in the appellants' parish, and is the son of George and Mary Fisk, but the said James Fisk never acquired a legal settlement in his own right.

5. A few weeks after the birth of James Fisk his parents, George and Mary Fisk, taking him with them, went to reside in the parish of Gorleston, in the county of Suffolk.

6. George and Mary Fisk, with their son James Fisk, continued to reside in that parish until Michaelmas, 1859, when they returned to Great Yarmouth.

7. During his residence in the parish of Gorleston, and before the said James Fisk was sixteen years of age, the said George Fisk acquired a settlement in Gorleston parish, and did not before the said James Fisk attained the age of sixteen years acquire any subsequent legal settlement.

8. James Fisk was not emancipated until about two months after George Fisk returned to Great Yarmouth in 1859, when he attained the age of sixteen years, and he has never acquired an independent settlement, nor has his wife, the said Hannah Louisa Fisk, ever acquired a settlement in her own right.

9. On the 15th of February, 1877, Hannah Louisa Fisk was in *custody by order of the court as aforesaid in [234 the gaol of Newgate, which is in the city of London.

10. On the 15th of February, 1877, two justices of the city of London, by authority of the 7th section of 3 & 4 Vict. c. 54, made an order by which they adjudged Hannah Louisa Fisk to be legally settled in the parish of Great Yarmouth, on the ground that her husband was born in Great Yarmouth, and directed the appellants, the guardians of the poor of that parish, to pay weekly to the superintendent of the Broadmoor Lunatic Asylum, to which she was about to be removed, the sum of 14s.

13. The opinion of this court is sought as to whether the order was rightly made upon the parish of Great Yarmouth.

Besley (*Poyser* with him), for the appellants: It will be conceded that Hannah Fisk's settlement was the settlement of James Fisk, her husband. Then James Fisk took his father's settlement, as he never acquired any settlement apart and distinct from it. The Divided Parishes and Poor Law Amendment Act, 1876 (¹), abolishing, with some ex-

(¹) By the Divided Parishes Act (39 shall be deemed to have derived a settlement from any other person, whether & 40 Vict. c. 61), s. 35, "No person

1878

Great Yarmouth v. City of London.

ceptions, derivative settlements, is not retrospective in its operation, but if it were, it provides that a child up to sixteen years of age shall take the settlement of his father, which in this case was not in the appellant parish. [He was then stopped.]

Poland (*Mead* with him), for the respondents: The settlement of the pauper's husband was his birth settlement in the appellant parish. The object of the act 39 & 40 Vict. c. 61, s. 35, was to abolish derivative settlements, and not to go back further than that of the parent or head of the family. 235] But if the pauper takes the *settlement of her husband's father, the result will be that her children, if she has any, cannot take this settlement which is their parent's derivative settlement, thus separating parents and children, which is contrary to the policy of the act.

[COCKBURN, C.J.: We are not now inquiring into the derivative settlement of the parents of James Fisk.]

When a man has married and become the head of the family, it was not meant to go back further than his own settlement, otherwise the children of James Fisk, the pauper's husband, who according to the act, take their birth settlement, will have a different settlement from that which he has, and will be removable to another parish.

PER CURIAM (COCKBURN, C.J., and MANISTY, J.): The words of the section are clear. A child under sixteen is within the exception. The pauper's husband, therefore, took the settlement of his father.

Judgment for the appellants.

Solicitor for appellants: *A. H. Barnard.*

Solicitor for respondents: *Nelson.*

by parentage, estate, or otherwise except in the case of a wife from her husband and in the case of a child under the age of sixteen, which child shall take the settlement of its father or of its widowed mother, as the case may be, up to that age, and shall retain the settlement so taken until it shall acquire another. . . . If any child in this section mentioned shall not have

acquired a settlement for itself, or being a female shall not have acquired a settlement from her husband, and it cannot be shown what settlement such child or female derived from the parent without inquiring into the derivative settlement of such parent, such child or female shall be deemed to be settled in the parish in which he or she was born."

[3 Queen's Bench Division, 235.]

Feb. 14, 1878.

ROSE & CO. V. GARDDEN LODGE COAL AND COKE COMPANY, Limited.

Company—Voluntary Winding-up—Stay of Proceedings in Action—Companies Act, 1862 (25 & 26 Vict. c. 89), ss. 85, 138—Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 24, subs. 5.

Upon an application to stay an action brought against a company which was being voluntarily wound up, it appeared that the plaintiff had gone on with the action after notice of the winding up and an offer from the company to allow him to prove against the estate for his debt and costs, if he would undertake not to proceed further:

Held, that on making the order to stay proceedings the plaintiff could not be allowed to add to his debt his costs of appearing upon the application.

[3 Queen's Bench Division, 237.]

Dec. 4, 1877.

[IN THE COURT OF APPEAL.]

*CLARK V. MOLYNEUX.

[237]

Libel—Privileged Communication—Malice in fact—Evidence of express Malice.

In an action for libel where the occasion is privileged, it is for the plaintiff to establish that the statements complained of were made from an indirect motive, such as anger, or with a knowledge that they were untrue, or without caring whether they were true or false, and not for the reason which would otherwise render them privileged; and if the defendant made the statements believing them to be true, he will not lose the protection arising from the privileged occasion, although he had no reasonable grounds for his belief.

APPEAL from the judgment of the Queen's Bench Division discharging an order obtained by the defendant for a new trial.

Claim alleged that the plaintiff was a clergyman, and was acting as curate in charge at Creting, Needham Market, for stipend; that he had before been curate at Horringer, near Bury, and had also been curate in charge of Assington, of which parish the Rev. H. L. Maud was vicar, and had applied to Canon Sparke and been accepted by him to take charge as his curate for a permanency of the parish of Feltwell for stipend. Shortly before the publishing of the letter hereinafter mentioned, one Canham had reported to H. L. Maud that James Oakes had stated to Bevan and his son that he had seen a letter written by the plaintiff, in which he owned that he had seduced two girls during his residence

1877

Clark v. Molyneux.

at Horringer. On the 2d of May, 1876, the defendant falsely and maliciously wrote and published of the plaintiff a letter addressed to H. L. Maud in the terms following: "The facts as I have them are these. If you had been at home I should at once have communicated them to you. Mr. N. Clark" (meaning the plaintiff) "was a candidate for the vicarage of All Saints. Mr. H. Pratt, being much interested in this, was anxious to learn particulars about him, and knowing that he had been curate at Horringer, in the neighborhood of Bury and near to Mr. Bevan's place, he requested Mr. Bevan to make some inquiries about him. The result of this was, amongst other things, that Mr. James Oakes assured him that he had seen a letter containing the matter reported to you by Mr. Canham" (meaning that the 238] plaintiff *while curate of Horringer seduced two girls), "Mr. Gascoigne Bevan was with his father in Mr. Henry Oakes' dining-room when Mr. James Oakes" (Henry Oakes' brother) "gave the information. At the time Henry Oakes stated that Mr. N. Clark had been expelled from the army for cheating at cards, had led a profligate life at Cambridge, &c. Mr. Gascoigne is quite willing to tell you all he knows, and to write for further information to Mr. Oakes." The claim also alleged that the defendant had maliciously spoken and published of the plaintiff, &c., the following words: "Mr. James Oakes told Mr. Bevan and his son that he had seen a letter of Mr. N. Clark in which he owned that while at Horringer he had seduced two girls." "While he was curate at Horringer he seduced two girls." "Mr. Henry Oakes had stated that he" (the plaintiff) "was expelled from the army for cheating at cards, and had led a profligate life at Cambridge:" alleging as special damage that Canon Sparke refused to employ him as curate.

Defence: a denial of all the material allegations, and that the causes of action were for words written and spoken without malice, and under circumstances which constituted the same privileged communications.

Issue thereon.

At the trial before Huddleston, B., at the Suffolk Summer Assizes, 1876, the following facts were proved: The plaintiff had been the curate in charge of the parish of Asington, near Sudbury, the vicar, the Rev. H. L. Maud, being absent on the continent. The Rev. C. Smith was the vicar of the adjoining parish of Newton, at whose church the plaintiff was to preach one of eight Lenten sermons, Mr. Green, Mr. Smith, the son of C. Smith, and other gentlemen having undertaken to preach on certain other

days. One Gascoigne Bevan, a banker at Sudbury, meeting the defendant at the Sudbury Bank, said to him, "I wished to see you on account of a notice I have seen in the *Free Press*, in which the Rev. Nassau Clark's name is advertised to preach a Lenten sermon for Mr. Smith. I had to make inquiries about Mr. Clark in reference to the living of All Saints. The inquiries I made were from H. Oakes, and the result of them was very much to this man's discredit, so much so that seeing his name advertised to preach for Mr. Smith, who was a very old friend of my father and *mother, and also a most intimate friend of yours, [239 I think it right to communicate these inquiries to you to do what you please with them. H. Oakes has told me that Mr. Clark had left the army through some trouble at cards, and also had led an irregular life while preparing for his ordination; and that James Oakes had stated that he had seen a letter written by Mr. Clark, in which he (Clark) said that he had seduced two girls while at Horringer." The defendant, *bona fide* believing the report on the respectability of his informant, went that same day to C. Smith's house, but C. Smith being unwell he communicated what he had heard to Mr. C. Smith's son in order that he might tell Mr. C. Smith. The defendant also informed his curate, Mr. Green, of the statement made to him by Mr. G. Bevan, in order to consult with him and take his advice on the matter; and he also afterwards communicated with Mr. Martin, the rural dean, with a view of consulting him as to whether he should inform the bishop of the diocese or Mr. Maud of the facts mentioned to him. The rural dean recommended the latter course, and the defendant afterwards meeting with Mr. Canham, Mr. Maud's solicitor, informed him of what he had heard, and asked him to write to Mr. Maud. Mr. Canham replied that Mr. Maud would shortly return to England, when he would mention the statements to him. Mr. Canham informed Mr. Maud of the statements, and Mr. Maud wrote to the defendant for further information; the defendant replied by the letter set out in the statement of claim. The defendant was not acquainted with the plaintiff, and had never had any communication with him.

At the close of the case the learned judge ruled that the letter of the 2d of May and statements made by the defendant to Mr. Clark, Mr. Green, and Mr. Martin, were privileged communications, and he left the question of malice to the jury in these terms: "Now in law if a man writes or says what is not true and what is libellous or slanderous of another, it is presumed to be malicious: but when the occa-

1877

Clark v. Molyneux.

sion is privileged then you require something more, you require what the law calls express malice. I must tell you what express malice means; it does not mean that hatred and uncharitableness which are usually associated with the 240] word malice. Malice in law means this—a *wrongful act done intentionally without just cause or excuse, that is what malice means. I cannot put it better than in the way it is put here. [The learned judge read the definition of malice in law given by Bayley, J., in his judgment in *Bromage v. Prosser* (*).] When you come to look at the word malice you will have to interpret it in this way: was there an intentional act on the part of the defendant, without just cause or excuse, in spreading those reports of the plaintiff? You have also to consider that to excuse him it must be done *bona fide*, and in the honest belief that what he wrote and said of the plaintiff was true, and the question I shall leave to you is this: did the defendant write the letter of the 2d of May and make the statements he did *bona fide*, and in the honest belief that what he wrote and said with reference to the plaintiff was true, or was he actuated by feelings of malice? . . . What you have to do is to look at all the circumstances of the case and consider what is proved here; was this done recklessly; were these statements made without due or proper inquiry; was this a course of conduct adopted that we, as men of the world, would expect to be adopted? If you can answer these questions satisfactorily, then you will say that the defendant acted *bona fide* and in the honest belief that what he stated was true: but if you think that you would not have acted in that way, and that there was a carelessness or recklessness and disregard for the feelings of others, a disregard of that sort of duty which one man owes to another, then you will say that this was not done *bona fide* in the honest belief that it was true. . . . You, Mr. Molyneux, may defend yourself by the fact that these occasions were privileged, but to do so you must satisfy a jury that what you did you did *bona fide* and in the honest belief that you were making statements which were true. . . . What you have to consider is this: assuming that these occasions were privileged, do you think that the defendant made these statements and wrote this letter *bona fide* and in the honest belief that they were true, not merely that he believed them himself, but honestly believed them—which means that he had good ground for believing them—to be true? I mean to say that if he pertinaciously and obstinately, perhaps, persuaded himself of a matter for which

(*) 4 R. & C., at p. 255.

persuasion *he had no reasonable ground, and with [241 respect to which persuasion you twelve gentlemen would say he was perfectly unjustified, . . . then your verdict will be for the plaintiff."

The jury found a verdict for the plaintiff for £200.

At the November Sittings, 1876, the defendant obtained an order calling on the plaintiff to show cause why there should not be a new trial, on the ground that the verdict was against the weight of evidence, and on the ground of misdirection of the learned judge, in that he misdirected the jury on the question of *bona fides* and malice, in telling them that if they thought the defendant published the defamatory matter complained of carelessly and recklessly, or with a disregard of the feelings of others, and in such a way as, being men of the world they would not have acted, they should find that the matter was not published *bona fide*.

At the Easter Sittings, 1877, after argument before Cockburn, C.J., and Mellor, J., the order was discharged.

The defendant appealed.

Dec. 1. *Willis*, Q.C., and *Anderson*, for the defendant: The judge rightly ruled that all the statements were privileged, *Harrison v. Bush* (*); and the question of express malice was left to the jury; but the judge was mistaken in ruling that the protection of privilege was taken away if the statements were made recklessly and without due and proper inquiry, and if the conduct of the defendant was such as the jury as men of the world would not expect to be adopted. The direction should have been, however reckless the defendant may have been, and although he may have made the statements without due and proper inquiry, nevertheless, if in the defendant's mind there was honesty of purpose, the privilege remains. The absence of inquiry is immaterial: *Lister v. Perryman* (*). The defendant is not deprived of the privilege because the jury, as men of the world, would not have adopted the same line of conduct. Whether a person acted maliciously depends upon his own motives and the view which the jury may entertain of the mind of the person himself: *Pitt v. Donovan* (*). *The jury might have been misled by the explanation [242 as to what kind of malice will take away the protection of a privileged occasion. The passage read by the judge from *Bromage v. Prosser* (*) refers to malice in law. But in

(*) 5 E. & B., 344; 25 L. J. (Q.B.), 25.

(*) 1 M. & S., 639-649.

(*) Law Rep., 4 H. L., 521.

(*) 4 B. & C., 247.

1877

Clark v. Molyneux.

order to render the defendant liable, he must have been actuated by malice in fact, as was laid down by Parke, B., in *Wright v. Woodgate* ('): "The proper meaning of a privileged communication is only this, that the occasion on which the communication was made rebuts the inference *prima facie* arising from a statement prejudicial to the character of the plaintiff, and puts it upon him to prove that there was malice in fact, that the defendant was actuated by motives of personal spite or ill-will independent of the occasion on which the communication was made." This passage clearly defines what express malice is, and that the *onus* of proving its existence is on the plaintiff. This case was cited with approval in *Laugton v. Bishop of Sodor and Man* (*). The judge also wrongly directed the jury that there must be an honest belief founded on reasonable grounds; but the defendant is protected if he really did believe the statement to be true, however groundless his belief may have been: *Whiteley v. Adams* (*). There was no evidence of malice which ought to have been left to the jury. The discrepancies between the letter of the 2d of May and the communications made to the defendant are of too slight a character to show that the defendant was influenced by an indirect motive: *Somerville v. Hawkins* (*); *Laughton v. Bishop of Sodor and Man* (*); *Child v. Affleck* (*). The case, therefore, ought to have been withdrawn from the jury: *Spill v. Maule* (').

Dec. 3. *Philbrick, Q.C.*, and *H. Cuffe*, for the plaintiff: It may be admitted that upon a privileged occasion the *onus* of proof is upon the plaintiff, and that it is for him to show that the defendant was actuated by malice; but at the trial of the present action the judge did leave to the jury the question whether the letter complained of was written under 243] a feeling of express malice. **Pitt v. Donovan* (*) was an action for slander of title, and it may well be that a person is not liable for setting up a claim to land which may ultimately prove to be groundless, unless he knew it to be false; and *Lister v. Perryman* (*) was an action for trespass and false imprisonment; these cases, therefore, are not authorities against the plaintiff. The letter itself, by its terms, affords evidence of express malice; the language is

(') 2 C. M. & R., 578, at p. 577.

(*) Law Rep., 4 P. C., 495; 4 Eng. R.,

(*) Law Rep., 4 P. C., 495, 505; 4 Eng. R., 162, 171.

(*) 9 B. & C., 403.

(*) 33 L. J. (C.P.), 89; 15 C. B. (N.S.),

(*) Law Rep., 4 Ex., 232.

892.

(*) 1 M. & S., 639.

(*) 10 C. B., 583; 20 L. J. (C.P.), 131.

(*) Law Rep., 4 H. L., 521.

exaggerated, and goes beyond the statement made to the defendant by G. Bevan: *Fryer v. Kinnersley* (¹); *Gilpin v. Fowler* (²). The communication to Mr. Green was not privileged. There was neither a duty nor an interest to make it.

Dec. 4. *Willis*, Q.C., in reply: Assuming that the learned judge misdirected the jury, the defendant is entitled to have the verdict entered for him under Order XL, Rule 10, which is extended to the Court of Appeal by Order LVIII, Rule 5.

BRAMWELL, L. J.: I think that this appeal must be allowed. In coming to that conclusion I do not take a different view of the law from that adopted by Cockburn, C.J., and Mellor, J.; the difference between their views and ours upon this occasion results from a different appreciation of the summing-up by the judge at the trial.

I certainly think that a summing-up is not to be rigorously criticised; and it would not be right to set aside the verdict of a jury, because in the course of a long and elaborate summing-up the judge has used inaccurate language; the whole of the summing-up must be considered in order to determine whether it afforded a fair guide to the jury, and too much weight must not be allowed to isolated and detached expressions. In the present case, however, I cannot help coming to the conclusion that the question left by the judge to the jury was put in an inaccurate shape. [The Lord Justice read it] (³). I am of opinion that this was in itself a misdirection, and that the proper direction to the jury would have been as follows: "These occasions were privileged, and unless you are satisfied that the defendant availed *himself of them to make the statements [244 complained of maliciously" (with an explanation of what is legally comprehended in that word) "then you ought to find a verdict for the defendant." By the language which the judge used, he led the jury to the conclusion that the burden of proof is upon the defendant. I also think that the form of the question is objectionable in this, that it may have induced the jury to suppose that they were to find affirmatively either that the alleged libel was written *bona fide*, or that the defendant in publishing it was actuated by feelings of malice; and that if they could not find the former, they must find the latter.

Before I proceed further in discussing the language of the

(¹) 15 C. B. (N.S.), 422; 38 L. J. (C.P.), 96. (²) 9 Ex., 615; 23 L. J. (Ex.), 152.

(³) See *ante*, p. 240.

summing-up, I wish to remark that a person may honestly make on a particular occasion a defamatory statement without believing it to be true; because the statement may be of such a character that on that occasion it may be proper to communicate it to a particular person who ought to be informed of it. Can it be said that the person making the statement is liable to an action for slander? In the present case the judge asked the jury whether the defendant did what is complained of in the honest belief that what he wrote and said with reference to the plaintiff was true. At a later period of the summing-up the judge explains what he means by honest belief; and the effect of his language is, that the jury must have been led to think that "honest belief" means, not the actual belief in the defendant's mind, but belief founded upon reasonable grounds. Apart, therefore, from the question upon whom the burden of proof lay, I think there was a misdirection as to the meaning of the term "honest belief," and that the verdict against the defendant cannot stand.

I do not say that there is no evidence of malice to go to the jury, but I think the evidence was very slight. The conduct of the defendant on the whole is not to be complained of on the ground of rashness, improvidence, or credulity, but in his letter he certainly made use of expressions in excess of the communications he had received: for instance, he was told that the plaintiff had left the army through some trouble at cards, but he writes that he was expelled the army for cheating at cards: he was also told that he had led an irregular life at Cambridge, and, again, he *writes that he had led a profligate life at Cambridge. It is possible that upon those statements being laid before a jury with a proper direction they might think that the defendant was indifferent as to the reputation of others, and that he desired to represent himself as a clergyman zealous for the welfare of the church and the character of its ministers, and that the defendant in making the statements complained of did not act *bona fide*. It is sometimes difficult to determine when defamatory words in a letter may be considered as by themselves affording evidence of malice. It was held⁽¹⁾, in a case cited to us, from the Exchequer Chamber, the judgment of which was delivered by Cockburn, C.J., my Brother Brett forming a member of the court, that the expressions in the letter complained of could not be evidence of malice, and the question ought not to have been left to the jury;

(¹) *Spill v. Maule*, Law Rep., 4 Ex., 232.

and on the other hand, authorities⁽¹⁾ have been cited in which the court thought the expressions in the letters of themselves furnished evidence which ought to have been left to the jury. I hesitate to say that there was no evidence of malice, because the jury need not ascertain what the wrong motive was if they can say that there was a wrong motive; and if the defendant was actuated by some motive, other than that which would alone excuse him, the jury may find for the plaintiff. Nevertheless, I have the strongest opinion that the verdict was against the weight of evidence on the question of malice. I am clearly of opinion that if there was more than a scintilla of evidence as to malice a jury properly directed would, upon a fair consideration of the facts proved at the trial, have disregarded it. On the ground of misdirection, and also on the ground of the verdict being against the weight of evidence, I am of opinion that there ought to be a new trial.

Even if I thought, upon the facts proved at the trial, that there was no evidence of malice, I do not think we ought to order a verdict to be entered for the defendant under Order XL, Rule 10. I think that this rule is not applicable to a case where, if a new trial is ordered, further evidence might be adduced; here, if the learned judge ruled that there was no evidence of malice, further *evidence might have [246 been given. I have some doubt whether the communication to Mr. Green was privileged; that might very much depend on the motive with which it was made; it may be privileged if the defendant made the communication to Mr. Green for the purpose of asking his advice; but if he made it merely for the purpose of unburdening his mind, or merely repeating a conversation, the occasion would not be privileged. I think this is another reason why we ought not to act on Order XL, Rule 10. On the two grounds I have already mentioned this appeal ought to be allowed.

BRETT, L.J.: I am of opinion that there was a misdirection by the learned judge to the jury; that the verdict was against the weight of evidence; and that there was no evidence of malice which ought to have been left to the jury.

With regard to the misdirection, we do not differ from the Queen's Bench Division as to the rule of law which governs this case, but we think that the direction of the learned judge was calculated to mislead the jury as to what was the right question for their decision. The direction to the jury was founded on the assumption that the occasions were privi-

⁽¹⁾ *Gilpin v. Fowler*, 9 Ex., 615; 23 L. J. (Ex.), 152; *Fryer v. Kinnersley*, 15 C. B. (N.S.), 422; 33 L. J. (C.P.), 96.

1877

Clark v. Molyneux.

leged, and that which must be taken to be a libel would be excused if the defendant had used the privilege fairly and honestly. Before I address myself to the summing up, I think it advisable to lay down what I consider would be a true exposition of the law in such matters. When there has been a writing or a speaking of defamatory matter, and the judge has held—and it is for him to decide the question—that although the matter is defamatory the occasion on which it is either written or spoken is privileged, it is necessary to consider how, although the occasion is privileged, yet the defendant is not permitted to take advantage of the privilege. If the occasion is privileged it is so for some reason, and the defendant is only entitled to the protection of the privilege if he uses the occasion for that reason. He is not entitled to the protection if he uses the occasion for some indirect and wrong motive. If he uses the occasion to gratify his anger or his malice, he uses the occasion not for the reason which makes the occasion privileged, but for an indirect and wrong motive. If the indirect and wrong motive 247] *suggested to take the defamatory matter out of the privilege is malice, then there are certain tests of malice. Malice does not mean malice in law, a term in pleading, but actual malice, that which is popularly called malice. If a man is proved to have stated that which he knew to be false, no one need inquire further. Everybody assumes thenceforth that he was malicious, that he did do a wrong thing for some wrong motive. So if it be proved that out of anger, or for some other wrong motive, the defendant has stated as true that which he does not know to be true, and he has stated it whether it is true or not, recklessly, by reason of his anger or other motive, the jury may infer that he used the occasion, not for the reason which justifies it, but for the gratification of his anger or other indirect motive. I think I have laid down the correct rule on which to ground the direction to the jury, and I think the learned judge did not follow that rule, but he so expressed himself that the jury would be misled into following other rules. I think the jury were misled into believing that the burden of proof, that the defendant was not actuated by malice in the statements he had made, lay upon the defendant rather than on the plaintiff. I apprehend the moment the judge rules that the occasion is privileged, the burden of showing that the defendant did not act in respect of the reason of the privilege, but for some other and indirect reason, is thrown upon the plaintiff. I also think that the learned judge was mistaken in the definition of malice he gave to the jury, and the

jury might have been misled by his leaving to them to apply that definition to the question of what was malice in fact. The judgment of Bayley, J., in *Bromage v. Prosser* (¹), treats of malice in law, and no doubt where the word "maliciously" is used in a pleading, it means intentionally, wilfully. It has been decided that if the word "maliciously" is omitted in a declaration for libel, and the words "wrongfully" or "falsely" substituted, it is sufficient, the reason being that the word "maliciously," as used in a pleading, has only a technical meaning; but here we are dealing with malice in fact, and malice then means a wrong feeling in a man's mind. I am further of opinion that the direction to the jury—that assuming that the occasions were privileged if they thought that the *defendant wrote the letter, [248 and made the statements *bona fide*, and in the honest belief that they were true, not merely that he believed them himself, but honestly believed them, which means he had good grounds for believing them to be true,—left the jury to suppose that, although the defendant did believe them in fact, yet that did not protect him unless his belief was reasonable: whereas the only question was whether the defendant did, in fact, believe what he said, and not whether a reasonable man would have believed it. The question of wilful blindness, or of an obstinate adherence to an opinion, may be tests by which a jury may be led to consider whether the defendant did or did not really believe the statements he made; whereas the learned judge, by the way in which he directed the jury, left them to understand, as I think, that although the defendant did believe the statements, yet if his belief was founded on a wrong reasoning that he was not within the protection of the privilege. In that respect, with great deference, I think the learned judge's direction to the jury was erroneous.

I am also of opinion that all the occasions were privileged. The only occasion which has been questioned is the occasion of the defendant's communication with Mr. Green. I am of opinion that where the relation between two persons is so intimate socially and professionally as that between a rector or a vicar and his curate, and when it can be said that the vicar is consulting with his curate either upon the conduct of the curate or of the vicar in ecclesiastical matters, that is an occasion which is privileged. Here the plaintiff calls Mr. Green as his witness, and his evidence is that the vicar did consult him in order to obtain his advice. I think on this point that the plaintiff was bound by the evidence of his

(¹) 4 B. & C., cited at p. 255.

1877

Clark v. Molyneux.

own witness, and the moment that it was ascertained as a fact that the statement to Mr. Green was made at a consultation between the vicar and his curate, as to the conduct the vicar should adopt in an ecclesiastical matter, the judge was bound to tell the jury that the communication was made on a privileged occasion.

Assuming that the right question had been left to the jury, is there any evidence to support the finding of malice? Now, the occasion being privileged, the burden of proof to [249] show that the *defendant was not within the protection of the privilege being on the plaintiff, and it being an admitted fact that the defendant did not know the plaintiff, had never even seen him, and that he had had no relations with him whatever, and no motive can be suggested why the defendant should have a vindictive feeling against the plaintiff, I think that the discrepancies which were relied upon, and the want of care in instituting inquiries, are too slight to justify a judge in asking the jury whether the defendant was actuated by indirect motives in making the statements. He certainly did not make them from a want of belief in them, nor was he influenced by anger in making them, not caring whether they were true or false.

I am of opinion, therefore, if on a new trial the facts are the same, if they cannot be altered, it would be the duty of the judge to direct the jury that there was no evidence of malice which could properly be submitted to the jury. I think that there has been a miscarriage, and that the verdict is against the weight of evidence.

This is not a case in which we ought to enter a verdict for the defendant; for there may be further evidence on a future occasion. We ought, therefore, only to grant a new trial.

COTTON, L.J.: I am also of opinion that this appeal must prevail. I think that the learned judge, after ruling that the statements made were privileged, left the case to the jury in a manner which may have misled them as to the true question for their consideration. When once the learned judge had laid down that the occasion was privileged, the only question for the jury to consider was whether the defendant acted from a sense of duty, or was actuated by some improper motive, and the onus of proving that the defendant was influenced by some improper motive, that is, that he acted maliciously, was on the plaintiff. In order to show that the defendant was acting with malice, it is not enough to show a want of reasoning power or stupidity, for those things of themselves do not constitute malice: a man may be wanting in reason-

ing power, or he may be very stupid, still he may be acting *bona fide*, honestly intending to discharge a duty. The question is not whether the defendant has done that which other men as men of the world would not have done, or whether the defendant acted *in the belief that the [250 statements he made were true, but whether he acted as he did from a desire to discharge his duty.

The learned judge intended to leave the question to the jury in the words of *Whiteley v. Adams* ('), subject to what he said as to the definition of honest belief. But the circumstances of *Whiteley v. Adams* (') and the present case are different. In that case the writer of the letter, which was the alleged libel, had pledged his belief in these words: "I will mention two or three [charges] which I have reason to believe are well founded." Therefore in that case it might well be put, as it was put to the jury, Do you or do you not think that the letters were written *bona fide* and in the honest belief that the matters therein contained were true? The writer of the letter stated, "I will mention those charges which I believe to be true," and the judge might properly ask the jury, Do you think that the defendant believed the charges to be true? If at the time he wrote the letter he did not believe them to be true, it might not be an unreasonable inference that he was acting not from a sense of duty, but from some other motive. In the present case the defendant has not stated in the letter set out in the statement of claim that the charges are in his belief true; he has merely stated that communications have been made to him by certain persons. If the defendant did not believe that the statement he was making was the one which had been made to him by Mr. Bevan, that might be evidence of *mala mens*; and, also, if he knew that there was no foundation for the charge, that again might be some evidence that he was actuated by an improper motive. In the present case it was not a question as to whether the defendant believed the charges to be true; certainly it was not a question whether he honestly believed them, in the sense of believing them on such good grounds that other men would reasonably come to the same conclusion. In the sentence following the question put to the jury, the learned judge explains what he means by honest belief; namely, had the defendant good grounds for believing the statements to be true? It might possibly be argued that the meaning of the words is, had the defendant good grounds to believe that these charges *were made? I do not, however, think [251

(') 15 C. B. (N.S.), 392; 33 L. J. (C.P.), 89.

1877

Clark v. Molyneux.

that is their fair meaning, and I think that when the question for the jury was the state of the defendant's mind at the time of making the communication, that is, whether he was actuated by malice, and with a motive other than a sense of duty, the question whether he himself believed the charges to be true in the sense attributed by the judge to "honestly believing" was immaterial.

There is also another part of the summing-up in which I think there was a misdirection to the jury. The burden of proof lay upon the plaintiff to show that the defendant was actuated by malice; but the learned judge told the jury that the defendant might defend himself by the fact that these communications were privileged, but that the defendant must satisfy the jury that what he did he did *bona fide* and in the honest belief that he was making statements which were true. It is clear that it was not for the defendant to prove that he was acting from a sense of duty, but for the plaintiff to satisfy the jury that the defendant was acting from some other motive than a sense of duty.

With regard to the question as to the statements being privileged, I am of opinion that the learned judge was right in ruling that all the communications were privileged. The only one as to which any doubt could be raised was the communication made to Mr. Green. Mr. Green is the plaintiff's witness, who says the communication was made to him, the curate, when he was in the vestry, and it was made as communications were often made to him by the defendant, for the purpose of asking his advice. On that evidence the learned judge was right in holding that it was a privileged communication. It was a communication made by the vicar to his curate, with whom he was on the terms stated by Mr. Green, with reference to a matter which seriously affected two parishes in the neighborhood, and which might seriously affect Mr. Green, if by preaching at Mr. Smith's church he was brought into communication with the plaintiff. I am therefore of opinion, the question being for the judge, that his ruling was correct.

On the only other point in the case, I think that there was no evidence of malice to be left to the jury. I am of opinion that in this case the evidence does not raise any presumption of malice on the part of the defendant, according [252] to the law as laid down in *Somerville v. Hawkins* (*). It must be borne in mind that the defendant, before this affair, had never been brought into connection with the plaintiff; had never had any difference of any kind with

(*) 10 C. B., 583; 20 L. J. (C. P.), 131.

him, and it is not suggested that these statements were made by the defendant with a view of exhibiting his zeal and activity as a clergyman. I think the evidence shows that he acted merely from a sense of duty. There are no doubt some discrepancies and inaccuracies between the statement made to the defendant by Mr. Bevan and the words used in the defendant's letters, but in the absence of any other proof of malice, I do not think that the excess of the defendant's expressions raises a presumption of malice. Then it is said that the statements were made to a great number of persons, and that this was some evidence of an indirect motive on the defendant's part in making the communications complained of. But it must be remembered that all the communications were privileged. One was to the clergyman of the parish in whose church the plaintiff was about to preach. It is true that he made this communication through the son, but under the circumstances that is the same as if he had made it directly to the father. Another was to his curate, Mr. Green. Another to Mr. Martin, the rural dean—the communication to this gentleman was for the purpose of taking his advice. He also made statements to Mr. Maud and his solicitor; the statement to the solicitor must be considered as made to Mr. Maud. In my opinion as all these communications were privileged, they do not afford any evidence of malice.

I agree with the other members of the court, that there should be a new trial.

Judgment reversed, and new trial ordered.

Solicitor for plaintiff: *John Grant.*

Solicitors for defendant: *Few & Co.*

See Moak's Underhill on Torts, p. 147.

[3 Queen's Bench Division, 253.]

Jan. 30, 1878.

[IN THE COURT OF APPEAL.]

*WELPLY V. BUHL (').

[253]

Practice—County Court, remitting case to be tried in—30 & 31 Vict. c. 142, s. 10—Security for Costs, extension of Time for giving.

An order was made under 30 & 31 Vict. c. 142, s. 10, remitting an action to be tried in the county court, unless security should be given for costs within a week. The plaintiff failed to comply with the condition stated in the order, but did not lodge the writ and order with the registrar of the county court, pursuant to s. 10, and, after the time mentioned in the order had elapsed, obtained a second order extending the time for giving the security:

(') Affirming, *ante*, p. 76.

1878

Welpley v. Buhl.

Held, affirming the judgment of the Queen's Bench Division, that until the plaintiff had lodged the writ and order remitting the action with the registrar of the county court the action remained in the superior court, and consequently there was jurisdiction to make the order extending the time for giving security.

APPEAL by the defendant against the decision of the Queen's Bench Division (*), rescinding an order of Fry, J.

An order had been made by a master, under 30 and 31 Vict. c. 142, s. 10, remitting the action to the county court, unless the plaintiff gave security for costs or paid money into court, in lieu of such security, within a week. The plaintiff failed to comply with the condition stated in the order, but did not lodge the writ and order with the registrar of the county court; and, after the expiration of the time mentioned in the order, applied for and obtained another order from the master extending the time for giving security, and paid money into court in conformity with the second order. On appeal to Fry, J., the judge rescinded the master's second order; the Queen's Bench Division reversed the judge's decision.

Anderson, for the defendant: The time for giving security under the master's first order having expired, the master had no jurisdiction to extend the time for giving security.

Whistler v. Hancock (*) decided that where an action was dismissed for want of prosecution, it was at an end, and the court had no jurisdiction to extend the time for a delivery 254] of statement of claim. *According to *Moody v. Steward* (*) when an action has been sent to be tried in the county court, under 30 & 31 Vict. c. 142, s. 10, it is no longer within the jurisdiction of the superior court for the purpose of taxing costs. When once an order is made to remit the action, it no longer remains in the High Court.

Tapping, and *J. Macdonald*, for the plaintiff, were not called upon.

BRAMWELL, L.J.: We are all of opinion that the judgment must be affirmed for the reasons given in the court below. I am inclined to think that, even if the case had got into the county court, the master might have rescinded his order, or his order might have been rescinded on appeal. In *Chitty's Practice*, p. 1537, 10th ed., it is said: "When an order has been made, or the conditions annexed to an order imposed, under a mistake, or when new circumstances arise which render it clearly essential to the justice of the case, a judge will amend or vary his order, or will sometimes even rescind it when it appears to have been irregularly and improperly obtained." According to this statement

(*) 3 Q. B. D., 80; *ante*, pp. 76, 78 note.

(*) 3 Q. B. D., 83; *ante*, p. 79.

(*) Law Rep., 6 Ex., 35.

of the law, an order may be dealt with at a subsequent time.

I think the reasoning of Cockburn, C.J., and Manisty, J., quite right, and that the appeal should be dismissed.

BRETT, L.J.: I think the decision of the Queen's Bench Division was correct. In questions of procedure the master has jurisdiction to rescind or vary an order on proper grounds.

COTTON, L.J.: I also am of opinion that the appeal should be dismissed. The cases that have been cited are clearly distinguishable.

Appeal dismissed.

Solicitor for plaintiff: *J. E. S. King.*

Solicitors for defendant: *Alsop & Co.*

[3 Queen's Bench Division, 255.]

Feb. 22, 1878.

[CROWN CASE RESERVED.]

***THE QUEEN V. THE INHABITANTS OF THE [255
TOWNSHIP OF ARDSLEY.**

Highway, indictment for non-repair—Township, liability to repair.

Upon the trial of an indictment against the township of A. for the non-repair of a highway within it, it appeared that A. was one of seven townships forming the parish of D. The parish itself had never repaired any highway, nor levied highway rates, nor appointed surveyors; each township having appointed its own surveyors, and levied its own highway rates. With the exception of the highway in question, and one other, each of the seven townships had from time immemorial repaired its own highways. The highway had always been repaired by the adjoining township of W., but there was no evidence of any consideration for such repair:

Held, that A. was liable, for it must be presumed that the repairs had been done by W. under some arrangement between the two townships, and such arrangement in the absence of sufficient consideration was not binding on W.

CASE stated by the Chairman of Quarter Sessions for the West Riding of York, upon a conviction of the inhabitants of the township of Ardsley for not repairing a highway situate within that township.

The parish in which the township of Ardsley is situate is divided into seven townships, each of which (with the two exceptions hereinafter mentioned) has repaired its own highways. There is an immemorial custom for each township to repair all highways (with the two exceptions hereinafter mentioned) within the limits of the respective towns.

Each township has appointed its own surveyors and levied its own highway rates.

There have never been any repairs done by the parish at
28 ENG. REP. 30

1878

The Queen v. Ardsley.

large, nor have any rates been levied by the parish at large, and no surveyors have been appointed for the parish.

The portion of road indicted is within the township of Ardsley, and is out of repair. Although the portion of the road lies within the township of Ardsley, yet down to the year 1868 (since which time Wombwell has denied its liability to repair the same) and so far as its previous history can be traced, it has always been repaired by the adjoining township of Wombwell; but there is no evidence to show when, and for what consideration (if 256] any), Wombwell *commenced to repair the road in question. There is also in the township of Ardsley another road which was till three years ago a turnpike road, leading from Doncaster to Saltersbrook. Five hundred yards of this turnpike road situate in the township of Ardsley have from time to time been repaired by the township of Darfield (one of the other seven townships into which the parish of Darfield is divided as aforesaid). Ardsley has repaired the remaining part of this turnpike road situate in Ardsley. These repairs (that is to say the repairs done by the township of Darfield as well as those done by the township of Ardsley) were directed by the trustees of the turnpike road and paid for by them. The trustees paid a sum of money out of the tolls to the township of Darfield, and also a sum of money to the township of Ardsley, to repair this road, and the sums of money so paid have been applied to the repair of the road in each township. If the sums so paid to the township of Darfield were not sufficient, the township rates of Darfield made up the difference, so far as the 500 yards in Ardsley were concerned.

The same thing occurred in Ardsley as to the remaining part of the turnpike road, situate in the township of Ardsley.

Since the expiration of the Turnpike Act, Darfield has not repaired any part of the old turnpike road in Ardsley.

With the above exceptions, each of the seven townships repaired its own highways.

The road indicted is part of an ancient and immemorial highway.

Upon these facts I directed the jury to find the defendants guilty, and they were convicted; and I respited the judgment, and reserved for the consideration of this court the question whether I was right in so directing the jury as above mentioned.

J. Forbes, for the defendants: Of common right a division of a parish is not liable to repair the highways within it, but that duty is imposed upon the whole parish. Not-

withstanding that the township of Wombwell has repaired the highway in question, there is nothing to relieve the parish from their duty to repair. In order to charge the township of Ardsley the court must infer that the township has from time immemorial undertaken the duty *of re- [257 pairing the highway, but this cannot be inferred, because it is at variance with the facts found in the case; namely, that another township has always repaired it.

[COCKBURN, C.J.: Why should we not infer that the township of Wombwell repaired under some arrangement with Ardsley, and that in repairing they were repairing for and on behalf of the indicted township?]

The case finds no such arrangement, and if such an inference was to be drawn, it should have been drawn by the jury. No question was left to the jury as to this matter, and they have found no facts to justify such an inference. If any such inference is to be drawn by the court, the proper inference would rather be that the township of Wombwell was repairing by virtue of arrangement with the whole parish, the body *prima facie* liable to repair. [The following authorities were referred to: *Starkie on Evidence*, p. 696, note (t); *Rex v. Hatfield* ('); *Reg. v. Barnoldswick* ('); *Rex v. Great Broughton* (').]

H. Matthews, Q.C., and *Bosanquet*, for the prosecution, were not called upon.

COCKBURN, C.J.: I think that the conviction must be affirmed. It is quite clear that the entire parish has never maintained the highways within it, that it has had no machinery for so doing, that it has never appointed officers for that purpose, and that it has never collected highway rates. The entire parish consists of seven townships, each of which has fulfilled generally the functions of a parish with regard to the highways within it. It would be vain now to contend, seeing the large and important townships that exist, that a township may not be liable, to the same extent and in the same way as if it were a parish, to maintain its highways. Independently, therefore, of the question between Ardsley and Wombwell, Ardsley is liable. How can Ardsley get rid of its liability? It is stated in the case that the highway was always repaired by Wombwell, but it is further stated that there was no evidence of any consideration for the repairing of the highway in question by Wombwell, so that there is no power to compel Wombwell to continue to repair it. It is, therefore, no *answer to the pres- [258 ent indictment to say that Wombwell always did repair,

(1) 4 B. & Al., 75.

(2) 4 Q. B., 499.

(3) 5 Burr., 2700.

1877

Hooper v. Bourne.

and the public have a right to have the road repaired by the present defendants. I therefore consider the verdict right.

CLEASBY, B., LINDLEY, MANISTY, and HAWKINS, JJ., concurred.

Conviction affirmed.

Solicitors for prosecution: *Wilkinson & Son*, for Dibb & Raley, Barnsley.

Solicitor for defendants: *H. H. Poole*, for W. H. Peacock, Barnsley.

[3 Queen's Bench Division, 258.]

Dec. 18, 1877.

[IN THE COURT OF APPEAL] (¹).

HOOPER and Another v. BOURNE, THE WESTBURY IRON COMPANY, Limited, and THE GREAT WESTERN RAILWAY COMPANY.

Railway—Superfluous Lands—Lands taken under Powers of Special Act—Lands acquired for Extraordinary Purposes—Lands not in actual use at expiration of period limited for disposing of Superfluous Land, but subsequently becoming useful for purposes of Undertaking—Mines and Minerals expressly conveyed to Railway Company, ownership of, where Surface afterwards becomes Superfluous Land—Inclosure—Grass and Herbage arising upon Soil of Road running between Allotments—41 Geo 3, c. 109, s. 11—Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), ss. 12, 13, 127—Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), s. 45.

Where a railway company are authorized by their Special Act (with which the Lands Clauses Consolidation Act, 1845, and the Railways Clauses Consolidation Act, 1845, are incorporated) to acquire lands compulsorily and also for extraordinary purposes, land delineated in the parliamentary plans, and described in the books of reference, and purchased by the company pursuant to agreement, no notice to treat having been given, must be deemed to have been acquired under the "provisions" of the Special Act, and the Lands Clauses Consolidation Act, 1845, within the meaning of s. 127 of the latter act; and although for some years after the purchase no works are constructed upon the land, yet if at a subsequent time it becomes useful for the purposes of the railway, it cannot be deemed to have been purchased for extraordinary purposes.

Where lands have been taken by a railway company under the provisions of their Special Act, and retained by them, with the *bona fide* intention of using them for the purposes of the railway, and at the expiration of the period for the sale of superfluous lands, though they are not in actual use, there is a reasonable prospect of their being ultimately required and used for the purposes of the railway, such lands are not superfluous within the Lands Clauses Consolidation Act, 1845, s. 127.

By Bramwell and Brett, L.JJ.: Where lands which a railway company are authorized *by their Special Act to take, have been conveyed to them, together with an express grant of the mines and minerals thereunder, although the surface may afterwards become superfluous by virtue of the Lands Clauses Consolidation Act, 1845, s. 127, yet the mines and minerals do not vest in the adjoining owners.

By Bramwell and Brett, L.JJ.: Where commonable lands have been inclosed under an award made pursuant to a local statute, passed subsequently to 41 Geo. 3, c. 109, and by the award the soil of the roads running between the allotments re-

(¹) Affirming 21 Eng. R., 145.

mains vested in the lord of the manor, if the land upon one side of a road becomes superfluous within the Lands Clauses Consolidation Act, 1845, s. 127, it will vest in the lord of the manor, for the right to the grass and herbage arising upon the road, under 41 Geo. 3, c. 109, s. 11, is insufficient to render the proprietor of the close upon the other side of the road an adjoining owner.

Semble, by Bramwell, L.J., where the natural drainage of land, belonging to a railway company and demised by them for agricultural purposes, flows into a reservoir used by them for the supply of water to their engines, the land is not superfluous within the Lands Clauses Consolidation Act, 1845, s. 127.

APPEAL from the judgment of the Queen's Bench Division in favor of the defendants (*).

This was a special case, stated by an arbitrator in an action of ejectment, brought to recover three closes of land, containing together thirteen acres or thereabouts. The writ of summons was tested on the 11th of May, 1875.

1. By the Wilts, Somerset and Weymouth Railway Act, 1845 (*) (with which the Lands Clauses Consolidation Act, 1845, and the Railways Clauses Consolidation Act, 1845, were incorporated), the Wilts, Somerset and Weymouth Railway Company was incorporated for the purpose of making a railway from the Great Western Railway to the city of Salisbury and town of Weymouth, with other railways in connection therewith. By s. 47, the quantity of land to be taken for extraordinary purposes was not to exceed 100 acres.

2. The Wilts, Somerset and Weymouth Railway (Amendment) Act, 1846 (*) (with which the Lands Clauses Consolidation Act, 1845, and the Railways Clauses Consolidation Act, 1845, were incorporated), was passed to authorize certain alterations and extensions of the line of the Wilts, Somerset and Weymouth Railway. By the 2d section of the last mentioned act, the provisions of the Wilts, Somerset and Weymouth Railway Act, 1845, *were ex- [260 tended to it. By the 10th section of the last mentioned act the company were authorized, amongst other things, to construct a railway passing through the parish of Westbury. By s. 12 of the act of 1846, after reciting that plans and sections of the altered or new lines of railway and extensions of the Wilts, Somerset and Weymouth Railway, showing the directions and levels thereof, and also books of reference containing the names of the owners, lessees, and occupiers, or reputed owners, lessees, and occupiers of the lands through which the same were intended to pass had been deposited with the clerks of the peace for the counties of Wilts, Somerset, and Dorset, it was enacted that, sub-

(*) 2 Q. B. D., 339; 21 Eng. R., 145.

(*) 9 & 10 Vict. c. cccxiii.

(*) 8 & 9 Vict. c. liii.

ject to the powers of deviation in the Railways Clauses Consolidation Act contained, the said altered or new lines of railway and extensions should be made according to the lines and levels thereof as defined in the said plans and sections; and, subject to the provisions in this and the Wilts, Somerset and Weymouth Railway Act, 1845, as extended to this act contained, it should be lawful for the said company to enter upon, take, and use such of the lands delineated on the said plans, and described in the said books of reference, as should be necessary for the purposes of such altered or new lines and extensions.

3. By s. 24 of the act of 1846, the altered or new and extended lines of railway by this act authorized, were to be completed within five years from the passing of that act, and on the expiration of such period the powers, granted to the company for executing the same or otherwise in relation thereto, were to cease to be exercised, except as to so much of the said lines of railway as should then be completed. This act received the royal assent on the 3d of August, 1846; the time for the completion of the said railways as prescribed by that act therefore expired on the 3d of August, 1851.

4. By a warrant under the seal of the Commissioners of Railways bearing date the 12th of April, 1848, and made in pursuance of an act intituled "An act to give further time for making certain Railways," the period of time limited by the act of 1846 for the completion of the altered and extended lines of railway was extended for the further period of two years, that is, to the 3d of August, 1853.

261] *5. By the Great Western Railway Act, 1851 ('), the Wilts, Somerset and Weymouth Railway Company was dissolved, and the undertaking of that company was thereby transferred to and remained vested in the Great Western Railway Company, with all rights, powers, privileges, and liabilities incidental thereto.

6. At the time of the execution of the indenture, dated the 25th of March, 1848, mentioned in paragraph 9, the freehold and inheritance in fee simple of the two several pieces of land containing together nineteen acres thereby conveyed to the Wilts, Somerset and Weymouth Railway Company, were vested in William Rossiter and John Rossiter, as trustees, with power of sale (with the consent of the Rev. John Hooper and Elizabeth Ann his wife), under an indenture of settlement, dated the 20th of November, 1818.

7. The whole of the said two pieces of land, containing

(¹) 14 & 15 Vict. c. xlviii.

together nineteen acres, were included in the plans and books of reference deposited with the clerk of the peace of the county of Wilts, and referred to by the secondly mentioned act; but a portion thereof, containing about $7\frac{1}{2}$ acres, was not included within the limits of deviation.

8. No notice to treat was served by the Wilts, Somerset and Weymouth Railway Company, or on their behalf, on any person interested in the two pieces of land containing nineteen acres, or any part thereof; but by an agreement, dated the 1st of March, 1848, the Wilts, Somerset and Weymouth Railway Company contracted with W. Rossiter and J. Rossiter, as trustees for the Rev. J. Hooper and his wife, for the purchase of the freehold and inheritance of the two pieces of land containing together nineteen acres, together with the mines under and timber on them, at the price of £3,280, which was to be in full satisfaction for all works for the accommodation of lands adjoining the railway, and for all gates, bridges, fences, &c., and was to include all severance and other damage.

9. By an indenture dated the 25th of March, 1848, and made between the said W. Rossiter and J. Rossiter of the first part, the Rev. John Hooper and Elizabeth Ann his wife of the second part, and the Wilts, Somerset and Weymouth Railway Company *of the third part, the said W. [262 Rossiter and J. Rossiter, at the request, and by the direction of the said J. Hooper and Elizabeth Ann his wife, in pursuance of the last mentioned agreement, and for the consideration therein mentioned, appointed and conveyed unto that company, their successors and assigns, the two pieces or parcels of land containing together nineteen acres, together with the cottage or tenement and outhouse thereto adjoining and belonging, erected on one of the said pieces, together with all mines and minerals thereunder, and all timbers and woods thereupon, which said two pieces of land in the said indenture were stated to be (and in fact were) in the maps or plans of the lines or course of the railway deposited with the clerk of the peace.

10. Shortly after the completion of the purchase the said company took possession of the said two pieces of land containing together nineteen acres, and upon the northwestern part thereof, containing about six acres constructed in part the line of railway, together with a station and other works connected with the railway and known as the Westbury station. The line of railway, the station, and other works were constructed within the limits of deviation.

11. After the railway was constructed, and down to the

1878

Welpley v. Buhl.

Held, affirming the judgment of the Queen's Bench Division, that until the plaintiff had lodged the writ and order remitting the action with the registrar of the county court the action remained in the superior court, and consequently there was jurisdiction to make the order extending the time for giving security.

APPEAL by the defendant against the decision of the Queen's Bench Division⁽¹⁾, rescinding an order of Fry, J.

An order had been made by a master, under 30 and 31 Vict. c. 142, s. 10, remitting the action to the county court, unless the plaintiff gave security for costs or paid money into court, in lieu of such security, within a week. The plaintiff failed to comply with the condition stated in the order, but did not lodge the writ and order with the registrar of the county court; and, after the expiration of the time mentioned in the order, applied for and obtained another order from the master extending the time for giving security, and paid money into court in conformity with the second order. On appeal to Fry, J., the judge rescinded the master's second order; the Queen's Bench Division reversed the judge's decision.

Anderson, for the defendant: The time for giving security under the master's first order having expired, the master had no jurisdiction to extend the time for giving security.

Whistler v. Hancock⁽²⁾ decided that where an action was dismissed for want of prosecution, it was at an end, and the court had no jurisdiction to extend the time for a delivery [254] of statement of claim. *According to *Moody v. Steward*⁽³⁾ when an action has been sent to be tried in the county court, under 30 & 31 Vict. c. 142, s. 10, it is no longer within the jurisdiction of the superior court for the purpose of taxing costs. When once an order is made to remit the action, it no longer remains in the High Court.

Tapping, and *J. Macdonald*, for the plaintiff, were not called upon.

BRAMWELL, L.J.: We are all of opinion that the judgment must be affirmed for the reasons given in the court below. I am inclined to think that, even if the case had got into the county court, the master might have rescinded his order, or his order might have been rescinded on appeal. In Chitty's Practice, p. 1537, 10th ed., it is said: "When an order has been made, or the conditions annexed to an order imposed, under a mistake, or when new circumstances arise which render it clearly essential to the justice of the case, a judge will amend or vary his order, or will sometimes even rescind it when it appears to have been irregularly and improperly obtained." According to this statement

⁽¹⁾ 3 Q. B. D., 80; *ante*, pp. 76, 78 note.

⁽²⁾ 3 Q. B. D., 88; *ante*, p. 79.

⁽³⁾ Law Rep., 6 Ex., 35.

of the law, an order may be dealt with at a subsequent time.

I think the reasoning of Cockburn, C.J., and Manisty, J., quite right, and that the appeal should be dismissed.

BRETT, L.J.: I think the decision of the Queen's Bench Division was correct. In questions of procedure the master has jurisdiction to rescind or vary an order on proper grounds.

COTTON, L.J.: I also am of opinion that the appeal should be dismissed. The cases that have been cited are clearly distinguishable.

Appeal dismissed.

Solicitor for plaintiff: *J. E. S. King.*

Solicitors for defendant: *Alsop & Co.*

[3 Queen's Bench Division, 255.]

Feb. 22, 1878.

[CROWN CASE RESERVED.]

***THE QUEEN V. THE INHABITANTS OF THE [255
TOWNSHIP OF ARDSLEY.**

Highway, indictment for non-repair—Township, liability to repair.

Upon the trial of an indictment against the township of A. for the non-repair of a highway within it, it appeared that A. was one of seven townships forming the parish of D. The parish itself had never repaired any highway, nor levied highway rates, nor appointed surveyors; each township having appointed its own surveyors, and levied its own highway rates. With the exception of the highway in question, and one other, each of the seven townships had from time immemorial repaired its own highways. The highway had always been repaired by the adjoining township of W., but there was no evidence of any consideration for such repair:

Held, that A. was liable, for it must be presumed that the repairs had been done by W. under some arrangement between the two townships, and such arrangement in the absence of sufficient consideration was not binding on W.

CASE stated by the Chairman of Quarter Sessions for the West Riding of York, upon a conviction of the inhabitants of the township of Ardsley for not repairing a highway situate within that township.

The parish in which the township of Ardsley is situate is divided into seven townships, each of which (with the two exceptions hereinafter mentioned) has repaired its own highways. There is an immemorial custom for each township to repair all highways (with the two exceptions hereinafter mentioned) within the limits of the respective towns.

Each township has appointed its own surveyors and levied its own highway rates.

There have never been any repairs done by the parish at
28 ENG. REP. 30

1877

Hooper v. Bourne.

spectively, before and at the time of the conveyance to the Wilts, Somerset and Weymouth Railway Company, had been, and still were, public highways for carriages, horses, and foot passengers, and repairable by the parish as such.

The land upon the northwest side of the railway, opposite to No. 1, No. 2, and No. 3, was the land from which they had been severed in 1848; and in 1863 it belonged, and did still belong, to the plaintiffs.

265] *12. By an agreement dated the 24th of December, 1849, the Wilts, Somerset and Weymouth Railway Company let No. 1, No. 2, and No. 3, to James Bourne, as tenant from year to year; but the agreement contained a provision that if the company should at any time require the pieces of land for the purposes of their act, or for any purpose connected with their railway, it should be lawful for the company on giving two months' notice in writing to the tenant, to determine the agreement, and to enter into and upon, to hold, occupy, and enjoy the said premises as if the agreement had never been made, immediately on the expiration of the two months, whether they should end with the current year of the tenancy or not. The three pieces of land were occupied by James Bourne and his successors in title under the agreement until the 16th of August, 1871, and were during that period of time used by them solely for agricultural and farming purposes.

13. By an agreement dated the 18th of August, 1871, the Great Western Railway Company let the three pieces of land, No. 1, No. 2, and No. 3, to the Westbury Iron Company, Limited, as tenants from year to year, such letting being subsidiary to a license, which, by an indenture dated the 16th of August, 1871, the Great Western Railway Company had granted to the Westbury Iron Company to work the iron ore under the pieces of land. The last mentioned agreement contained a provision, that in the event of the railway company requiring the whole or any portion of the land for any purpose whatsoever, they should be entitled to take possession of the same, and to put an end to the tenancy upon giving twenty-eight days' notice in writing. The indenture dated the 16th of August, 1871, contained a provision having the like object with the above mentioned provision in the agreement, dated the 18th of August, 1871. The Westbury Iron Company, Limited, had occupied the three pieces of land under and by virtue of the license and agreement respectively from the dates thereof until the time of stating the special case, and had in part used them for the purposes therein mentioned respectively.

14. Since the year 1868 the railway traffic at Westbury station had much increased, and since that period of time the three pieces of land, No. 1, No. 2, and No. 3, had been and still were *required for the purpose of construct- [266 ing additional sidings upon them to accommodate the increased traffic. The want of such additional accommodation was, during the period aforesaid, a subject of frequent discussion between the several district officers of the Great Western Railway Company having the general supervision of the traffic at the Westbury station; but in consequence of general instructions from the general manager of the company, that, as the company were expending large sums of money upon other works, district officers were not to ask for anything that was not necessary or could possibly be postponed, no requisition was made by the district officers to the company since that period to provide such additional accommodation, nor did the company, since that period, provide, or take any steps to provide, such additional accommodation, and the three pieces of land had, since that period, remained, and still remained, in the same state as they were up to the end of the year 1868.

19. The plaintiffs contended that the three pieces of land, No. 1, No. 2, and No. 3, were superfluous land within the meaning of s. 127 (¹) of the Lands Clauses Consolidation Act, 1845, and were vested in the plaintiffs.

20. The defendants, on the other hand, contended that the three pieces of land claimed by the plaintiffs were not superfluous land within the meaning of that section, and that the plaintiffs were not entitled to recover them.

21. The court were to have the same power of drawing inferences of fact as a jury would have.

22. The question for the opinion of the court was whether, *under the circumstances hereinbefore set forth, the [267 plaintiffs were entitled to recover possession of the whole or any, and what, part of the lands claimed in the writ.

Dec. 11, 12, 13, 18. *H. T. Cole*, Q.C., and *C. G. Mere-*

(¹) Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), s. 127, "And with respect to lands acquired by the promoters of the undertaking under the provisions of this or the special act, or any act incorporated therewith, but which shall not be required for the purposes thereof, be it enacted as follows: Within the prescribed period, or if no period be prescribed, within ten years after the expiration of the time limited by the special act for the completion of the

works, the promoters of the undertaking shall absolutely sell and dispose of all such superfluous lands, and apply the purchase-money arising from such sales to the purposes of the special act, and in default thereof all such superfluous lands remaining unsold at the expiration of such period shall thereupon vest in and become the property of the owners of the lands adjoining thereto in proportion to the extent of their lands respectively adjoining the same."

wether, Q.C., for the plaintiffs: This case is distinguishable from *Betts v. Great Eastern Ry. Co.* ⁽¹⁾, for in that case the jury found ⁽²⁾ that the land in dispute had been ever since it was taken, and still was, retained *bona fide* for the purposes of the line, whereas here it is found that the land sought to be recovered was conveyed to the Wilts, Somerset and Weymouth Railway Company in March, 1848, and that it was not required for the use of the railway until the year 1868. As the land was not in use upon the last day of the ten years computed from the expiration of the time limited for the completion of the railway, it was superfluous, according to the principles laid down in *Great Western Ry. Co. v. May* ⁽³⁾. Upon the 3d of August, 1863, there was no pretence for saying that the land was wanted; it had not then occurred to any of the officials that additional sidings would be needed for the increasing traffic upon the railway, and, in fact, they had never been constructed. The judgments delivered in the Queen's Bench Division in the present case are irreconcilable with *Great Western Ry. Co. v. May* ⁽⁴⁾; for ever since the land was purchased, a period of almost thirty years, it has never been used for the purposes of the railway; it has been let for agricultural and farming and mining purposes, and from its large size, some part at least cannot be wanted for the increased traffic. At the expiration of the ten years the officials of the company, as is pointed out by Lord Cairns, L.C., in *Great Western Ry. Co. v. May* ⁽⁵⁾, must determine whether the land is superfluous or not; to judge from the facts stated, the engineers of the Great Western Railway Company were of opinion, in 1863, that the land was not required for the purposes of the undertaking. The officials of the company ought, by the performance of some act, to have made an election whether

268] the land sought to be recovered *was wanted for the purposes of the undertaking. It may be argued, on the part of the defendants, that although the land is superfluous it did not vest in the plaintiffs by force of the Lands Clauses Consolidation Act, 1845, s. 127; but the land was taken under the powers of the special act, although no notice to treat was given and an agreement for the purchase of it was executed; this is clear from the terms of the conveyance to the Wilts, Somerset and Weymouth Railway Company, and also from the circumstance that the land was included within the plans and the books of reference de-

⁽¹⁾ Law Rep., 8 Ex., 294. Judgment affirmed in the Court of Appeal, 25th February, 1878.

⁽²⁾ Law Rep., 8 Ex., 297.

⁽³⁾ Law Rep., 7 H. L., 283; 10 Eng. R., 38.

⁽⁴⁾ Law Rep., 7 H. L., 283, 294; 10 Eng. R., 38.

posited with the clerk of the peace, and that company had, by s. 12 of the Wilts, Somerset and Weymouth Railway (Amendment) Act, 1846, power to take the lands delineated on the plans and described in the books of reference.

C. Bowen, and *Moulton*, for the defendants: The burden of proof lies upon the plaintiffs, for the statute imposes a forfeiture, and therefore must be construed strictly. The question is whether, at the expiration of the ten years, the land was required for the purposes of the undertaking, and it may be required, although it is not in actual use. The argument for the plaintiffs is fallacious, that a railway company must decide at the end of the ten years whether land not in actual use is superfluous; this construction is not supported by any provision in the Lands Clauses Consolidation Act, 1845; but if it is necessary for a railway company at that period to elect whether land is or is not required, then an election has been made that the land in dispute is not superfluous. It is found as a fact that the land was wanted in 1868, and this raises a strong presumption that it was wanted in 1863. The long time which elapsed before the plaintiffs began to assert their claim is evidence against them that they thought the land would be wanted. It is true that the company have demised the land for agricultural and farming purposes and mining purposes, but a power to resume possession upon a short notice was reserved. Then plot No. 1 was, in 1863, actually wanted for the supply of water to the reservoir, which was fed by the natural drainage from the surrounding lands. In the judgment of Lord Cairns, L.C., in *Great Western Ry. Co. v. May* (*) it is stated that superfluous lands may be divided into four classes, but the land in dispute does not fall within the *definition of any one of those classes. Further; the [269 land in dispute was not acquired under the compulsory powers of the company, through whom the Great Western Railway Company claim it; and this is a further reason for holding that it did not vest in the plaintiffs as adjoining owners. That company gave no notice to treat; the land was conveyed pursuant to agreement, and was, in fact, acquired for extraordinary purposes under the Lands Clauses Consolidation Act, 1845, ss. 12, 13, and the Railway Clauses Consolidation Act, 1845, s. 45 (*); for if the plaintiffs are

(*) Law Rep., 7 H. L., 283, at pp. 292, 293; 10 Eng. R., 38.

(*) By the Lands Clauses Consolidation Act (8 & 9 Vict. c. 18), s. 6, "And with respect to the purchase of lands by agreement, be it enacted as follows:

Subject to the provisions of this and the special act, it shall be lawful for the promoters of the undertaking to agree with the owners of any lands by the special act authorized to be taken, and which shall be required for the

1877

Hooper v. Bourne.

270] *right that the land in dispute is useless to the Great Western Railway Company, it has not been acquired under the Lands Clauses Consolidation Act, 1845, s. 6, because that refers only to land by the special act "authorized to be taken, and which shall be required for the purposes of such act." And it has been decided by the House of Lords in *City of Glasgow Union Ry. Co. v. Caledonian Ry. Co.* ⁽¹⁾, that land acquired for extraordinary purposes does not vest in adjoining owners: *Horne v. Lymington Ry. Co.* ⁽²⁾. The difference between land acquired by voluntary agreement and under compulsory powers becomes clear upon referring to *Lord Carington v. Wycombe Ry. Co.* ⁽³⁾. Further, a railway company has no power to take mines compulsorily, *Great Western Ry. Co. v. Bennett* ⁽⁴⁾; *Great Western Ry. Co. v. Smith* ⁽⁵⁾; and as the conveyance to the Wilts, Somerset and Weymouth Railway Company expressly includes "all mines and minerals," it is clear that the land in dis-

purposes of such act, and with all parties having any estate or interest in such lands, or by this or the special act enabled to sell and convey the same, for the absolute purchase, for a consideration in money, of any such lands, or such parts thereof as they shall think proper, and of all estates and interests in such lands, of what kind soever."

By s. 12, "In case the promoters of the undertaking shall be empowered by the special act to purchase lands for extraordinary purposes, it shall be lawful for all parties who, under the provisions hereinbefore contained, would be enabled to sell and convey lands, to sell and convey the lands so authorized to be purchased for extraordinary purposes."

By s. 18, "It shall be lawful for the promoters of the undertaking to sell the lands which they shall have so acquired for extraordinary purposes, or any part thereof, in such manner and for such considerations, and to such persons as the promoters of the undertaking may think fit, and again to purchase other lands for the like purposes, and afterwards sell the same, and so from time to time; but the total quantity of land to be held at any one time by the promoters of the undertaking for the purposes aforesaid shall not exceed the prescribed quantity."

Sect. 16 and the following sections

relate to the purchase and taking of lands otherwise than by agreement; s. 18 relates to the giving of notices to treat.

By the Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), s. 45, "It shall be lawful for the company, in addition to the lands authorized to be compulsorily taken by them under the powers of this or the special act, to contract with any party willing to sell the same for the purchase of any land adjoining or near to the railway, not exceeding in the whole the prescribed number of acres for extraordinary purposes (that is to say) for the purpose of making and providing additional stations, yards, wharfs, and places for the accommodation of passengers, and for receiving, depositing, and loading or unloading goods or cattle to be conveyed upon the railway, and for the erection of weighing machines, toll-houses, offices, warehouses, and other buildings and conveniences; for the purpose of making convenient roads or ways to the railway, or any other purpose which may be requisite or convenient for the formation or use of the railway."

⁽¹⁾ Law Rep., 2 Sc. Ap., 160.

⁽²⁾ 31 L. T. (N.S.), 167.

⁽³⁾ Law Rep., 3 Ch., 377.

⁽⁴⁾ Law Rep., 2 H. L., 27.

⁽⁵⁾ 2 Ch. D., 235, at p. 244; on appeal, 3 Ap. Cas., 165; 24 Eng. R., 95.

pute was acquired by voluntary agreement. A railway company is a corporation; and possibly, under the Statutes of Mortmain, if they purchase by agreement lands not required for the purposes of the undertaking, the Crown may be entitled to the lands, but they do not vest in the adjoining owners under s. 127. In any event the land beyond the limits of deviation was not acquired under the compulsory powers. Then the plaintiffs are not adjoining owners as to Nos. 2 and 3. They cannot be adjoining owners in respect of their land situate on the northwest side of the railway. The Great Western Railway Company, whose line bounds the land in dispute, are the adjoining owners upon the north-western side. The plaintiffs are not adjoining owners in respect of their land situate upon the southeast side of No. 3, for their land is separated from it by the road to Hawk-bridge, and that road having been set out under an award made pursuant to parliamentary powers, its soil remains vested in the representatives of the lord of the manor. No. 2 is bounded *upon the south by the Station Road, [271 which is clearly vested in the Great Western Railway Company, and not in the plaintiffs.

Mereweather, Q.C., in reply: The Lands Clauses Consolidation Act, 1845, ss. 12, 13, and the Railways Clauses Consolidation Act, 1845, s. 45, were intended to allow a railway company to buy additional land in case their engineers miscalculated the amount necessary for the construction of the railway. The land in dispute being delineated in the parliamentary plan and described in the books of reference was taken under the powers of the special act, although no notice to treat was given, and it is immaterial that a portion of it lay beyond the limits of deviation, for land so situate is acquired under the powers of the special act: *May v. Great Western Ry. Co.* ('). The period of ten years is assigned in order that a company may ascertain what lands they really want for the purposes of the undertaking. Granted that the land has been wanted for sidings since 1868, nevertheless it was not required for the purposes of the railway between 1848, when it was bought, and that year, a period of twenty years; it was, therefore, in 1863, superfluous land. Then the plaintiffs are adjoining owners by reason of their lands upon the northwest side of the railway. The land in dispute was originally severed from the plaintiffs' land upon the northwest side of the railway; they were entitled to the right of pre-emption under the

(') Law Rep., 7 Q. B., 364; per Blackburn, J., at p. 382, and per Quain, J., at p. 386.

1877

Hooper v. Bourne.

Lands Clauses Consolidation Act, 1845, s. 128⁽¹⁾, and must be the adjoining owners, in whom the land vested. If a different construction were adopted, the Great Western Railway Company would, by virtue of their line, be the adjoining owners on the northwest side of the land in dispute.

Further, the plaintiffs are adjoining owners to No. 3 by reason of their land upon the southeast side thereof; it may be admitted that as the road to Hawkbridge was set out under an award made pursuant to parliamentary powers, no presumption of law arises, that its soil belongs to 272] the proprietors of the neighboring lands, **Rex v. Hatfield*⁽²⁾; but under 41 Geo. 3, c. 109, s. 11, the grass and herbage belong to them⁽³⁾; and the enjoyment of the pasturage is substantially the only benefit which can arise from the use of the soil of a road; therefore the proprietors of the neighboring land, including the plaintiffs, having the same benefit as if they were seized of the soil of the road, are adjoining owners within the meaning of the Lands Clauses Consolidation Act, 1845, s. 127.

BRAMWELL, L.J.: I cannot help considering this an action which ought not to have been brought; for even if the plaintiffs were right in point of law, it would have been more equitable in them to offer to pay to the Great Western Railway Company the fair price of the land, and thereby to settle the dispute, than to endeavor to take possession of it by legal process; and therefore in deciding this case it is necessary to guard against any prepossessions in favor of the defendants, and to resist any bias adverse to the claim of the plaintiffs.

I think that ss. 12, 13 of the Lands Clauses Consolidation Act, 1845, and s. 45 of the Railways Clauses Consolidation Act, 1845, do not apply to the present action; the land sought to be recovered was not wanted for extraordinary purposes. It is not necessary now to give an interpretation of these sections, but I may say that they seem to be intended to enable the promoters to acquire land, which at the time of passing the special act was not supposed to be required for the undertaking; the purposes, for which additional land is allowed to be acquired after the special act is passed, must be those described in the 45th section of the Railways Clauses Consolidation Act, 1845, or at least analo-

⁽¹⁾ By the Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), s. 128: "Before the promoters of the undertaking dispose of any such superfluous lands, they shall . . . first offer to sell the same to the person then entitled to the lands (if any) from which the same were originally severed."

⁽²⁾ 4 A. & E., 156, at p. 164, per Lord Denman, C.J.

⁽³⁾ By the grant of herbage the soil does not pass: Co. Litt., 4 b.

gous thereto. It seems to me plain that these enactments do not protect the defendants.

I think, also, that s. 127 of that statute and those which follow are not restricted to cases where land has been acquired under what are called its compulsory powers; no limitation of that kind exists in express terms, and the only mode in which the scope of the sections can be confined so as to suit the defendants' contention *is by [273 construing the words in the introductory portion, "under the provisions," as if they were "by virtue of the compulsory powers;" but I see no reason why the limitation suggested should be created. It seems to me that the object of these sections is as applicable to lands acquired by negotiation, where the special act confers a power to take them, as to lands which are not so acquired. If a different construction were adopted, it would be hard to draw a line as to the application of these sections. The company who are now represented by the Great Western Railway Company intimated that they wanted amongst others the land in dispute, and they came to an agreement with the then owners as to what should be taken and what should be paid. But suppose that the company and the then owners had not in the first instance been able to agree, and that the company had given notice to treat, and that afterwards, but before any further proceeding was taken, an agreement was arrived at: I see no substantial distinction between that state of facts and what actually happened in this case. Suppose that the proceedings between the company and the owners had gone further, and that a claim had been sent in which was objected to, and that notice had been given to summon a jury to assess the compensation, and even that a jury had been summoned and had met together, and that the parties had appeared before it, and that an agreement had then been arrived at: I still think that no distinction in principle can be made between such circumstances as I have last mentioned and the actual facts of this case. It seems to me that where a company are empowered to take lands compulsorily, no distinction can be drawn between those lands which they take not by having recourse to their compulsory powers, but by agreement, the owner knowing that if he does not agree he will be forced to part with them, and those lands which are taken without any agreement, the owner opposing and obstructing every proceeding of the company; the same principle applies in all the instances which I have alluded to. I therefore think that the lands sought to be recovered were acquired by the company who

1877

Hooper v. Bourne.

were promoters of the original undertaking "under the provisions of" the Lands Clauses Consolidation Act, 1845, and of their special act.

The next question to be determined is whether the land 274] sought *to be recovered is "superfluous land," within the meaning of s. 127 of the Lands Clauses Consolidation Act, 1845; that section enacts that within a limited period, in this case ten years, from the expiration of the time fixed for the completion of the works, "the promoters of the undertaking shall absolutely sell and dispose of all such superfluous lands." It has been laid down by an authority binding upon us that for the purposes of this section the point of time to be considered is the last day of the ten years, and that if land is not then required by the company it is superfluous, although at a previous time it may have been required, or although at a subsequent time it may be required by them for the purposes of the undertaking. I agree with the view of the law as stated in the House of Lords in *Great Western Ry. Co. v. May* ⁽¹⁾, even if that case did not bind us as the decision of a higher tribunal. In the present case it is necessary to consider the meaning of the words "required for the purposes thereof" in the introductory portion of s. 127. Land is "required" by a railway company where they have actually used it for laying down the rails over which the trains carrying their traffic pass and repass, or for erecting works necessary in conducting their business. I think also that land is "required" where, although it is not at the moment used by the company, it will be wanted within a definite and ascertained time. I will give an illustration of what I mean: Suppose that in this case during July, 1863, a contract had been entered into for the commencement in the September following of works upon the land in dispute, and that the contract was *bona fide* and was not colorable, and was not entered into for the purpose of saving the forfeiture, and that the works contemplated were really wanted for the purposes of the railway: is it not clear that in that event the land would, on the 3d of August, 1863, be "required for the purposes of the undertaking"? If it were held that the land was not "required," the absurd consequence would follow, that if the works had been commenced upon the 1st of August, the land would not be superfluous, but that it is superfluous because they are not begun until September, even although the commencement of them has been postponed merely to suit the convenience of the contractor

(1) Law Rep., 7 H. L., 289, per Lord Cairns, L.C., at p. 294.

who has undertaken to execute *them. I cannot [275 think that the land would vest in adjoining owners by reason of a delay on the part of the contractor. I am satisfied therefore that the expression "required for the purposes thereof" includes at least two classes, namely, lands actually in use on the day with respect to which the matter is to be decided, and also lands which are on that day within a definite and ascertained time intended to be used for the purpose of the railway company. But I think that there is also a third class of cases where land may properly be said to be "required" for the purpose of the undertaking, that is to say, where at the expiration of the period the land, although not in actual use, will be, owing to the growing traffic of the line, wanted for the railway within a reasonable time, which it is not possible to specify. I do not profess to give a precise definition of the class of cases to which I am now alluding, and I wish to remark that I do not think any land is "required" for the purposes of an undertaking merely because some person may be found to say that very likely at some time it may be wanted; but suppose that persons of competent skill can *bona fide* say that although the land is not at the moment wanted for the railway, and although it is not possible to fix a time when it will be, yet at some future time, perhaps five or six years, it assuredly will be wanted; in that case I think that the land is required for the purposes of the undertaking. If the argument for the plaintiffs were correct, adjoining owners would become entitled to land which had been covered with sidings unless those sidings were necessary for the then existing traffic of the railway; it would not be enough for the company to urge that the sidings had been made in order to provide for traffic which at some time would assuredly be created. The adjoining owners might claim the land because the sidings on it were not then wanted, and even if the company used them, the adjoining owners might still successfully contend that the use was not *bona fide*, but only colorable, in order to save a forfeiture under these sections. I think it would be a hardship upon a railway company if they were not allowed to retain land for which they have no immediate use, and which they do not expect to use within a definite and ascertained time, but which they will certainly use at some future and reasonable time. It must be borne in mind that *when land has once [276 vested in adjoining owners, a railway company may find it very difficult, if not impossible, again to become owners of it; and therefore an estimate ought to be made in their fa-

1877

Hooper v. Bourne.

vor, not only of the present, but also of the future, state of the traffic. In order to make myself clear, I will say that in my opinion land will vest in adjoining owners at the end of the limited period, although at some subsequent time a new railway is unexpectedly constructed, forming a junction with the old railway, which would have rendered the retention of the land by the old company desirable for the purposes of their undertaking; for if this were allowed to be done, there would be a difficulty in saying that any piece of land would not at some future time be required. But, for the reasons which I have before given, I think that there is a third class of lands "required for the purposes" of the undertaking.

Having arrived at this conclusion as to the meaning of s. 127 and those which follow, I wish to make one remark before proceeding further. It has been forcibly argued for the plaintiffs that the sole object of mentioning a period of years in s. 127 is that the company shall within that period ascertain what lands are superfluous, and it is contended that the time for that purpose cannot under any circumstances be extended. I do not think that this is quite the correct construction of the section; for upon referring to the words of s. 127, it will be found that the promoters are to sell and dispose of the superfluous land, so that the period specified is given, not merely to ascertain what lands are superfluous, but also to allow the company to sell and dispose of such lands as may be superfluous.

Then the next question to be considered is whether the land sought to be recovered upon the 3d of August, 1863, fell within any of the classes which I have mentioned. It certainly was not within the first class, for it was not then used for the railway or for the works thereof. And I think that we should draw an erroneous inference if we were to hold that it fell within the second class; for upon the 3d of August, 1863, it could not then be said that it would be wanted within a definite and ascertained time. The question, therefore, is reduced to this, whether the land in dispute fell within the third class, which I have endeavored to describe, that is to say, whether it was land which, as 277] competent *persons might have foreseen, would be wanted at some future uncertain but reasonable time for the purposes of the railway. I confess that I have felt very great difficulty as to what answer ought to be given to this question; for we are called upon by the defendants to hold that the land sought to be recovered was, on the 3d of August, 1863, required for the purposes of the special act,

and although at the commencement of this action almost twelve years had elapsed from that date, the land in dispute, or at all events some portion of it, had never been applied to any use connected with the traffic of the railway. This is a consideration which, as a matter of fact, is deserving of very great weight. But we must deal with the case as it has been presented to us, and it is found as a fact by the arbitrator that "since the year 1868 the railway traffic at the Westbury station has very much increased, and during that period of time the three pieces of land have been and still are required for the purpose of constructing additional sidings upon them to accommodate the increased traffic." It seems to me that we are bound to consider this case as though this was the year 1868, and as though the Great Western Railway Company had in that year laid down additional sidings and were making use of the land. If the argument for the plaintiffs were well founded, it would follow that although the Great Western Railway Company had in 1868 covered the three pieces of land with sidings for the purposes of the railway, still this would have been land which in 1863 was superfluous. But Mr. Justice Mellor and Mr. Justice Manisty, who decided this case in the Queen's Bench Division, and who had power to draw inferences of fact, have come to the conclusion that the land in dispute was, upon the 3d of August, 1863, required for the purposes of the undertaking. Ought we to say that these learned judges were wrong, and to lay down that these three pieces of land cannot fall within the third class of lands "required" which I have endeavored to describe? However much I may feel embarrassed by the length of time which has elapsed without constructing the sidings, I cannot say that their judgment is wrong; and as I cannot say that the judgment of the Queen's Bench Division is wrong, I must hold that in this court it ought to be affirmed. I wish to add that this part of my judgment is founded upon what I consider to be the *correct interpretation of what was laid down in *Great Western Ry. Co. v. May* (1) by Lord Cairns, L.C., and Lord Hatherley when that case was before the House of Lords, and by Cockburn, C.J., and Blackburn, J., when it was before the Court of Queen's Bench (2).

I have further to remark that even if the three pieces of land were superfluous, in my opinion the mines and minerals would clearly belong to the Great Western Railway Company, because they at all events have not been acquired

(1) Law Rep., 7 H. L., 288; 10 Eng. R., 88.

(2) Law Rep., 7 Q. B., 364.

1877

Hooper v. Bourne.

under the "provisions" of the act. The mines and minerals were conveyed by the same deed as the surface; and it was ingeniously suggested for the defendants that because the mines and minerals were not acquired under the provisions of the special act the surface was not; but this argument seems untenable, for the mines are severable from the surface, and the circumstance that the whole was conveyed by one deed will not prevent the surface from being acquired under the "provisions" of the special act, although the mines were not; therefore the surface may become superfluous land, although the mines cannot. But in any point of view as to the construction of s. 127, the Great Western Railway Company would be entitled to keep the mines.

It is possible that this case may go before a higher tribunal, and therefore I think it right to express my view as to the other points which have been raised. I am of opinion that as to the piece of land No. 3, the plaintiffs are not shown to be adjoining owners. I am satisfied that we are not to take into account for this purpose the land belonging to them, which lies upon the other side of the railway. Under the Lands Clauses Consolidation Act, 1845, s. 128⁽¹⁾, before superfluous lands can be disposed of, they are to be offered to the person then entitled to the lands from which they were originally severed. The plaintiffs were in 1863 the owners of the lands upon the northwest side of the railway, from which the land sought to be recovered was originally severed, and it has been argued that because they would have been entitled to the right of pre-emption, the plaintiffs are adjoining owners of the lands in dispute. That is an argument to which I cannot assent. *I will now refer to the road upon the southeast side of the piece of land No. 3; as it was set out under an award made by commissioners appointed by an act of Parliament, the soil does not belong to the plaintiffs even where their land abuts upon it; and I think no weight ought to be attached to the contention that because the plaintiffs are, by virtue of 41 Geo. 3, c. 109, s. 11, entitled to the grass and herbage upon the road opposite their land, they are adjoining owners. The soil of the road was vested in the lord of the manor at the time when it was set out, and is now vested in those who represent him, and it seems to me that the adjoining owners of the piece of land No. 3 are the precentors of Sarum, and the owners of the soil of the roads which bound it on its southeast and southwest sides.

(1) See *ante*, p. 248, n. (2).

With respect to the piece of land No. 1, no doubt the plaintiffs were adjoining owners, and therefore if it was forfeited the plaintiffs would be entitled to a portion. But I cannot help thinking that the whole of No. 1 was in 1863 in actual use by the company, and that it would be extremely difficult to mark off any portion as being not in use on the 3d of August, 1863. At the north corner was the cottage inhabited by the company's servant; in the middle was the reservoir, with the pipes leading from it to the well; the company also would be entitled to a margin for the station road, and it might be very inconvenient to be without direct access from the cottage to the reservoir. Under these circumstances I think that the whole of the north end of No. 1 was in 1863 used by the company; but these considerations do not apply to the south end which lies beyond the reservoir, and if it were not for the following consideration it might be questionable whether it could be said to have been used by the company in that year. It is found in the special case that the reservoir was *bona fide* used for the purposes of the railway, and it was supplied by the natural drainage of the surrounding land. Possibly the company would not have bought the south end of No. 1 merely for the purpose of allowing the drainage from it to flow into the reservoir, and that even if they had bought it they might be willing to sell it for a good price, because, in order to make up the deficiency in the supply of water to the reservoir, they might sink another well; but it seems to me difficult to say that the south end *was not used for the purposes of the [280 railway. When a thing is said to be "required" for the purposes of a railway, it is not meant that no equivalent or substitute for it can be found, but it is meant that the thing is or will be at a future time useful for carrying on the traffic. In this point of view the company were in 1863 making use of the south end. It is true that they had let it to James Bourne for agricultural and farming purposes; but if he had stopped the flow of drainage into the reservoir, he would in all probability have received notice to quit. If the company had sold the south end, the new owner might have caused the drainage to flow away from the reservoir, and the company would have been at his mercy, unless they could have obtained an adequate supply of water by other means. I therefore am strongly inclined to hold that the whole of the piece of land No. 1 was in 1863 in actual use for the purposes of the railway.

I have already said the defendants are entitled to judgment in the action on the main question, namely, that in

1877

Hooper v. Bourne.

1863 the three pieces of land were required for the purposes of constructing additional sidings, and I repeat that in my opinion the judgment of the Queen's Bench Division ought to be affirmed, because Mr. Justice Mellor and Mr. Justice Manisty have drawn inferences which I cannot say are erroneous.

BRETT, L.J.: I also am of opinion that our judgment ought to be for the defendants.

In order that the plaintiffs may succeed in this action, they were bound to show that on the last day of the ten years the land sought to be recovered, or some part of it, was superfluous within the meaning of the Lands Clauses Consolidation Act, 1845, s. 127, and also that they were adjoining owners. As it seems to me, this result flows from the judgment in *Great Western Ry. Co. v. May* (¹), and in that case Lord Cairns (p. 292) states his view as to the meaning of the term "superfluous land," and points out that, as appears from the introductory portion of s. 127, its synonym is land acquired by the promoters of the undertaking "under the provisions of this or the special act or any act incorporated therewith, but which shall not be required for the 281] purposes thereof." *The plaintiffs, therefore, undertook to show that the lands sought to be recovered were acquired by the promoters of the original undertaking under the provisions of the Lands Clauses Consolidation Act, 1845, or their special act: this proposition was denied by the defendants upon several grounds. It was contended upon their behalf that the land in question was purchased for extraordinary purposes under ss. 12, 13 of the Lands Clauses Consolidation Act, 1845, and s. 45 of the Railways Clauses Consolidation Act, 1845, and that land purchased for extraordinary purposes cannot be considered as land acquired by the promoters of the undertaking under the "provisions" of those acts or the special act. It seems to me that lands purchased for extraordinary purposes may be properly said to have been acquired under the provisions of those acts and the special act; but that, owing to the very words of the Lands Clauses Consolidation Act, 1845, ss. 12, 13, it is at the very least doubtful whether they can be deemed to vest in the adjacent owners at the expiration of the specified time, or to be subject to the right of pre-emption. This is a matter which, in my opinion, it is unnecessary to determine now, because, upon referring to the facts as found in the case, it is plain that the land sought to be recovered was not purchased for extraordinary purposes. It was further con-

(¹) Law Rep., 7 H. L., 283; 10 Eng. R., 38.

tended that if the land sought to be recovered was not purchased for extraordinary purposes, it was, at all events, not acquired under the "provisions" of the Lands Clauses Consolidation Act, 1845, or the special act, because no notice to treat was given. I do not agree with this contention. It was included in the plans and books of reference deposited with the clerk of the peace, and although it was acquired by agreement with the owners, it was plainly acquired for the purposes of the undertaking, for it was part of a plot of land conveyed by one indenture, and upon other portions of that plot the line and station now belonging to the Great Western Railway Company have been constructed. The necessity for the notice to treat arises only when the company are driven to avail themselves of the compulsory powers, and it may be dispensed with where the company, after their special act has been passed, can obtain land by agreement with the owner: nevertheless, even in this case, it is the statutes, and the statutes *alone, which enable [282 the company to take the land for the purposes of the railway; and therefore, although in the present case there was no notice to treat, it seems to me plain that the land was acquired under the "provisions" of the Lands Clauses Consolidation Act, 1845, and the special act. Upon this question, as well as upon the question as to land purchased for extraordinary purposes, the plaintiffs are entitled to succeed.

I will now consider the further argument advanced on behalf of the defendants, that the land sought to be recovered was on the last day of the ten years required for the purposes of the undertaking. In *Great Western Ry. Co. v. May* (¹), Lord Cairns, L.C., after pointing out that the Legislature has fixed a period of time at which a survey is to be made of the condition of a railway, proceeds to say: "Can you at that moment of time thus indicated by Parliament predicate of any land in the occupation of a railway company that it is at that moment superfluous land"? The argument on the part of the plaintiffs was in effect that the meaning of the words "can you at that moment of time predicate," in the passage which I have read, is, "could the officers or directors of the railway company, and did they at that moment, predicate"? I cannot assent to this: in my opinion the real meaning is: can the tribunal which has to try the case say at the time when the case is tried that, if all the facts existing on the last day of the ten years had been known to a reasonably skilful and careful person, he

(¹) *Law Rep.*, 7 H. L., 283, at p. 294; 10 Eng. R., 88.

would have said at that time that the lands in question would, by the ordinary development of the railway or neighborhood, be required to be actually applied to the purposes of the railway within a reasonable time? And in order to enable the tribunal which is trying the case to determine that question, they have a right to receive evidence of facts which have become known since the last day of the ten years. I guard the proposition which I have laid down by the phrase, "ordinary development of the railway or neighborhood;" and my reason is, that those facts, which arise after the last day of the ten years, and which are not the ordinary development of the railway or neighborhood, must not be taken into consideration; for instance, suppose that after the last day of the ten years and before the trial 283] of the case some *great manufactory be established in the neighborhood, which would bring a large population and cause the alleged superfluous land to be wanted for the increased traffic: this circumstance must not be taken into account, because it could not at the end of the ten years have been foreseen as an ordinary development of the railway: again, if an act authorizing the construction of a new railway were after the expiration of that period to be obtained by a new company, and the existing railway were to run into it at a junction by passing over the land alleged to be superfluous, that would be an accidental matter not to be taken into account. Nevertheless the proposition which I have mentioned must be applied to the case before us. Upon the findings it is plain that in the year 1868 not only was the land in question actually required for the purposes of the railway, but also the necessity was present to the minds of the officials of the railway. In 1863 the attention of the officials had not been drawn to the advisability of constructing sidings upon the pieces of land; but as this circumstance existed in 1868, it is a piece of evidence fit to be laid before us. Since 1868 nothing has been done owing to the lack of funds. This seems to me the result of the findings according to the ordinary mode of construing a special case. The question is, what has the tribunal trying the case the right to infer as to the facts existing in 1863 from the facts proved to exist in 1868? There are considerations on both sides, which the tribunal would be bound to take into account. There were the circumstances that from 1863 to 1868 nothing was done, and that from 1868 to the commencement of this action, and, so far as appears, down to the present time, nothing has been done; there was the circumstance that the land sought to be recovered was of such large size that

it seems strange that the whole of it should be required for the purposes of the railway. All these circumstances were pieces of evidence in favor of the plaintiffs; but then in 1868 the land was wanted for the purposes of the undertaking, and the advisability of using it was present to the minds of the officials. It is true that the three pieces of land had been let to James Bourne as tenant from year to year, and they were used solely for agricultural and farming purposes; but the agreement contained a power to resume possession upon notice. Therefore *some circumstances existed [284 which favored the view for the plaintiffs, and others existed which favored the case for the defendants, and, as appears from the judgment of Mr. Justice Manisty, the judges in the Queen's Bench Division took them all into consideration, and came to the conclusion that if in 1863 all the facts had been known, it might have been said that owing to the ordinary development of the railway and neighborhood the land sought to be recovered would be wanted for the purposes of the undertaking within a reasonable time. Can we say, upon a review of the facts stated in the special case, that the decision of the Queen's Bench Division is wrong? I am of opinion that we cannot say that it was wrong, and therefore I think that we ought not to overrule it. So far from thinking the decision wrong, I incline to think it right. This determines the whole question in favor of the defendants; but I agree with Lord Justice Bramwell that, as the case may go before a higher tribunal, we ought to express an opinion upon some subsidiary points. I agree that although the surface of the land sought to be recovered, or even although the land without the minerals might in 1848 be "required" for the purposes of the undertaking, the mines were not so required, and therefore, in any point of view, the plaintiffs could not recover as to them.

I will now proceed to consider the question whether the plaintiffs can be deemed to be adjoining owners of the land sought to be recovered. They are owners of the land lying upon the northwest side of the railway; but I do not think this circumstance renders them adjacent owners of the land in dispute. The plaintiffs' land is separated by the railway from the land sought to be recovered, and it is the railway company who upon the northwest side are the adjoining owners. I say nothing as to whether the plaintiffs might not have been entitled to the right of pre-emption in respect of their land situate on the northwest side of the railway. Then I do not think that they can be deemed adjoining owners to the piece of land No. 3 in respect of their piece of

land lying to the southeast of it, for they are in no sense the owners of the intervening road. It was a highway set out by an award made under parliamentary powers: the plaintiffs may have rights of pasturage over the road, but they were not owners of the soil of the road. The right to 285] the soil of *the road was originally in the lord of the manor, and remains in his representative, and if the public right of way were extinguished, his representative would become entitled to all the benefits arising from his ownership. Therefore the plaintiffs in no point of view are adjacent owners of the piece of land No. 3. As to the piece of land No. 1, I think that they are adjacent owners; but, apart from the question whether No. 1 is wanted for sidings, I feel great difficulty in saying that No. 1 is not wanted for the purposes of the undertaking: it is a question, however, as to which I will give no decision.

Upon the findings of the arbitrator, and upon the decision of the Queen's Bench Division, we are bound to say that it is not proved that any part of the land was superfluous upon the last day of the ten years.

COTTON, L.J.: This case has been fully dealt with by the Lords Justices, and therefore I will express my opinion merely as to the most material points which have been raised before us.

The plaintiffs allege that the land sought to be recovered has become vested in them as owners of adjoining land under the Lands Clauses Consolidation Act, 1845, s. 127; upon the question whether their land is adjoining land, I need not add anything to what has already been said, but for the purposes of my judgment I will assume that they are adjoining owners, and will proceed to consider whether the land sought to be recovered has vested in them. It is for the plaintiffs to make out that this land has been "acquired by the promoters of the undertaking under the provisions of this or the special act or any act incorporated therewith," and that it is not "required for the purposes thereof." It was argued for the defendants that it was very reasonable that this section should apply to lands taken compulsorily, but that it ought not to be extended to lands taken by agreement. I cannot agree with that contention, if by "lands taken by agreement" are meant lands which could have been taken under the compulsory powers, but which in fact were not so taken. It is well known that a large portion of the land which a railway company are entitled to take under their compulsory powers is in fact not so 286] taken; but the owner of the land, knowing that *the

compulsory powers can be put in force, prefers to dispose of it to the railway company by treaty. It would have been easy to begin s. 127 with the words "and with respect to lands acquired under the compulsory powers," if the Legislature had intended to limit its operation in the manner suggested on behalf of the defendants. I take it that the section extends to all lands acquired by agreement, if they are lands which the railway company might have taken under their compulsory powers, although their owner was unwilling to part with them. Various cases were referred to for the purpose of showing that s. 127 bears only the limited construction contended for on behalf of the defendants, but no decision to that effect is to be found. At first sight *City of Glasgow Union Ry. Co. v. Caledonian Ry. Co.* (1) may appear to support the argument for the defendants, but that case really turned upon the provisions of the Lands Clauses Consolidation (Scotland) Act as to lands purchased for extraordinary purposes, which are very similar to those contained in ss. 12 and 13 of the English act. No doubt some remarks are made in the judgments delivered in the House of Lords which appear to favor the contention for the defendants, but it must be recollected that they were uttered with reference to the facts before the House, and that it was intended to point out that lands purchased by agreement for extraordinary purposes do not vest in adjoining owners: I cannot think that it was intended to lay down that lands which might have been taken compulsorily cannot become superfluous, if they have been conveyed to the company pursuant to an agreement. And I think that the defendants fail to establish that the land sought to be recovered was purchased for extraordinary purposes; in my opinion it was acquired for the purposes of the undertaking which were directly contemplated by the special act.

Then comes the question whether these lands were "required" for the purposes of the undertaking. I agree with the arguments for the plaintiffs that the material period to be considered is the expiration of the ten years. It was contended on behalf of the plaintiffs that in order to prevent the application of s. 127 the land must be in actual use at that time. I cannot accede to that proposition; it may be true that if the purpose for which the land was originally *acquired has come to an end, it is superfluous; but in order to defeat the operation of the section it is not necessary that the land should be in actual use for the purposes of the railway; to my mind it is quite sufficient

(1) Law Rep., 2 H. L., Sc., 160.

1877

Hooper v. Bourne.

if, having regard to the ordinary development of the railway, it may be reasonably said of the land that it will be required for the purposes of the undertaking. In my opinion it is not necessary that anything should be done at the expiration of ten years by the railway company expressing their opinion that the land is wanted; if without proper grounds they came to a determination that the land was wanted, that determination would not save the land from being forfeited, and the want of such a determination as this in the present case is not decisive against the railway company. The question of fact, whether the land is or is not required at the expiration of the ten years for the purposes of the undertaking, must be decided by the tribunal before which the right to the land is contested by adverse litigants, and that tribunal, although it must pronounce its decision with respect to the facts as they existed at the period, may take notice of what has subsequently occurred; for instance, if the railway company had after the expiration of the ten years put up the land for sale as superfluous land, that circumstance would, in my opinion, be almost decisive against them; and this seems to have been the view of Lord Blackburn in *Moody v. Corbett*⁽¹⁾; and if circumstances which tell against a railway company may be looked at, in like manner those may be considered which seem to be in their favor. In the present case the plaintiffs have elected not to prosecute their claim as adjoining owners until after some circumstances happened, which would not have been before us if they had taken proceedings at an earlier time; but as these circumstances have come into existence, they may be considered by the tribunal which has to decide whether the land is or is not superfluous.

This being the principle upon which we are to proceed, I will review very briefly the facts in the case before us. It appears that the land has been let in 1849 for agricultural and farming purposes, and in 1871 for mining purposes; 288] but this circumstance *is not against the defendants, for in either case power was reserved to the company to resume possession upon giving a short notice. No doubt by the demise in 1871 the iron company was enabled to take a part of the inheritance, but without the minerals the land is just as useful for the railway as it is with them: it is the surface and the soil which the railway company want, and it is a fallacious argument that the grant of the minerals by the company entitles the adjoining

⁽¹⁾ 5 B. & S., 859, at p. 880; 34 L. J. (Q. B.), 166, at p. 174; in Ex. Ch. Law Rep., 1 Q. B., 610.

owners to say that by getting the minerals the surface and the soil fall within the description of superfluous land. It is found as a fact in the special case that the land sought to be recovered has been required for the purpose of constructing additional sidings, and that the officials have frequently discussed the want of more accommodation; it is true that no additional sidings have been constructed up to the present time, but this circumstance is explained by the circumstance that the company have been expending large sums of money upon other works. Therefore evidence existed, which was fit to be laid before a jury, for the purpose of showing that on the 3d of August, 1863, it might have been reasonably said in respect of the land sought to be recovered that by the ordinary development of the traffic the land would come to be wanted for the purposes of the railway. Therefore, I am not prepared in any way to dissent from the conclusion at which the Queen's Bench Division have arrived, with respect to the facts stated in the special case.

Judgment affirmed.

Solicitors for plaintiffs: *Field, Roscoe, Field, Francis & Osbaldeston.*

Solicitor for defendants: *R. R. Nelson.*

See 10 Eng. Rep., 56 note; 27 id., 830 note.

[8 Queen's Bench Division, 289.]

Jan. 17, 1878.

***BENTHAM, Appellant v. HOYLE, Respondent. [289**

Railway Company—By-law, Validity of—Travelling in Carriage with Ticket of Inferior Class—8 Vict. c. 20, s. 103.

By 8 Vict. c. 20, s. 103: "If any person, having paid his fare for a certain distance, knowingly and wilfully proceed in any such carriage beyond such distance, without previously paying the additional fare . . . and with intent to avoid payment thereof, he shall for every such offence forfeit 40s." By s. 108: "The company, subject to this and the special act, may make regulations for regulating the travelling upon or using and working the railway." By s. 109: "For better enforcing the allowance of all and any of such regulations, it shall be lawful for the company subject, &c., to make by-laws . . . provided that such by-laws be not repugnant to the laws of that part of the United Kingdom, where the same are to have effect, or to the provisions of this or the special act." By a by-law made under the above act "any person travelling without the special permission of some duly authorized servant to the company, or by a train of a superior class to that for which his ticket was issued, is hereby subject to a penalty not exceeding 40s., and shall in addition be liable to pay his fare according to the class of carriage in which he is travelling from the station where the train originally started, unless he shows that he had no intention to defraud."

The appellant was convicted in a penalty of 10s. under this by-law for travelling

1878

Bentham v. Hoyle.

in a first-class carriage with only a second-class ticket; but it was found as a fact that he had no intention to defraud the company:

Held, that the conviction must be quashed, for without deciding whether the by-law did or did not make proof of the absence of fraudulent intention an exemption from the penalty as well as from the extra fare, it was, if it made the fraudulent intention immaterial in the case of the penalty, repugnant to 8 Vict. c. 20, s. 103, and *ultra vires* the company.

CASE stated by justices of Lancaster under 20 & 21 Vict. c. 43.

On information preferred by J. B. Hoyle, ticket collector, on behalf of the Lancashire and Yorkshire Railway Company (the respondent), against W. Bentham (the appellant), charging that the appellant, on the 12th of April, 1877, unlawfully did travel on the Ramsbottom and Bacup line of the company, without permission, in a carriage of a superior class to that for which he had obtained a ticket, by travelling from Stacksteads to Bacup in a first-class carriage, he (the appellant), having then only a ticket for a second-class carriage, contrary to the 8th by-law of the company and the statute; the appellant was convicted in the mitigated penalty of 10s. and costs.

The appellant is the holder of a second-class ticket between Bacup and Manchester, available at intermediate stations.

290] *The appellant on the day in question got into a first-class carriage in company with his daughter, who had a first-class ticket from Stacksteads to Bacup, and passed through the Bacup station without showing his ticket or tendering the difference between the first and second-class fare, namely, one penny.

It was found as a fact that the appellant had no intention to defraud the company.

12. It was contended on behalf of the respondent that the by-laws constituted by inference two distinct offences and two penalties, viz.: (1st offence), that of a person travelling without permission in a superior class of carriage to that for which his ticket was issued, where the person so travelling had no intention to defraud: and (2d offence), that of a person doing the same thing with an intention to defraud: and (1st penalty), a sum not exceeding 40s.: and (2d penalty), in addition to a penalty not exceeding 40s., the liability to pay the fare from whence the train started, and whilst it was admitted that the appellant could not be liable to pay the fare from whence the train started, unless there was intention to defraud, yet it was urged he was subjected to a penalty not exceeding 40s., though he had no intention to defraud, and that the words at the end of the by-law, "un-

less he shows that he had no intention to defraud," were applicable only to the latter part of the by-law.

13. On behalf of the appellant it was contended that the by-law only created one offence in which the intention of the person was made an essential ingredient.

14. It was further contended on behalf of the appellant that, if the construction sought to be put upon this by-law by the respondent was the literal and correct one, the by-law had the effect of making that an offence without any intention to defraud, which the act only makes an offence when the intention to defraud exists, and therefore the by-law would be "repugnant," within the meaning of 8 & 9 Vict. c. 20, s. 109⁽¹⁾, and *ultra vires*, and that *the by-laws [29] could only be used for carrying out the act, and not going beyond it.

15. The justices were of opinion that the construction of the by-law contended for on behalf of the respondent was the correct one, and that the appellant was legally liable to a penalty not exceeding 40s., notwithstanding that they found as a fact that he had no intention to defraud, and gave their determination against the appellant as before stated.

(1) By 8 Vict. c. 20 (The Railway Clauses Consolidation Act, 1844), s. 108: "If any person travel or attempt to travel in any carriage of the company, or of any other company or party using the railway without having previously paid his fare, and with intent to avoid payment thereof, or if any person having paid his fare for a certain distance knowingly and wilfully proceed in any such carriage beyond such distance, without previously paying the additional fare for the additional distance, and with intent to avoid payment thereof, every such person shall for every such offence forfeit to the company a sum not exceeding forty shillings."

By s. 108: "It shall be lawful for the company from time to time, subject to the provisions and restrictions in this and the special act contained, to make regulations for the following purposes . . . for regulating the travelling upon, or using and working of the said railway."

By s. 109: "For better enforcing the observance of all or any of such regulations, it shall be lawful for the company, subject to the provisions of 8 & 4 Vict.

c. 97, ss. 8, 9, to make by-laws and from time to time to repeal and alter such by-laws and make others, provided that such by-laws be not repugnant to the laws of that part of the United Kingdom where the same are to have effect, or to the provisions of this or the special act, &c. . . . and any person offending against any such by-law shall forfeit for every such offence any sum not exceeding five pounds to be imposed by the company in such by-laws as a penalty for any such offence."

The Lancaster and Yorkshire Railway Company made by-laws accordingly, the 8th of which is follows:

"Any person travelling without the special permission of some duly authorized servant to the company in a carriage or by a train of a superior class to that for which his ticket was issued is hereby subject to a penalty not exceeding forty shillings, and shall in addition be liable to pay his fare according to the class of carriage in which he is travelling from the station where the train originally started, unless he shows that he had no intention to defraud."

16. The questions for the opinion of the court are :

1. Whether or not the construction put upon the by-law on behalf of the respondent is the correct one ;

2. If it be the correct construction, is the by-law bad as being *ultra vires* or on any other ground ?

Besley, for the appellant: *Dearden v. Townsend*(¹) is undistinguishable from this case. There, though it became unnecessary to decide the point, the court expressed a strong 292] opinion that a *by-law which made it an offence to travel without a ticket, irrespective of the intention to defraud, was repugnant to 8 Vict. c. 20, s. 109, and illegal. Here it is expressly found that there was no intention to defraud. The power to make by-laws is only for the purpose of promoting the execution of the act, and not to enable railway companies to create new offences. To divide the by-law into paragraphs in the manner contended for by the respondent, so as to create two offences, and two penalties, would be most inconvenient, and calculated to mislead the public, but even if this construction were right, it would make the first paragraph unreasonable and invalid for the reasons already mentioned.

E. Clarke, for the respondent: *Dearden v. Townsend*(¹) contains no decision upon the validity of any by-law, but only an expression of opinion. The present case involves two questions: first, can the by-law be divided so as to confine the words as to the intention to defraud to the latter part, and if it can, is the earlier provision invalid? Having regard to the punctuation, and the reason of the matter, it must be taken that the words as to the intention to defraud do not apply to the whole of the by-law. A man who contravenes the regulations innocently is fined 40s., but where there is an intention to defraud, the fine is 40s. plus the fare from the point where the train started. Then if this construction be the right one, there is nothing in 8 Vict. c. 20, to make the provision illegal. It is not repugnant to the provisions of the act, it merely carries them a little further, and not being repugnant to the act, the question whether it is a reasonable exercise of the power is for the Board of Trade when they are asked to sanction it.

[COCKBURN, C.J.: The power of this court to inquire into the validity of such a by-law can only be taken away by express enactment.]

This can only be where the by-law is clearly in excess of the power to make it.

(¹) Law Rep., 1 Q. B., 10.

COCKBURN, C.J.: I think this conviction cannot stand, and must be quashed. It seems to me that Mr. Clarke is on the horns of a dilemma: either the last words of the by-law which have been *cited,—which say that [293 the passenger shall be liable to pay the fare according to the class of carriage in which he is travelling from the station whence the train originally started, unless he shows that he had no intention to defraud—apply to all that goes before, namely, to the penalty to which the man is subjected, as well as to the liability to pay the fare in addition from the station from whence the train originally started, or the by-law is unreasonable. If the words apply to all that go before, they apply to the penalty attached to the offence of which the appellant has been convicted, and for which the 40s. penalty has been imposed, because it is found as a fact—and it is immaterial whether he has proved it himself or whether it appeared *aliunde* in the course of the proceedings, although the burden of proving it is cast upon him (as to which there may be a question whether it is competent for the company to cast that burden on him)—that he did not intend to defraud the company, and therefore he is within the qualifying terms in the last part of the section. If, however, those words do not apply to the whole, but apply only to the second branch of the by-law, upon which I confess I am somewhat disposed to think that, according to the true canon of construction, Mr. Clarke is right, if that is so then I say the by-law is an unreasonable one, and I say this for two reasons. When the by-law deals with offences and inflicts a penalty, there must be in point of reason a *mens rea* to warrant the charging people with offences and convicting them on such charges, in addition to the offences under the act of Parliament. The act, although it gives the company power to make by-laws, and makes the observance, or rather the non-observance of those by-laws, the subject of penalties, cannot have intended to leave it to the company to make by-laws in respect of matters where the Legislature itself has taken the initiative, and has superseded the necessity of making any by-law by a statutory enactment applicable to the very case in respect of which the company have taken upon themselves to make a by-law. The 103d section includes this very case, and makes the offence subject to the condition of an intention on the part of the party travelling to avoid payment of the fare. Then it imposes a penalty not exceeding 40s., which is the penalty the company have attached to their by-law. I think *that is an indication on the part of the Legislature [294

of what they intended should constitute the offence, and it is not competent for a railway company to alter the nature and character of the offence, and to say that this is a reasonable exercise of the power to make by-laws intrusted to them by the act. Therefore, if those qualifying words do not govern the whole of the by-law in question, then the by-law is inconsistent with the act of Parliament, and therefore unreasonable and *ultra vires*. The Legislature cannot have intended, while it was legislating with reference to the very case under consideration, to give the company, when it gave that power to make by-laws, a power to supersede the act and make that an offence which the Legislature did not. *Quidcumque vidâ* the conviction is bad.

MANISTY, J.: I am of the same opinion. I think the conviction cannot be supported, and it is unnecessary to decide whether or not those words, "unless he shows he had no intention to defraud," are applicable to the whole of the by-law. I confess I do not entertain so strong a doubt as my Lord seems to entertain as to whether or not they do, because it does seem to me that, as to paying the fare from the place of starting, he is to do that unless he shows he had no intention to defraud, and he is to be subjected to a penalty whether he intended to defraud or not. If it had been the other way I could have understood it—that he should both pay his fare from the place whence the train started, and also be subjected to a penalty unless he could show that he had no intention to defraud. That would be something like sense and reasonable; but certainly I do not entertain so strong a doubt as my Lord; and it is unnecessary to say whether or not those words do override the whole clause. If they do not, then it seems to me the by-law is unreasonable and void, and also having regard to the terms of the act of Parliament, I think it is *ultra vires*; but that it is unreasonable I think is beyond all doubt.

Judgment for the appellant.

Solicitors for appellant: *Shaw & Tremellen.*

Solicitors for respondent: *Clarke, Woodcock & Ryland.*

See *ante*, p. 64 note; 1 Amer. & Eng. R. R. Cases, 261 note.

A railroad company may make reasonable rules and regulations as to the management of its affairs, and as to passengers carried by it: *Bordeux v. Erie*, etc., 8 Hun, 579, 581.

As to setting aside one car for ladies, see *Bass v. Chicago*, etc., 36 Wisc., 450; *Peck v. N. Y. Central*, etc., 8 Hun,

286, 70 N. Y., 587, S. C., 4 Hun, 236; *T. W.*, etc., v. *Williams*, 77 Ills., 354.

As to right to take seat in drawing room car where none could be found elsewhere: *Thorp v. Hudson River*, etc., 76 N. Y., 402.

A purchaser of a ticket must inform himself of the rules governing the transit and conduct of the trains: *Dietrich v. Penn.*, etc., 71 Penn. St.

R., 432, 10 Am. R., 711; Pittsburgh, etc., v. Nuzum, 50 Ind., 141, 2 Cent. L. J., 829.

But see *Chicago, etc., v. Chisholm*, 79 Ills., 584.

The burden is not on the company to show that a passenger had notice of their reasonable rules in running trains: *Dietrich v. Penn., etc.*, 71 Penn. St. R., 432, 10 Am. R., 711; *Pittsburgh, etc., v. Nuzum*, 50 Ind., 141, 2 Cent. L. J., 829.

A conductor has a right to eject a disorderly passenger, though not done at the moment of the disorderly conduct: *People v. Caryl*, 3 Park., 326; *Hoffman v. Sargent*, 8 N. Y. Leg. Obs., 137.

Under section 2 (1 R. S. 1876, p. 710), a passenger who gets on a train intoxicated, and advises other passengers not to pay their fare, is guilty of disorderly conduct, and the conductor of the train may, after tendering him such "proportion of the fare he has paid, as the distance he then is from the place to which he has paid his fare bears to the whole distance for which he has paid his fare," remove him from the train, and, unless unnecessary force is used, the railroad company incurs no liability on account of such removal: *Baltimore, etc., v. McDonald*, 68 Ind., 316.

Employees of a railway company have no right to eject a passenger having a proper ticket because he did not enter the car by a prescribed door: *Huertsel v. N. Y., etc.*, 1 City Courts Rep., 134.

Where, in violation of an unquestioned by-law, a party took a seat in a railway carriage without having first paid his fare and obtained a proper ticket, and refused to leave when requested to do so by the railway company's servants: Held, reversing the Court of Queen's Bench (*Irish Rep.*, 3 C. L., 511), that the railway company was justified in removing him from the carriage; though he had, when challenged by the company's servants, offered to pay the fare: *McCarthy v. Dublin, etc.*, *Irish R.*, 5 C. L., 244.

Where a railway company is authorized to charge additional fare if the passenger do not purchase a ticket before entering the cars, when the conductor demands the increased fare, and the passenger refuses to pay it, the con-

ductor has the right to put such passenger off his train at any time and at any place on the road, without reference to stations, and without actual danger to his life or person. When he refuses to pay his fare the passenger becomes an intruder and trespasser, and he has only the rights of a trespasser. A statute that, "If any passenger shall refuse to pay his fare or toll, the conductor of the train and the servants of the corporation may put him out of the cars at any usual stopping place," is permissive and not prohibitory: *Toledo, etc., v. Wright*, 68 Ind., 586.

The plaintiff got upon a train without a ticket, and when asked for his fare declined paying then, as he said he had not made up his mind how far he should go; defendant, the conductor, said he must decide, and afterward, on his declining again on the same ground, stopped the train and put him out, at a place about a mile and a quarter from the last station, and within half a mile of a house. The plaintiff at last tendered a \$20 gold piece, telling the conductor to take his fare, \$1.35, out of it. Held, that plaintiff had refused to pay his fare within the meaning of 14 & 15 Vict. c. 51, sec. 21, sub. 6, and that defendant was justified in what he did: *Fulton v. Grand Trunk*, 17 U. C. Q. B., 428, 431-3, 435-6.

M., a passenger who had not procured a ticket previous to entering the train, handed the conductor a ten dollar bill to pay his fare of \$6.20. In making the change, the conductor returned him five dollars too much. Upon the demand of the conductor that the mistake be corrected, M. refused, and declined to examine his change to ascertain if the conductor's claim of mistake was correct. When he had rode as far as the payment made entitled him to ride, he was directed to leave the train and did so:

Held, that having the means at hand to determine whether or not the mistake had been made, and failing to use them, he was not entitled to damages for expulsion from the train: *McCarthy v. Chicago, etc.*, 41 Iowa, 432.

Where one, upon a passenger train, tenders an invalid ticket, he cannot be forcibly ejected until request to pay the proper fare, and if he decline to do

so, to leave the car : *Farewell v. Grand Trunk*, 15 U. C. Q. B., 427.

See also *DuLaurans v. St. Paul*, etc., 15 Minn., 49.

Where a passenger holds a ticket for a station at which a train by the time tables of the company should stop, and is carried past to another station, he has a cause of action, but not for punitive damages : *Thompson v. N. O.*, etc., 50 Miss., 315.

In an action by a passenger against a railroad company to recover damages for carrying him past a station to which he had purchased a ticket, it is necessary that he aver in his complaint that the train upon which he took passage was one which, by its running arrangements under the rules and regulations of the company, should have stopped at such station, or that by a special contract the company had agreed to carry him to that station on that train.

Where a passenger, having a ticket to a certain station, takes passage upon a train which, under the regulations of the company, does not stop at that station, the fact that the conductor takes up his ticket and agrees to stop the train and let the passenger off at that station will not bind the company.

Where, in such a case, the passenger has a ticket containing a stipulation that it is "good only on trains stopping at station named," and he is informed by the conductor that that train does not stop at that station, the passenger cannot infer any right on the part of the conductor to agree to stop at such station : *Ohio*, etc., *v. Hatton*, 60 Ind., 12, 6 Cent. L. J., 389.

The conductor of an express train of cars may lawfully stop the train and expel a passenger who holds a ticket to a station, between the place where fare is demanded and the first station at which the train by the published time tables is to stop, if such passenger refuse to pay the fare which, in addition to the sum paid for his ticket, would entitle him to ride to such latter station. And this is so, notwithstanding the train may occasionally stop at the station for which the passenger has a ticket, if at the time the fare is demanded facts do not exist which call for its stoppage there : *Fink v. Albany & Susquehanna R. R.*, 4 Lans., 147; *Dietrich v. Penn.*, etc., 71 Penn. St. R., 432, 10 Am. R., 711; *Pittsburgh*, etc.,

v. Nuzum, 50 Ind., 141, 2 Cent. L. J., 829, 2 Month. West. Jur., 595.

See *Chicago*, etc., *v. Fisher*, 66 Ills., 152.

When a passenger purchases a ticket, he only acquires the right to be carried according to the custom of the road. He has a right to go to the place for which his ticket calls, on any train that usually carries passengers to that place. But he does not acquire the right to insist that the company shall carry him out of the customary course of their road. It is his duty, when he obtains a ticket, to inform himself as to the usual mode of travel on the road, and, so far as the customary mode of carrying passengers is reasonable, he should conform to it : *Chicago*, etc., *v. Randolph*, 53 Ills., 511; *Fink v. A. & S. R. R.*, 4 Lans., 147; *Pittsburgh*, etc., *v. Nuzum*, 50 Ind., 141, 2 Cent. L. J., 829, 2 Month. West. Jur., 595.

Railroad companies, furnishing reasonable means for carrying passengers to all their stations, have the right to run trains that only stop at designated or the principal stations on their road. And when a person purchases a ticket he should ascertain, before getting on a train, whether such train will only stop at the principal stations, or at all of them; and were he to get on one that was not accustomed to stop at the station to which he desired to go, and for which his ticket called, he would not, without an agreement to stop, have any right to insist upon the company's changing the course of their business for his accommodation, and to serve his convenience : *Chicago*, etc., *v. Randolph*, 53 Ills., 511; *Fink v. A. & S. R. R.*, 4 Lans., 147; *Pittsburgh v. Nuzum*, 50 Ind., 141, 2 Cent. L. J., 829, 2 Month. West. Jur., 595.

And should a person get on a train without the consent of the employees of the road, not accustomed to stop at the station to which he desired to go and for which his ticket called, the taking up of his ticket merely, without an agreement to stop at the desired station, would not amount to an undertaking by the company to put him off at that place : *Chicago*, etc., *v. Randolph*, 53 Ills., 511.

In such a case the passenger is in the wrong, and has no right to insist that he should be safely put off at the point he desires, or to be carried through

without charge : Chicago, etc., *v.* Randolph, 53 Ills., 511.

Though a conductor may expel one upon cars for refusing to pay fare, he has no right to do so while the car is in motion ; and if he attempt to do so, it will justify resistance by the passenger : Sanford *v.* Eighth Av. R. R., 23 N. Y., 343 ; Columbus, etc., *v.* Powell, 40 Ind., 37.

A railroad company cannot be subjected to liability for the ejection of a recusant passenger at a point remote from a station, if in other respects, and under all the circumstances, reasonable care and prudence are exercised in the act : Brown *v.* Chicago, etc., 51 Iowa, 235.

Section 28 of the statute under which most of the railroads of this State (Indiana) are organized (1 R. S. 1867, p. 709), provides that " If any passenger shall refuse to pay his fare or toll, the conductor of the train and the servants of the corporation may put him out of the cars at any usual stopping place," is a police regulation, for the purpose of protecting the public from the frequent and unnecessary stopping of trains between stations, and the increase of speed necessary to regain time thus lost ; but if a passenger refuse to pay his full fare, on proper request by the conductor, he becomes an intruder, and it is the right and duty of such conductor to put him off the train, and it makes no difference that the conductor has previously received a part of the fare : Baltimore, etc., *v.* McDonald, 68 Ind., 317.

See also Pittsburgh, etc., *v.* Nuzum, 50 Ind., 141, 2 Cent. L. J., 829.

The plaintiff entered the cars without procuring a ticket and handed the conductor the ticket fare. The conductor demanded of plaintiff the additional amount required by the rules of the company to be paid by persons paying on the train, and, on plaintiff's refusal to pay, ejected him from the cars and then returned him his money : Held, that the conductor had no right to eject the plaintiff without *first* returning the money which he had paid : Bland *v.* Southern, etc., 55 Cal., 570.

A passenger purchased a ticket from W. to D. and return ; on his return journey from D. to W., went on to P., a station beyond, refusing to pay fare from W. to P., on the ground that a return

ticket from P. to D. was the same price as a return from W. to D. Held, that as soon as the passenger arrived, on his return journey at W., the contract between him and the company was at an end and he must pay the fare : Great Western, etc., *v.* Pocock, 41 L. T. Rep., 415, 10 Cent. L. J., 84.

Where a certain freight train was in the habit of carrying passengers to a certain station, and before the company had made any different rule or regulation in this respect the plaintiff purchased a ticket for such station, but was informed by the conductor that he would not stop at such station, and advised to take passage with another extra train, to which he applied and was refused passage, and the plaintiff entered the first train, informing the conductor of the facts, and was by it carried to the next station beyond the one named in his ticket : Held, that the company was liable to the plaintiff in compensatory damages : Chicago *v.* Fisher, 66 Ills., 152.

Though a passenger have a ticket, he may be ejected if he refuse to exhibit it : Hibbard *v.* New York, etc., 15 N. Y., 456.

If a passenger have lost his ticket or conductor's check, he is not entitled to ride to the point to which his ticket entitled him. The ticket is the contract entitling him to do so, and must be produced as such evidence. If it be found by another, the finder might ride upon it : Townsend *v.* N. Y. Cent. R. R., 56 N. Y., 295, reversing 6 Thomp. & C., 495 ; Frederick *v.* Marquette, etc., 37 Mich., 342 ; Crawford *v.* Cincinnati, etc., 26 Ohio St. R., 580 ; Jerome *v.* Smith, 48 Verm., 230 ; Cresson *v.* Philadelphia, etc., 32 Leg. Int., 363, 11 Phila. R., 597 ; Duke *v.* Great Western, 14 U. C. Q. B., 369 ; Id., 377.

See Pullman, etc., *v.* Read, 75 Ills., 126.

Where a passenger surrendered his ticket to one conductor, so that he was unable to produce it to another who took the train, held he was lawfully ejected by the latter conductor : Townsend *v.* N. Y. Cent. R. R. Co., 56 N. Y., 295, reversing 6 Thomp. *v.* Cook, 495.

Where one paid for a ticket to Marquette, but the station agent handed him a ticket for Morgan ; held, that when he reached Morgan he was bound to pay for the remainder of the dis-

tance to Marquette, or the conductor had a right to eject him: *Frederick v. Marquette*, 87 Mich., 342, 5 Cent. L. J., 476.

Commutation tickets are qualified by the rules and regulations of the company, in running their trains, provided their rules are reasonable and not contrary to the terms expressed: *Dietrich v. Penn.*, etc., 71 Penn. St. R., 432, 10 Am. R., 711.

D. purchased of a railroad company a commutation ticket that entitled him to ride upon their road a certain time upon certain conditions; one of the conditions was that the ticket should be shown to the conductor on every trip the holder might make, and in case it should not be shown, when requested by the conductor, regular fare for that trip should be paid. On one occasion D., by mistake, left his ticket at home, and when it was called for by the conductor he stated that he had forgotten it and refused to pay the regular fare, whereupon he was ejected from the train at the next station. Held, D. could not recover of the company: *Downs v. New York*, etc., 36 Conn., 287, 4 Am. Rep., 77.

Where one had a commutation ticket upon his person, but was unable to find it at the time, and so informed the conductor. The conductor knew that the plaintiff was a commuter, and that the time covered by his ticket had not expired, but acting in accordance with the instructions of the defendants, he demanded of the plaintiff his fare for the trip, and on his refusal to pay it, ejected him from the train:

Held, that the plaintiff was not bound to produce his ticket immediately when requested, but was entitled to a reasonable time to find it, and was entitled to ride as long as there was any reasonable expectation of finding it during the trip; that under the circumstances the production of his ticket by the plaintiff was the merest formality, and that in the absence of an express stipulation in the contract that the plaintiff should pay the fare of the passage unless the ticket should be produced, his failure to produce the ticket was not such a breach of the contract as to justify the defendants in rescinding it and treating the plaintiff as a trespasser on the train; and that if the defendants had a right to

eject the plaintiff from the train, they had no right to do so elsewhere than at a regular station on the road—that any rule or regulation of the defendants which required or allowed such an act to be done, between stations, to a person in the condition of the plaintiff, was unreasonable and void: *Maples v. New York*, etc., 38 Conn., 557.

Where a commutation ticket provides that it shall be void if allowed by the holder to be used by any other person, if so used it may be subsequently taken up by a conductor from the possession of the person to whom it is issued and fare for the trip demanded: *Freidenrich v. Baltimore*, etc., 58 Md., 201.

If a ticket to a passenger does not designate the particular seat which the passenger is to occupy, he has a right to enter the car, to take any vacant seat, and to hold it through the route subject to such reasonable changes as the conductor may have occasion to direct. A passenger who selects a seat does not forfeit it by stepping out of the cars, provided he leaves it in charge of a friend, or leaves some article indicating his intention to return, and that he has not abandoned it. The conductor of a train has a right, after his passengers are seated, to require, for a sufficient and reasonable cause, a passenger to leave one seat and take another; but he has no right to do so capriciously. What is a sufficient reason, for requiring a passenger to leave one seat and take another, is a question of fact for the jury: *Hoffman v. Sargent*, 8 N. Y. Leg. Obs., 137.

See *Bass v. Chicago*, etc., 36 Wisc., 450.

The holder of a ticket has no right to stop over and insist upon riding the remainder of the distance upon another train; and this, though he may have once stopped over and been allowed to ride a part of the way upon the ticket by a conductor: 6 Albany L. J., 378; *Dietrich v. Penn.*, etc., 71 Penn. St. R., 432, 10 Am. R., 711, 719 note; *Beebe v. Ayres*, 28 Barb., 275.

See 24 Am. R., 22-3 note; *Barker v. Coffin*, 31 Barb., 556; *Brice v. Hudson*, etc., 61 id., 611; *Gale v. Delaware*, etc., 7 Hun, 870; *Stone v. C. & N. W.*, etc., 47 Iowa, 82, 29 Am. R., 458, 10 Chicago Leg. News, 78, 6 Reporter, 489; *Churchill v. C. & A. R. R. Co.*, 67 Ills., 390; *Terry v. Flushing*, 13 Hun, 359;

Breen v. Texas, etc., 50 Tex., 43; Craig v. Great Western, etc., 24 U. C. Q. B., 504; Drew v. Central, etc., 51 Cal., 425; Peters v. Penn., etc., 42 N. J. Law, 449; Tarbell v. Northern, etc., 24 Hun, 58.

Otherwise where the passenger's journey has been interrupted by misfortune or accident, not his fault: Dietrich v. Penn., etc., 71 Penn. St. R., 432, 10 Am. R., 711.

Though if a passenger purchase tickets for a trip over two roads, he may ride over one, stop over and resume his trip over the other, though the tickets when sold were connected. They are distinct contracts and vouchers for separate journeys: Burke v. Grand Trunk, 15 Mich., 332.

For coupon tickets issued by several railroads are regarded as separate and distinct tickets of each road: Knight v. Portland, etc., 56 Maine, 234, 8 Am. Law Reg. (N.S.), 654; Horton v. Eastern, etc., 114 Mass., 44.

Plaintiff bought a ticket over defendants' road, rode part of the distance, stopped over without permission, and tendered the same ticket for the remainder of the distance. The conductor took up the ticket, refused to return it, demanded fare, and, upon refusal to pay until the ticket was returned, ejected the plaintiff. Held, that defendants were not entitled to the ticket and to the fare too, and that the ejection of the plaintiff was unlawful: Vankirk v. Penn., etc., 76 Penn. St. R., 66, 2 Leg. Chron. Rep., 178.

Where the ticket or a stop-over ticket contains a statement that it is good for a specified time, it is not valid after that time: Churchill v. Chicago, etc., 67 Ills., 390; Farewell v. Grand Trunk, 15 U. C. Q. B., 427; Terry v. Flushing, 13 Hun, 359; Lillis v. St. Louis, etc., 64 Mo., 464, 5 Cent. L. J., 117; Boice v. Hudson River, etc., 61 Barb., 611; Elmore v. Sands, 54 N. Y., 512; Craig v. Great Western, 24 U. C. Q. B., 504; Gale v. Delaware, etc., 7 Hun, 670.

And an indorsement allowing the passenger to stop over, is not a change of the portion of the ticket limiting the time for which it is valid: Hill v. Syracuse, etc., 63 N. Y., 101.

Where the ticket read "Saturday fare," and a notice was conspicuously posted in the passenger room saying such tickets would not be good on any

other day, it was held the passenger was not entitled to ride on it Sunday, though the station agent told him it was good for any mail train: Menzies v. Highland Railway, 15 Scottish Law Reporter, 608.

Plaintiff purchased an excursion ticket from the city of New York to Bridgeport and return; he paid \$2.60; the regular fare between the two places was \$1.50 each way. The ticket and return coupon attached to it had printed on them, "Good this day only on all trains, except the Boston express train. See printed regulations in the depot." The regulations referred to were contained in a printed notice posted up in the depot, headed in large letters,

"Excursion tickets."

Underneath this, in prominent but not quite so large letters,

"Rates for round trip."

Under this,

"Bridgeport and New York, \$2.60."

Under this, in large letters,

"Rules and regulations."

Under this,

"Excursion tickets are not good, and will not be received on Boston express trains."

With this ticket plaintiff got on the one o'clock P. M. Boston express train. The conductor of that train refused to accept plaintiff's ticket, and demanded full fare. Plaintiff refused to pay the fare, and the conductor at the next station, without using any unnecessary force, put him off the train. Plaintiff claimed that he was led to take the train with the belief that his ticket was good, by the statements of ticket agents and doorkeepers. The ticket agent, to an inquiry made by plaintiff before purchasing his ticket, as to whether the company was selling return tickets to and from Bridgeport, said it was, and in response to a further inquiry as to what time the train would reach Bridgeport, answered, a few minutes to three o'clock. The plaintiff then purchased his ticket, and on presenting it to the man at the door, at the entrance to that portion of the depot in which the cars are placed for the reception of passengers, was allowed to pass in:

Held, that plaintiff had no cause of action: Nolan v. N. Y., etc., R. R. Co., 41 N. Y. Supr. Ct. R., 541.

Where a ticket says "not good if

detached," the conductor may refuse to receive it: if detached from the stub: *Houston, etc., v. Ford*, 53 Tex., 364.

A railroad ticket from one point to another, as from Portland to Boston, will not entitle the holder to ride over the road in the opposite direction, and it makes no difference that he had been permitted to do this on similar tickets before that time: *Keeley v. Boston & Maine R. R.*, 67 Maine, 163, 24 Am. R., 19, 22 note.

Railway companies are bound by the contracts entered into by their *general* agents as to the terms and conditions of carrying passengers, although such contracts should, within the means of knowledge of the agent, be beyond the regulations made by the railway company in relation to such matters: *Childs v. Great Western*, 6 U. C. Com. Pl., 284.

Some authorities hold that if a station agent tell one who is about to purchase a ticket that he can ride part of the distance designated by it, stop over and ride the balance of the distance upon it, the company is bound by the statement of the station agent, and the passenger has a right to so ride upon it, though the rules of the company forbid his so doing: *Burnham v. Grand Trunk*, 68 Maine, 298.

See also *Robinson v. Railroad*, 2 Lea (Tenn.), 594, where the purchaser was so informed by the station agent, of a connecting road, selling the ticket: *Childs v. Great Western*, 6 U. C. Com. Pl., 284.

Plaintiff bought of the Fitchburgh R. R. Co. at C., a ticket to T. over the Fitchburgh R. R. and defendant's road connecting therewith. He was informed at the time by the ticket agent that he could stop off at a certain station on defendant's road and go on to T., by a subsequent train, on the same ticket. Plaintiff stopped off at said station, but before doing so he asked for a stop-over ticket, which the conductor refused to give, informing plaintiff that he could not resume his journey on his ticket if he got off. On taking the next train, fare was demanded which plaintiff refused to pay, and he was forcibly ejected from the car. In an action for damages, plaintiff was nonsuited on the merits: Held, that the nonsuit was proper: *Russ v.*

Troy & Boston R. R. Co., 8 Weekly Dig., 309, affirmed 81 N. Y., 628.

A passenger on a railroad purchased a ticket from one not the agent of that road, which was issued by one who was the general ticket agent of another railroad company. The agent issuing the ticket was authorized, by custom among railroads, only to issue tickets of a certain prescribed form. The ticket purchased was not of the prescribed form, and on being presented was not accepted by the conductor, who ejected the passenger from the car, after the train had proceeded a few miles from the station, on his refusing to pay his fare as a passenger. Held, that the ticket having been issued by one who at most occupied to the defendant company the relation of special agent, the passenger purchased the ticket at his own peril, and defendant was not liable: *Houston, etc., v. Ford*, 53 Tex., 364.

If the conductor of a railroad train agree to put a passenger off at a particular place, which is not a station or regular stopping place, it would be the duty of the conductor to stop the train at that place, so that the passenger could get off in safety. This rule would apply, although the passenger had a ticket only to the last station passed before reaching the place at which he was to be put off.

If the agreement with the conductor was that the train would not be stopped but its speed only slackened, it was not error in the court to charge the jury that the speed of the train should be so checked that the passenger could get off safely. Nor was it error to give such a charge as a qualification to a request of defendant, "that if the train did slack up so that the plaintiff might have gotten off safely, then, although plaintiff was injured in getting off, defendant is not liable in damages."

Under the facts of this case it was not error in the court to refuse to charge the jury "that if the train slackened up so that plaintiff might have gotten off safely, it was for plaintiff to determine whether he would get off or not; and if he did get off, and in so doing was injured, he is not entitled to recover:" *Western, etc., v. Young*, 51 Geo., 489.

Where a passenger, upon applying for information to a train agent or con-

ductor, is informed by him that he may get off at a station and continue his journey by the next train upon the same ticket, and the passenger, relying upon the statement, leaves the train at that station, the company is bound to carry him upon the next train to the end of his route upon that ticket, and is estopped from denying the authority of the conductor to make the said agreement: *Tarbell v. Northern, etc.*, 24 Hun, 51.

This case was put upon the ground that the conductor was authorized to give stop-off tickets, and that the transaction was in effect doing so.

See *Petrie v. Penn., etc.*, 43 N. J. Law, 449.

Otherwise had the passenger got off on the conductor's individual check, without any such statement by the conductor: *Breen v. Texas, etc.*, 50 Tex., 43.

The individual check of a conductor upon one train given to a passenger on taking up his ticket, is not evidence of a right to be carried on another train under another conductor: *Breen v. Texas, etc.*, 50 Tex., 43.

Where a passenger started on a slow train, where he received for his ticket the conductor's card, the conductor telling him that at a certain station he could get off and get on to an express train, which he did: Held, the company was liable for his ejection by the latter conductor, though the rules of the company required in such case a stop-over ticket, and the card given him by the first conductor was not a stop-over ticket: *Toledo, etc., v. McDonough*, 53 Ind., 289.

See *Petrie v. Penn. R. R.*, 42 N. J. L., 449.

If a person purchase a ticket expressly for a particular train of cars, and at the time of the purchase he is informed by the agent of the railroad company that the train will stop at the station for which the ticket is purchased, he will have a right to take passage on such train, and it will be the duty of the railroad company to allow him to leave the train at that station: *Pittsburgh, etc., v. Nuzum*, 50 Ind., 141, 2 Cent. L. J., 829.

But see *Fink v. A. & S. R. R.*, 4 Lans., 148, if when he purchases the ticket the passenger knows that by the time table the train does not stop, even

though the station agent tell him it will.

A passenger was pointed, by an agent of the carrier, to a train then standing in his sight, as one which would convey him to Lyons. That train, after running one hundred and fifty miles, deflected to a branch road not passing through Lyons, but was followed, an hour afterwards, by another train which passed through Lyons. Held that the passenger was in fault for being mis-carried, if, at or before reaching the point of divergence, the carrier used such means as would have conveyed to a traveller of ordinary intelligence, using reasonable care and attention, information of the necessity of his transferring himself to the second train.

If the traveller, without fault on his part, passed the point of divergence but was apprised of his error and requested to take a return train on which he would have been carried free, in season to have reached a train which would have carried him to Lyons without delay, his refusal to do so and persisting in remaining upon the wrong train, renders him a trespasser, liable to ejection from the cars: *Barker v. N. Y. Cent., etc.*, 24 N. Y., 599.

Where a railroad corporation runs and operates two roads between two points on its through route—one a part of the through route, the other a longer, more circuitous route used simply for trains passing between the two points—a passenger purchasing a through ticket is only entitled to travel over the usual through and most direct route; the company is not bound to carry him over the circuitous route.

Where, therefore, the passenger leaves the through train and takes one passing over the way route, upon his refusal to pay the additional compensation charged, the company has a right to eject him from the train: *Bennett v. N. Y. Cent., etc.*, 69 N. Y., 594.

A person who by mistake gets on a passenger train other than the one he intended to take passage upon, is nevertheless a passenger upon the train he is on, and the relation of passenger and carrier exists between him and the company.

The railroad company may, in such case, charge him for the distance it carries him, and is not bound to stop to allow him to get off except at a reg-

1878

Bentham v. Hoyle.

ular station or stopping place. If, however, the train is stopped at any other point, or he is put off without stopping, reasonable and proper diligence must be used in putting him off, and if informed of dimness of vision and feeble condition of the passenger, such care must be used as his condition requires, to prevent injury: *Columbus, etc., v. Powell*, 40 Ind., 37.

A passenger, who is lawfully upon a railroad train and has paid his fare, has the right to offer such resistance to any attempt on the part of the conductor to remove him therefrom as may be necessary to prevent his being ejected; and if, in consequence of his resistance, extraordinary force becomes necessary, and is used to remove him, and he is injured thereby, he can recover of the corporation for such injury.

A passenger has the right to resist an attempt to eject him from a train for non-payment of fare, made when the train is in motion, so that his being put off would subject him to great peril: *English v. Delaware, etc.*, 66 N. Y., 454, distinguishing *Townsend v. N. Y. Central, etc.*, 56 id., 295.

The better doctrine is, that if a passenger refuse to pay fare and the conductor stop the car to eject him, he cannot, by then tendering the fare, acquire a right to remain. It would tend to encourage a practice which, if indulged in, would interfere with the convenience of the company and the dispatch and quiet to which other passengers are entitled: *O'Brien v. Boston, etc.*, 15 Gray, 20; *Thompson on Carriers of Passengers*, 82; *People v. Jillson*, 8 Park. Cr. Rep., 234.

See cases cited in *Thompson on Carriers of Passengers*, 840 note; *Nelson v. Long Island, etc.*, 7 Hun, 140; *Thomas v. Geldart*, 8 Pugsley & Burbidge (New Brunswick), 95; *Hibbard v. New York, etc.*, 15 N. Y., 456.

Though, if a passenger were so put off at a regular station, he would, it seems, have a right to purchase a ticket or tender his fare: *Nelson v. Long Island, etc.*, 7 Hun, 140; *Chicago, etc., v. Bryan*, 90 Ills., 126.

The case of *O'Brien v. N. Y. Central R. R.*, 6 Weekly Dig., 121, falls within this rule, as the fare was tendered at West Albany, a regular station, though the head-note makes no mention of the distinction.

A conductor, sued for assault and battery, must plead the regulations of the company and the facts authorizing a passenger's expulsion: *Pier v. Finch*, 29 Barb., 170.

In an action for damages caused by an expulsion, evidence of bruises exhibited by plaintiff a fortnight or so after his expulsion from the train, where there is no evidence as to what did or did not occur in the meantime, should not be regarded by the jury: *O'Brien v. N. Y. Central, etc.*, 6 Week. Dig., 121.

There is much conflict in the authorities as to when exemplary damages may be given against a railway company for improperly expelling a passenger from its cars. In the following it was held that exemplary damages could not be given:

California: *Plesant v. North, etc.*, 84 Cal., 586.

Illinois: *Chicago v. Kelly*, 69 Ills., 475; *Pullman, etc., v. Reed*, 75 Ills., 125; *Kolb v. O'Brien*, 86 Ills., 210; *Pittsburgh v. Dewin*, 86 Ills., 296.

See *Chicago, etc., v. Chisholm*, 79 Ills., 584.

Iowa: *Payne v. Chicago, etc.*, 45 Iowa, 569; *FitzGerald v. C. R.*, etc., 50 Iowa, 79.

Maryland: See *Balt., etc., v. Boone*, 45 Md., 844.

Missouri: *Doss v. Missouri, etc.*, 59 Mo., 27.

New York: *Fink v. A. & S. R. R.*, 4 Lans., 147; *Townsend v. N. Y. Cent.*, etc., 56 N. Y., 295; *Cleghorn v. N. Y. Cent.*, etc., Id., 44; *Hamilton v. Third, etc.*, 48 How. Pr., 50.

See *Yates v. N. Y. Cent.*, etc., 67 N. Y., 100.

Ohio: *Cincinnati, etc., v. Cole*, 29 Ohio St. R., 126.

Texas: *Houston, etc., v. Ford*, 53 Texas, 864.

United States, Supreme Court: *Milwaukee, etc., v. Arms*, 91 U. S. R., 489.

Vermont: See *Jerome v. Smith*, 48 Verm., 230.

Wisconsin: See *Bass v. Chicago, etc.*, 39 Wisc., 636.

And in the following that they could:

Georgia: *Elliott v. Western, etc.*, 58 Geo., 454.

Illinois: *Singer, etc., v. Holdford*, 86 Ills., 455; *Chicago, etc., v. Bryan*, 90 Ills., 126.

Barton Regis Union v. Overseers of Liverpool.

1878

See Chicago, etc., v. Chisholm, 79 Ill., 584.

Indiana: Jeffersonville v. Rogers, 88 Ind., 116; St. Louis, etc., v. Myrtle, 51 Ind., 566; Toledo, etc., v. McDonough, 53 Ind., 289.

Kansas: Kansas, etc., v. Kessler, 18 Kans., 523.

See Hefley v. Baker, 19 Kans., 9.

Maine: Goddard v. Grand Trunk, 57 Maine, 202, 2 Am. R., 39, 54 note.

Maryland: See Balt., etc., v. Boone, 45 Md., 344.

Massachusetts: Hawes v. Knowles, 114 Mass., 518.

Missouri: Travers v. Kansas, etc., 63 Mo., 421; Newman v. St. Louis, etc., 2 Mo. App. R., 402.

See Eckert v. St. Louis, etc., 2 Mo. App. R., 36.

New York: See Yates v. N. Y. Cent. R. R., 67 N. Y., 100.

Tennessee: Haley v. Mobile, etc., 7 Baxter, 289.

Vermont: See Jerome v. Smith, 48 Verm., 230.

Wisconsin: Bass v. Chicago, etc., 48 Wisc., 654.

See Bass v. Chicago, 39 Wisc., 686.

[3 Queen's Bench Division, 295.]

Dec. 20, 1877.

[IN THE COURT OF APPEAL.]

*PONTIFEX V. SEVERN.

[295]

Practice—Reference under Judicature Act, 1873, ss. 56, 57—Official Referee—Reference for Report—Reference for Trial.

The court or a judge has no power under ss. 56, 57, to order an action to be referred to an official referee, for s. 56 only allows any question arising in a cause to be referred for inquiry and report, and the report may or may not be adopted by the court; and s. 57 only allows any question or issue of fact, or any question of account, to be tried before an official referee if the parties consent in any cause, and if they do not consent, in any cause requiring a prolonged examination of documents or accounts, or any scientific or local investigation.

An official referee has no power to order judgment to be entered on any question referred to him under ss. 56, 57 of the Judicature Act, 1873.

THIS case is reported 3 C. P. D., 142.

[3 Queen's Bench Division, 295.]

Jan. 24, 1878.

THE GUARDIANS OF BARTON REGIS UNION, Appellants;
THE OVERSEERS OF LIVERPOOL, Respondents.

Poor Law—Settlement—Order of Removal, how far conclusive—Change of Law pending Order of Removal—39 & 40 Vict. c. 61, ss. 35, 36.

An order for the removal of a pauper to the place of his birth settlement, confirmed by sessions subject to a case, was quashed on the ground that the facts showed a settlement which the pauper derived from his grandfather. Between the order at sessions and the decision upon the case, the act 39 & 40 Vict. c. 61, abolishing a derivative settlement, such as that above mentioned, became law, and a fresh order for the removal of the pauper to the place of his birth settlement was made:

Held, that such order must be quashed, for the quashing of the first order was a conclusive adjudication of a settlement of the pauper, inasmuch as the facts upon which it proceeded were unaltered, and its validity could not be affected by a subsequent change in the law, and further, because it must be taken to be an order "pending" at the date of the act, and therefore under s. 36 excluded from its operation.

[3 Queen's Bench Division, 299.]

Jan. 24, 1878.

299] *LAING, Appellant; THE OVERSEERS OF THE TOWNSHIP OF BISHOPWEARMOUTH and the ASSESSMENT COMMITTEE OF SUNDERLAND UNION, Respondents.

Poor-rate—Rating of Shipbuilding Premises—Machinery capable of being removed without Injury—6 & 7 Wm. 4, c. 96, s. 1.

In assessing shipbuilding premises to the poor-rate, the value of machinery attached to the premises is to be taken into consideration in ascertaining their ratable value where such machinery, though some of it may be capable of being removed without injury to itself or the freehold, is essentially necessary to the shipbuilding business to which the premises are devoted, and intended to remain permanently attached to them so long as they are applied to their present purpose.

CASE stated under 12 & 13 Vict. c. 45, s. 11.

In May, 1875, a rate of 12*d.* in the pound for the relief of the poor of the township of Bishopwearmouth, Durham, was duly made and allowed. In the part of the rate relating to the property of the appellant in the township he is named in the first and second columns as owner and occupier respectively, and the property is rated separately under the following four items: (1.) Workshops, warehouse, and office. (2.) Shipbuilding yard, graving dock, quay, workshops, warehouse, machinery, land, cranes, and other plant. (3.) Shipbuilding yard, workshops, and drafting loft, offices, stables, cottage, land, machinery, plant, &c. (4.) Tenements gallery.

1. The appellant is the owner and occupier of extensive premises for building, fitting out, and repairing iron and wooden ships and vessels situate on the River Wear, in the township of Bishopwearmouth, and for manufacturing and repairing machinery for such ships and vessels.

2. The premises comprise several acres of land upon which are constructed the necessary shipways for building and launching iron and wooden ships, a large graving dock for repairing iron and wooden ships, and large and extensive workshops, warehouses, and other erections necessary to carry on the above trades.

In and upon such premises are certain valuable machinery and plant used for the purposes of the business.

3. No question arises as to the rating of a part of the
300] premises *rated, viz., the workshop, warehouse, and office, nor of the shipbuilding yard, graving dock, quay, workshops, warehouses, land, nor of the shipbuilding yard,

workshop, drafting office, stables, cottage, and land, nor of the tenements gallery.

4. The question is whether the whole of the "machinery and plant," or any portion of such machinery and plant which is hereinafter described in detail, is ratable, or is to be taken into consideration in ascertaining the ratable value of the "premises."

5. The machinery and plant in question is divided into classes, mentioned in the appendix, but each of these classes is subdivided so as to show the nature of the several machines, the purposes for which they are used, and further, in those cases in which the machines are attached to the freehold, the mode in which they are so attached; and in those cases in which the machines are not attached to the freehold, the mode in which they are fastened, so as to be available for the purposes for which they are used.

6. For the purpose of illustrating the nature of the questions which arise, the description of certain of the principal pieces of machinery has been extracted from the schedule contained in the appendix, and is contained in the twenty-four following paragraphs:—

Boilers.

7. There is a boiler 33 feet long by 4 ft. 6 in. in diameter, which is set in Ashlar masonry (lined with fire-brick) partially sunk in the ground. The steam-pipe from this boiler is carried overhead to an engine, and also to another engine, which is attached to a plate bending machine. There is a second boiler set in the same manner. Some of the pipes from these boilers are carried overhead to one engine, and others under ground to another engine. They have also flues attached to them. There is a third boiler which stands on a cast-iron plate, which plate is sunk into the ground, but the boiler is not fixed in any way to the plate. The steam-pipes connected with this boiler are carried under ground.

Engines.

8. There is a horizontal high-pressure engine weighing about six tons. The cylinders, motion bars, and some other parts of it are mounted upon a cast-iron bed plate. This plate is bolted to a stone foundation, which is partially sunk in the ground. The engine drives all the machinery on the east side of the high yard and in the joiners' shop.

A vertical high-pressure compound steam-engine weighing about ten tons. The cylinders and some other parts are mounted upon a heavy cast-iron pillar, which is bolted at the base to a large bed stone sunk in the ground, and at the side to the main wall of the building, and is fixed by bolts. This engine [301] is provided with condenser, and with air and circulating pumps, which are fixed to a concrete foundation sunk into the ground, and are driven by a belt from the main shaft through a counter-shaft. This engine drives all the machinery in the low yard, excepting those described as having their own engines attached.

A pair of double cylinder vertical engines, bolted to one of the cast-iron columns which support the roof, and unattached to any foundation.

A portable engine with boiler, mounted on cast-iron wheels, so that it can be moved from place to place.

Shafting.

9. The main shafting is about 220 feet long, and is coupled direct to the

1878

Laing v. Bishopwearmouth.

crank shaft of the engine (No. 14 in Schedule); it is supported on bearings carried upon brackets bolted to the main wall of the building.

There is also a main shaft 210 feet long, carried upon bearings borne by and attached to the principals of the roof.

And another main shaft, 237 feet long, carried on bearings borne by brackets bolted to the cast-iron columns carrying the roof.

There are other lines of shafting in connection with the main shafts carried by bearings borne by brackets bolted to the girders.

Punching and Shearing Machines.

10. Three punching and shearing machines driven by their own engines, which are bolted to the main frames of the machine. The machines, which weigh 14, 12, and 17 tons respectively, have cast-iron frames and gearing. The two first stand upon wooden sleepers, the last upon a concrete foundation; both the sleepers and the said foundation being partially sunk into the ground. The first and third of the machines are attached by bolts to the sleepers and the foundation respectively.

Planing, Boring and Slotting Machine.

11. Planing, boring and slotting machine weighing 58½ tons, driven by its own engine. It is bolted to a cast-iron foundation plate. This foundation plate rests on a concrete bed sunk into the ground, but is not fixed thereto by any fastening.

Riveting Machine.

12. A riveting machine, weighing without boiler 18½ tons, consisting of cast-iron frames and holder-up; the whole is bolted down to a concrete or brick foundation.

Punching and Shearing Machines.

13. Three punching and shearing machines, the first and second of which, weighing 14 and 10 tons respectively, stand on wooden sleepers partially sunk in the ground. The first is, but the second is not, fixed thereto; the third stands upon, and is bolted to, a wooden frame built into brickwork, forming a kind of pit, the machine itself being partially sunk in the ground. It is driven by a cross-shaft from the counter-shaft.

Lathes.

14. Four lathes; the first, weighing 34 tons, attached to a heavy cast-iron 302] *foundation plate, but having a movable headstock for the purpose of widening or narrowing the gap, the foundation plate is bolted to a concrete foundation. The second is bolted to stone blocks partially sunk in the ground, the third is partially embedded in concrete, and the fourth rests on blocks of stone partially sunk in the ground, but is not attached thereto.

Drilling Machines.

15. Three drilling machines; the first is bolted to a stone block sunk into the floor, the second to a cast-iron column of the roof, the third to the cast iron bed of one of the lathes.

Saw Benches.

16. A saw bench and bond saw; the first is mounted upon a wooden frame partially sunk into the ground, the second is fixed to the wooden floor of the shop.

Steam Hammer, Shearlegs, and Cranes.

17. The steam hammer is bolted to wooden foundation sunk in the ground.

18. The shearlegs, which with their engines weigh 40 tons, and are constructed to lift 80 tons, are bolted to a stone foundation in the quay wall; the back leg is traversed by a screw carried in a cast-iron frame, which is bolted to a concrete foundation sunk in the ground.

19. The cranes. The first and third are bolted to the wooden quay, and have cast-iron frame, gearing, and main post fixed in a cast-iron bed plate. The second has cast-iron frames fixed in a cast-iron sole plate, which is bolted to a wooden frame, and with others moves on a line of rails. The remaining cranes are bolted to stone blocks to the cast-iron columns of the roof, or to the main wall of the building, or to wooden main posts sunk in the ground. There is also a traversing crane, weighing 30 tons, carried on a pair of wrought-iron girders bolted to the iron columns supporting the roof.

Pumps.

20. Graving dock pumps, for keeping graving dock free from water, fixed to cast-iron box set in a wood frame sunk in the ground, and driven by bolt from counter-shaft.

Two donkey pumps mounted on cast iron bed plates bolted to stone blocks partially sunk in the ground.

Weighing Machines.

21. Two weighing machines, the first fixed in masonry sunk in the ground with brick house attached, the second is mounted on wheels.

Smiths' Shop.

22. A smiths' shop containing twelve fire-places with brick hearths partially sunk in the ground, and three furnaces constructed of brickwork also partially sunk in the ground and tied with iron tie rods and cast-iron plates.

Water Tanks.

23. Four water tanks, the first of cast-iron fixed on wooden pillars partially sunk in the ground; the second of wood placed on blocks of wood laid on the surface of the ground; two others of wrought iron stayed to the main wall of the engine-building shop. These stand respectively on concrete and brick foundations, and are 35 feet and 50 feet in height, and 4 ft. 6 in. and 5 feet in diameter.

Grindstone.

24. A grindstone fixed to cast-iron columns of the roof by flat wrought iron stays bolted to the columns.

Railway.

25. A railway 280 yards in length laid with cast-iron chairs on wooden sleepers balasted in the usual way.

26. In the above description, where machines are spoken of as being bolted to the foundations, or to the walls, roof, columns, or pillars of the buildings, such machinery could not be taken to pieces and removed without the nuts of such bolts being unscrewed or such bolts being extracted, but, except removing the bolts, the whole of the machinery could be removed without any disturbance or injury to the freehold, and when removed might be used in, and are suitable to be used in, any other similar mill or manufactory.

27. It is to be understood throughout the above descriptions that, except when fastenings and connections are stated, all the machines are retained in their places by their own weight merely. That before being connected as described, each of them, except the railway mentioned in paragraph 25, is a separate and complete article in itself known in the trade as such.

1878

Laing v. Bishopwearmouth.

28. In the cases in which the machines are stated to rest upon or be bolted to stone, brick, wood, or concrete foundations, such foundations were specifically constructed for the purpose of receiving the said machines.

29. The whole of the buildings, foundations, engines, shafting, and other machinery included in the appendix, and hereinbefore referred to, were intended to be permanently used in the shipbuilding and repairing yard, the subject of the assessment, and are now used by the appellant for the purpose of building, and repairing ships and vessels, and for manufacturing and repairing machinery for such ships and vessels, and are intended to be permanently used for such purposes.

30. The question for the opinion of the court is, whether the machinery and plant hereinbefore mentioned and described, or any *and what parts thereof are to be taken into consideration as in any way enhancing the ratable value of the hereditaments included in the assessment, and if any parts are to be taken into consideration as enhancing the ratable value, upon what principle are they to be valued, or rated, or taken into consideration?

The court is to have power to draw any inference of facts.

The amount of the ratable value is to be ascertained by the parties upon the principles laid down by the court.

J. Edwards, Q.C. (*Crompton* with him), for the appellant: A large proportion of the machinery in question ought not to be taken into account in calculating the ratable value. The boilers are not fixed to the premises with the intention of permanently adding to the value of the freehold. They may be taken away without injury to the whole structure. The planing machine, force-pump, saw-bench, &c., are only fastened for the purpose of steadying them. They are not affixed to the freehold. The boring machine may be disused at any time, and is for ratable purposes upon the same footing as an ordinary sewing-machine or a billiard-table, which could not be considered as part of a house. The leading authorities upon the subject are not conclusive. In *Reg. v. Lee* (*) where gasworks were rated and their value ascertained with reference to the effective machinery, the articles were attached to the premises for the permanent improvement of them. In two subsequent cases, *Reg. v. Halstead* (†) and *Chidley v. Overseers of West Ham* (‡), referred to in *Browne on Rating*, p. 383, the test is stated to be whether the articles are intended to be part of the land.

(†) Law Rep., 1 Q. B., 241.

(‡) 31 J. P., 378.

(*) 32 L. T., 486.

Herschell, Q.C. (*R. E. Webster*, with him), for the respondents: The authorities show conclusively that the value of the machinery described in the case cannot be deducted from the ratable value of the premises, *Reg. v. Southampton Dock Company* (1); *Reg. v. North Staffordshire Ry. Co.* (2); *Staley v. Castleton* (3), all show that if machinery is attached to premises for the purpose of a business, it will increase the ratable value.

*[LUSH, J.: A stove is removable, but it adds to [305 the ratable value of a house. In *Reg. v. Halstead* (4), it was never intended to vary the rule laid down in *Reg. v. Lee* (5).]

Edwards, Q.C., in reply.

Cur. adv. vult.

Jan. 25. The judgment of the Court (Cockburn, C.J., Mellor and Lush, JJ.), was delivered by

COCKBURN, C.J.: This is an appeal against a rate for the relief of the poor, in which in assessing the appellant's premises, the value thereof has been treated as enhanced by reason of extensive machinery attached to them for the business carried on by the appellant, which is that of building, repairing, and fitting out iron and wooden ships. For this purpose, the appellant is in the occupation of extensive premises, into and upon which, the machinery in question, and which is of a ponderous character, is affixed.

The law on the subject of rating with reference to premises on which machinery has been erected with a view to the use of such premises for the purpose of manufacture, is settled by former decisions.

In *Rex v. Birmingham and Staffordshire Gas Light Co.* (6) where a rate had been made under a local act, which required a valuation to be made periodically of all houses, &c., it was held, that where steam-engines or other machines were affixed to the houses, the house was ratable according to its value as increased by the machinery. In *Reg. v. Guest* (7) it was held that in a rate upon buildings to which machinery is attached, the real property ought to be assessed according to its value as combined with the machinery, without regard to whether the machinery was real or personal property so as to be liable to distress or seizure under a fi. fa., or whether it would descend to the heir or executor, or would belong at the expiration of a lease, to

(1) 14 Q. B., 587; 20 L. J. (M.C.), 155.

(2) 30 L. J. (M.C.), 68.

(3) 5 B. & S., 505; 33 L. J. (M.C.), 178.

(4) 31 J. P., 373.

(5) Law Rep., 1 Q. B., 241.

(6) 6 Ad. & E., 634.

(7) 7 Ad. & E., 951.

1878

Laing v. Bishopwearmouth.

the landlord or the tenant. This rule was again affirmed in *Reg. v. Southampton Dock Company* ⁽¹⁾ in which it had been expressly found by the sessions, that the fixtures in 306] question, although attached to the freehold *were capable of being detached from it, as easily and with as little injury to it as other fixtures put up for the purposes of the trade of the tenant and usually valued as between incoming and outgoing tenant.

In the case of *Reg. v. North Staffordshire Ry. Co.* ⁽²⁾, it was held that things which, though capable of being removed, are yet so far attached to the freehold that it is intended that they shall remain permanently connected with it, or with the premises used with it, and shall remain permanent appendages to it, as essential to the purpose for which the premises are used, must be taken into account in estimating the ratable value of the premises.

In *Reg. v. Lee* ⁽³⁾ the principle was applied to the retorts, purifiers, gasholders, steam-engines, boilers, and even pumps and exhausters, on premises fitted up and used as a gas manufactory, as being essential to the working of the manufacture, and, therefore, as having been erected with the view of their remaining permanently attached to the premises, even though some of the machinery, such as the pumps and exhausters, would have been removable as trade fixtures.

Applying the rule established by these decisions to the present case, it appears to us, after having carefully considered the character of the machinery in question, that the whole of it, though some of it may be capable of being removed without injury to itself or to the freehold, is essentially necessary to the shipbuilding business to which the appellant's premises are devoted, and must be taken to be intended to remain permanently attached to them so long as those premises are applied to their present purpose.

The case is consequently governed by the decisions which have been referred to, and our judgment must therefore be for the respondents.

Judgment for the respondents.

Solicitors for appellant: *Johnson & Weatherall*, for E. H. Haswell, Sunderland.

Solicitors for respondents: *Shum & Crossman*, for Kidson, Son & Mackenzie, Sunderland.

⁽¹⁾ 14 Q. B., 587; 20 L. J. (M.C.), 155.

⁽²⁾ 30 L. J. (M.C.), 68.

⁽³⁾ Law Rep., 1 Q. B., 241.

[3 Queen's Bench Division, 307.]

April 30, 1877.

[IN THE COURT OF APPEAL.]

*RABBITS V. COX.

[307]

Land Tax—Hospital chartered before 1693—Continuance of Exemption of Site after removed of Hospital—4 Wm. & M. c. 1, s. 25—38 Geo. 3, c. 5, ss. 25, 29.

By 4 Wm. & M. c. 1, s. 25, the sites of hospitals were rendered exempt from chargeability to land tax. In 38 Geo. 3, c. 5, s. 25 (rendered perpetual by 38 Geo. 3, c. 60, s. 1) this exemption was repeated. By 38 Geo. 3, c. 5, s. 29, all such lands "belonging to any hospital . . . as were assessed in the fourth year of the reign of King William and Queen Mary" were to be charged with the land tax: but no other lands "then belonging to any hospital" were to be assessed.

An hospital, erected and chartered before 4 Wm. & M. c. 1, was maintained until 1849, when, pursuant to a decree of the Court of Chancery, the almshouses of which it consisted were taken down and rebuilt upon another spot: the former site of the hospital was then let to the plaintiff:

Held, reversing the judgment of the Queen's Bench Division, that the exemption from chargeability for land tax continued after the site had been let to the plaintiff.

[3 Queen's Bench Division, 315.]

Feb. 20, 1878.

[IN THE COURT OF APPEAL.]

*THE SOUTHWARK AND VAUXHALL WATER COMPANY [315]
v. QUICK.

Practice—Discovery and Inspection of Documents—Communication from Agent of Party—Instructions to Solicitor and Materials for such Instructions—Privilege.

Documents prepared in relation to an intended action, whether at the request of a solicitor or not, and whether ultimately laid before the solicitor or not, are privileged if prepared with a *bona fide* intention of being laid before him for the purpose of taking his advice; and an inspection of such documents cannot be enforced.

APPLICATION on behalf of the defendant for the inspection of certain documents that had been scheduled by the plaintiffs in their affidavit of discovery. The application was referred by Field, J., from chambers to the court. The action was by the company against their former engineer to recover various sums of money which, it was alleged by the company, had been wrongly debited to them in accounts that had been settled between them and the defendant.

The documents in question were stated in the plaintiffs' affidavits to be as follows:

1. A transcript of shorthand writer's notes of conversation between a chimney-sweep employed by the company and the company's engineer, for the purpose of such engi-

neer's obtaining information and reporting the same to the board of directors to be furnished to the company's solicitor for his advice in relation to the intended action.

2. Transcripts of shorthand writer's notes, of interviews between the chairman of the company and the engineer, and certain inspectors of the company, obtained with a view of submitting the same to the company's solicitor for advice in relation to the intended action. The transcripts of the notes were afterwards handed to such solicitor.

3. A statement of facts drawn up by the chairman of the company to be submitted to the company's solicitor for advice in relation to the intended action. It appeared that the statement of facts was afterwards submitted to the solicitor.

316] *Feb. 4. *J. C. Mathew*, for the defendant, moved for a rule for inspection of the documents in question: The case of *Anderson v. Bank of British Columbia* (1) is an authority directly in the defendant's favor. It is clear since that decision that it is not sufficient in order to make a document privileged that it should have come into existence in contemplation of litigation. It was there held by the Court of Appeal, that a written communication by an agent to his principal made in contemplation of litigation was not privileged. *Bustros v. White* (2) is another decision of the Court of Appeal to the same effect. The effect of those decisions is to confine the privilege to communications between the party to the litigation and his solicitor. If on the advice of the solicitor when consulted with reference to the litigation, or at his instance, or at his request, written communications are procured from an agent of the party to be submitted to such solicitor, those communications would fall within the same rule as written communications by the party to his solicitor. But there can be no privilege until the relation as solicitor and client is established, and the solicitor is consulted, and then only with regard to documents that are in the nature of communications between the party and his solicitor. Communications spontaneously procured by the party from his agent to be submitted to his solicitor, are not privileged, and the other side is as much entitled to discovery of them as of any other document relating to the subject-matter of the action in the principal's possession. Knowledge that the principal procures from his agent with regard to the subject-matter of the action, before the relation of solicitor and client has commenced, is not within the

(1) 2 Ch. D., 644; 17 Eng. R., 656.

(2) 1 Q. B. D., 423.

principle upon which the privilege is based. Even if the documents that were actually submitted to the plaintiff's solicitor were privileged, document No. 1, which is not stated to have been actually submitted to the solicitor, is not privileged. In *Friend v. London, Chatham and Dover Ry. Co.* (¹), the affidavit stated that the communications were written at the instance and for the use of the solicitors of the defendants, for the purpose of the legal proceedings.

Arthur Wilson, for the plaintiffs, showed cause: The present case is not within the authority of the de- [317] cisions that have been cited. It is admitted that the only privilege is with reference to the relation between solicitor and client. In those cases the documents in question had nothing to do with such relation. It is not disputed that communications procured by the advice of the solicitor are privileged. This is pointed out in the judgment of Jessel, M.R., in *Bustros v. White* (²).

The documents in the present case are intermediate between those held not to be privileged in *Anderson v. Bank of British Columbia* (³) and those which it was laid down would be privileged in *Bustros v. White* (²). These documents, though not procured on the advice of the solicitor, and indeed procured before he was consulted, were nevertheless procured as instructions to the solicitor, or as materials for such instructions. It is submitted that document No. 3, which constituted the instructions to the solicitor for the action then determined on, was clearly privileged, and it is contended that documents Nos. 1 and 2, which were the materials for such instructions, fell within the same privilege. There being no decision exactly in point, it is necessary to look to the reason of the privilege. The reason of it is that it is essential to the interests of justice that there should be complete freedom of communication between the client and the solicitor. This freedom cannot be protected unless the privilege goes as far as is now contended for on behalf of the plaintiffs.

J. C. Mathew, in reply: The defendant's contention would really destroy the effect of the decisions in the Court of Appeal. Such communications are always submitted to the solicitor, and it would be always said that they were procured as materials for instructions to him.

COCKBURN, C.J.: I am of opinion that this application should be refused. We are bound by the decisions of the Court of Appeal which have been cited, but the principle of those decisions does not appear to me to include the pres-

(¹) 2 Ex. D., 437. (²) 1 Q. B. D., 423. (³) 2 Ch. D., 644; 17 Eng. R., 656.

1878

Southwark Water Co. v. Quick.

ent case. The relation between the client and his professional legal adviser is a confidential relation of such a nature that to my mind the maintenance of the privilege with 318] regard to it is essential to the interests of *justice and the well-being of society. Though it might occasionally happen that the removal of the privilege would assist in the elucidation of matters in dispute, I do not think that this occasional benefit justifies us in incurring the attendant risk. The question here is whether the documents of which inspection is sought are within the privilege. I think they are. It is clear that they were documents containing information which had been obtained by the plaintiffs with a view to consulting their professional adviser. Two out of the three sorts of documents were actually submitted to him ; as to the other it is not clear whether it was actually submitted to him or not. It is admitted upon the decisions that where information has been obtained on the advice of the party's solicitor it is privileged. I can see no distinction between information obtained upon the suggestion of a solicitor, with the view of its being submitted to him for the purpose of his advising upon it, and that procured spontaneously by the client for the same purpose. Again, I see no distinction between the information so voluntarily procured for that purpose and actually submitted to the solicitor, and that so procured but not yet submitted to him. If the court or the judge at chambers is satisfied that it was *bona fide* procured for the purpose, it appears to me that it ought to be privileged. Though fully recognizing the authority of the decisions of the Court of Appeal which have been referred to, I do not feel bound nor am I disposed to carry the doctrine of those decisions to the extent suggested on behalf of the defendant.

MELLOR, J.: I agree with the opinion expressed by my Lord. I am satisfied that the decisions of the Court of Appeal, by which I am entirely prepared to abide, do not govern this case. It is conceded that information procured by the advice of a solicitor to be submitted to him is privileged. If so, I cannot understand the distinction between such information and that spontaneously procured for the same purpose. I cannot think that the Court of Appeal meant to decide that such information must be disclosed. I do not see any sound distinction between the document that was not actually submitted to the solicitor and those that were, provided the former was really intended to be submitted to him.

*MANISTY, J.: As to the documents that were [319 actually submitted to the solicitor I entirely agree. As to the other document I have some doubt; but the distinction is perhaps rather subtle, and I am not prepared to differ from my Lord and my Brother Mellor. With regard to the statement of facts by the chairman, it would be monstrous that such a statement, made for the purpose of being laid before the company's solicitor, and actually laid before him, should not be privileged. What can be the difference between asking to see such a statement and asking what oral instructions were given to a solicitor? The same principle also applies, I think, to the other set of documents that were submitted to the plaintiffs' solicitor.

Order refused.

Feb. 20. The defendant appealed.

J. C. Mathew, for the defendant.

Arthur Wilson, for the plaintiffs.

The arguments and the cases cited were the same as in the court below.

BRAMWELL, L.J.: I am of opinion that this case is governed by the principle laid down in *Anderson v. Bank of British Columbia* (1), and that the appeal should be dismissed.

BRETT, L.J.: I am of the same opinion. It seems to me that the case of *Bustros v. White* (2) is not in point; the documents which the plaintiff declined in that case to produce were letters forming part of a correspondence between the plaintiff and other persons, and not between the plaintiff and his solicitor; neither is the present case governed by *Friend v. London, Chatham and Dover Ry. Co.* (3), for in that case the communications were written "at the instance, and for the use of the solicitor." The question, therefore, depends upon what is the principle to be extracted from *Anderson v. Bank of British Columbia* (1). The facts of that case do not apply to the present, but the judgment lays down a rule upon which we ought to act. James, L.J., lays down a rule, which I think is in effect what was said by Jessel, M.R., "in the court below, and also mentioned by Mellish, L.J., in his judgment; he says, "Looking at the dicta, and the judgments cited, they might require to be fully considered; but I think they may possibly all be based upon this, which is an intelligible principle, that as you have no right to see your adversary's brief, you have no right to see that which comes into existence merely as the materials for the brief." Now reading that passage

(1) 2 Ch. D., 644; 17 Eng. R., 656.

(2) 1 Q. B. D., 423.

(3) 2 Ex. D., 487.

with what was said by Mellish, L.J., in the course of the argument, it is clear that if a party seeks to inspect a document which comes into existence merely as the materials for the brief, or that which is equivalent to the brief, then the document cannot be seen, for it is privileged. It has been urged that the materials, or the information obtained for the brief, should have been obtained "at the instance" or "at the request" of the solicitor; but I think it is enough if they come into existence merely as the materials for the brief, and I think that phrase may be enlarged into "merely for the purpose of being laid before the solicitor for his advice or for his consideration." If this is the correct rule, the only question is whether the affidavits in the present case bring the documents under discussion within that rule. I think all the classes of documents mentioned are brought within the rule. The only document about which there can be any doubt is the transcript of the shorthand writer's note of the conversation between the chimney-sweep and the company's engineer; but I think that the Queen's Bench Division construed the language of the affidavit to mean that the transcript was made in order that it might be furnished to the solicitor for his advice, although before passing on to him, it was to be laid before the board of directors, or reported to the board, in order that they also might see it. The object for which the notes were taken, and the transcript made, was that they might be furnished to the solicitor for his advice. If that is so, then it stands on the same footing as the others, except that it was not sent to the solicitor; that cannot make any difference. If at the time the document is brought into existence its purpose is that it should be laid before the solicitor, if that purpose is true and clearly appears upon the affidavit, it is not taken out of the privilege merely because afterwards it was not laid before the solicitor. It might not have been laid before 321] the solicitor, *because the person making the statement had died or went away and could not be found. I think, therefore, that this document having been made *bona fide* merely for the purpose of being laid before the solicitor for his advice or his consideration, it is precisely like the other documents, and that all the documents are privileged.

COTTON, L.J.: I am of opinion that the judgment of the Queen's Bench Division was right. We are discussing the question of discovery, but discovery in a particular way, and I call attention to that, because in the argument I think sufficient distinction was not taken between the particular

modes of discovery : discovery by the production of documents, and discovery by compelling an opponent to answer interrogatories. As regards the latter, the directors of a company, in answering interrogatories, must not only answer as to their own individual knowledge, but in answering for the company they must get such information as they can from other servants of the company who personally have conducted the transaction in question, and they cannot properly answer interrogatories by saying they know nothing about the matter, when it is in their power to obtain information from other servants of the company who may have personal knowledge of the facts ; and it is perfectly clear if the information has been communicated to them from the other servants of the company, in answering interrogatories properly administered to them, they must disclose to their opponent the knowledge which they got from that communication, even though the communication itself may be a document which is privileged.

We are now dealing with the production of documents, and the question is, whether the documents do or do not come within what is called privilege? Privilege only extends to communications with legal advisers, or in some way connected with legal advisers ; communications with a most confidential agent are not protected if that confidential agent happens not to be a solicitor. And this proceeds on the principle that laymen (by which I mean persons not learned in the law) cannot be expected to conduct their defence or litigation without the assistance of professional advisers ; and, for the purpose of having the litigation conducted *properly, the law has said that communica- [322
tions between the client and the solicitor shall be privileged, and that no one shall be entitled to call for the production of a document which has been submitted to the solicitor for the purpose of obtaining his advice, or for the purpose of enabling him to institute or to defend proceedings. There must be the freest possible communication between solicitor and client, and it is on this ground that professional communications are entitled to privilege, which excepts them from the general rule. The most obvious form of claiming privilege is when any litigant sends either directly or indirectly to his solicitor a document for the purpose of obtaining his advice, or for the purpose of enabling him to institute or defend an action. That is not quite the question here, but there is another class of cases, where information or evidence, which is usually obtained by the solicitor himself, is not obtained by him, but a document stating what

evidence can be given, is prepared to be communicated to the solicitor. It was conceded on behalf of the defendant, that if the documents had been obtained or prepared at the instance and by the instruction of the solicitor, they would be privileged, though not prepared by the solicitor himself, and the contention is, in fact, that there was no request beforehand by the solicitor that this information should be obtained. I am of opinion that would be an unsubstantial distinction. I believe there is no case directly in point, in which it has been held that the want of a request by the solicitor is fatal to the privilege claimed, but in *Friend v. London, Chatham and Dover Ry. Co.* (1) Cockburn, C.J., pointed out the correct principle. He said: "I think that the defendants' affidavit, which is unanswered, and therefore must be assumed to be true, brings this case within the exception to the general rule mentioned in *Bustros v. White* (2). The defendants intended that the medical men should make the examination merely with the view of informing their solicitor." That, I think, is the true principle, that if a document comes into existence for the purpose of being communicated to the solicitor with the object of obtaining his advice, or of enabling him either to prosecute or defend an action, then it is privileged, because [323] it is something done for the purpose* of serving as a communication between the client and the solicitor. I agree with Brett, L.J., that except the transcript of the shorthand writer's note of the conversation between the chimney-sweep and the company's engineer, these are documents which clearly were prepared for the purpose of being laid before the solicitor of the company for obtaining his advice, and, as regards that document, though that is not stated quite so clearly, I think that in substance the transcript is also stated to have been prepared for the purpose of being laid before the solicitor. The fact that it was not laid before him can in my opinion make no difference; the object of the rule and the principle of the rule is that a person should not be in any way fettered in communicating with his solicitor, and that must necessarily involve that he is not to be fettered in preparing documents to be communicated to his solicitor. If such a distinction prevails, what is to be the rule where the application for production is made before a document is laid before the solicitor, but which it is intended should be laid before him? Is it then to be produced? If so, is it to be saved from production, because after the original application, but before the appeal

(1) 2 Ex. D., 437.

(2) 1 Q. B. D., 423.

is heard, the party has in fact laid the document before his solicitor? The distinction, in my opinion, is not one which can be supported. All these documents must be looked upon as having been prepared for the purpose of being laid before the solicitor, either for the purpose of enabling him to prosecute the action contemplated, or for the purpose of obtaining his advice on the question at issue in the action, and in my opinion are privileged. The appeal should therefore be dismissed.

Appeal dismissed.

Solicitor for plaintiffs: *Bircham.*

Solicitors for defendant: *Hollams, Son & Coward.*

[3 Queen's Bench Division, 324.]

March 5, 1878.

[IN THE COURT OF APPEAL.]

*WINTERFIELD V. BRADNUM.

[324

Security for Costs—Foreigner, residing without the Jurisdiction—Counter claim.

A defendant who admits the cause of action sued upon and sets up a counter-claim founded upon a distinct claim, is not entitled to security for costs from the plaintiff, a foreigner residing without the jurisdiction.

CLAIM for goods sold and delivered.

The defendant admitted his liability for the debt, and set up, by way of counter-claim, a claim for damages for breach of a contract for not delivering onions.

The plaintiff was a foreigner residing abroad.

The defendant's counter-claim exceeded in amount the plaintiff's claim.

The Queen's Bench Division refused an application that the plaintiff be ordered to give security for costs.

The defendant appealed.

Feb. 27. *Anstie* for the defendant: The Queen's Bench Division decided that although a plaintiff residing out of the jurisdiction of the court must give security for costs, yet the principle ought not to be extended to a case where a defendant sets up a counter-claim, which is a new right conferred recently by statute. If the defendant had asked for security before he had pleaded, he would certainly have been entitled to it; if he had pleaded a set-off greater than the plaintiff's claim, he likewise would have been entitled to security, and under the present system he would have judgment in his favor for the balance. Why, then, is he not entitled to

security when he admits the plaintiff's claim and sets up a counter-claim? On principle there is no reason why he should be deprived of his security. It is true that the counter-claim is in the nature of a new action, but in effect it does not differ from the case where the defendant's set-off exceeds the plaintiff's demand, and judgment is given for the defendant for the excess. In that case there is one proceeding and one judgment, *Staples v. *Young* ⁽¹⁾; and the present case is strictly analogous: there is only one proceeding and one judgment. Here the defendant has admitted the plaintiff's claim and set up a counter-claim, but if the defendant had denied the plaintiff's claim and had also pleaded a counter-claim he would have been entitled to security. If a plaintiff resides without the jurisdiction and brings the defendant into court, the defendant is entitled, as a general rule, to security for his costs.

Raikes, for the plaintiff: The judgment of the Queen's Bench Division ought to be maintained. The right to plead a counter-claim is a new right recently conferred by statute: it is in the nature of a fresh action, and a defendant who merely sets up a counter-claim in answer to a plaintiff's claim ought not to be allowed to call upon a plaintiff residing out of the jurisdiction to give security for costs. If the defendant had brought an action instead of pleading a counter-claim, he would not have been entitled to have security; he is in the same position as if he had taken that course. In *The Julia Fisher* ⁽²⁾ a defendant residing out of the jurisdiction was ordered to give security for costs, the court treating the counter-claim as if it were a separate action.

Cur. adv. vult.

March 5. BRAMWELL, L.J.: Upon the whole I think that the appeal should be dismissed. I do not say that in no case security is to be given where the defendant sets up a counter-claim and the plaintiff is a foreigner residing abroad. I agree with the reasoning of the defendant's counsel that a counter-claim is an extended set-off, and that if it is more extensive than the claim it enables the defendant to recover the balance. Suppose an action in which the plaintiff sues for the price of ten parcels of goods, one of which has been delivered, and the defendant says that he admits he is liable for the price of one, but alleges that all the ten parcels are inferior to contract and that he has a counter-claim for damages; why should not the defendant

⁽¹⁾ 2 Ex. D., 324.

⁽²⁾ 2 P. D., 115.

in such a case as this have security for costs? Again, suppose a counter-claim for exactly the same amount, I see no reason why he should not have security for costs. Moreover, in some cases the defendant may be entitled to security *on the ground of the plaintiff being a foreigner re- [326 siding abroad, although the defendant's real defence consists in his counter-claim; but in this case the Queen's Bench Division have refused the defendant's application, and I think it wrong to encourage appeals of this sort. I think that the judgment ought to be affirmed.

BRETT, L.J.: The question before us is whether the defendant is entitled to security in respect of his counter-claim, for he admits the plaintiff's claim. A counter-claim is sometimes a mere set-off; sometimes it is in the nature of a cross action; sometimes it is in respect of a wholly independent transaction. I think the true mode of considering the claim and counter-claim is, that they are wholly independent suits which, for convenience of procedure, are combined in one action. I know that a practice has arisen that if the counter-claim overtops the plaintiff's claim, judgment is entered for the defendant, and costs given accordingly. But I think that the allocatur should only be for the difference of the costs between the respective parties. I think that security for costs should not be given where the defendant sets up such a counter-claim as this.

COTTON, L.J.: I am of the same opinion. The counter-claim is in the nature of a new action, and in respect of that the defendant cannot have security for costs.

Appeal dismissed.

Solicitor for plaintiff: *John Scott.*

Solicitors for defendants: *Waterhouse & Winterbottom.*

[3 Queen's Bench Division, 327.]

April 15, 1878.

*CLARK V. CHAMBERS.

[327

Negligence—Dangerous Instrument in Road—Proximate Cause of Injury—Intervening Act of third Party—Remoteness of Damage.

The defendant, who was in the occupation of certain premises abutting on a private road consisting of a carriage and footway, which premises he used for the purposes of athletic sports, had erected a barrier across the road to prevent persons driving vehicles up to the fence surrounding his premises and overlooking the sports. In the middle of this barrier was a gap which was usually open for the passage of vehicles, but which, when the sports were going on, was closed by means of a pole let down across it. It was admitted that the defendant had no legal right to erect this barrier. Some person, without the defendant's authority, removed a part of the barrier armed with spikes, commonly called chevaux de frise, from the carriageway

1878

Clark v. Chambers.

where the defendant had placed it, and put it in an upright position across the footpath. The plaintiff, on a dark night, was lawfully passing along the road on his way from one of the houses to which it led. He felt his way through the opening in the middle of the barrier, and getting on to the footpath was proceeding along it when his eye came in contact with one of the spikes of the chevaux de frise and was injured. It was not suggested that the plaintiff was guilty of any negligence contributing to the accident, and the jury found that the use of the chevaux de frise in the road was dangerous to the safety of the persons using it:

Held, that the defendant, having unlawfully placed a dangerous instrument in the road, was liable in respect of injuries occasioned by it to the plaintiff, who was lawfully using the road, notwithstanding the fact that the immediate cause of the accident was the intervening act of a third party in removing the dangerous instrument from the carriageway, where defendant had placed it, to the footpath.

Mangan v. Atterton (Law Rep., 1 Ex., 239) discussed.

THIS was a case tried before Cockburn, C.J., at the Hilary Sittings in Middlesex. The Lord Chief Justice did not give judgment at the trial for the damages found by the jury for the plaintiff, but reserved the case for further consideration, and it was accordingly argued before the Lord Chief Justice and Manisty, J.

The facts, the nature of the action, and the arguments, sufficiently appear from the judgment.

Feb. 18. *Willis*, Q.C., and *Glyn*, for the plaintiff.

Hannen, for the defendant.

The following authorities were cited: *Ionides v. Universal* 328] **Marine Insurance Company* ('); *Corby v. Hill* ('); *Lynch v. Nurdin* ('); *Dixon v. Bell* ('); *Burrows v. March Gas Company* ('); *Collins v. Middle Level Commissioners* ('); *Mangan v. Atterton* ('); *Abbott v. Macfie* ('); *Hoey v. Felton* ('); *Blagrove v. Bristol Waterworks Company* ('); *Barber v. Lesiter* ('); *Sharp v. Powell* (').

Cur. adv. vult.

April 15. The judgment of Cockburn, C.J., and Manisty, J., was delivered by

COCKBURN, C.J.: This is a case of considerable nicety, and which, so far as the precise facts are concerned, presents itself for the first time.

The defendant is in the occupation of premises which abut on a private road leading to certain other premises as well as to his; it consists of a carriage road and a footway. The soil of both is the property of a different owner; the defend-

(¹) 14 C. B. (N.S.), 250; 32 L. J. (C.P.), 170. (⁷) 4 H. & C., 388; Law Rep., 1 Ex., 239.

(²) 4 C. B. (N.S.), 556; 27 L. J. (C.P.), 318. (⁸) 2 H. & C., 744; 33 L. J. (Ex.), 177. (⁹) 11 C. B. (N.S.), 142; 31 L. J. (C.P.), 105.

(³) 1 Q. B., 29; 10 L. J. (Q.B.), 73. (¹⁰) 1 H. & N., 369; 26 L. J. (Ex.), 57. (⁴) 5 M. & S., 198. (¹¹) 7 C. B. (N.S.), 175.

(⁵) Law Rep., 5 Ex., 67; Ibid, 7 Ex., 96; 1 Eng. R., 202. (¹²) Law Rep., 7 C. P., 253; 2 Eng. R., 567.

(⁶) Law Rep., 4 C. P., 279.

ant has no interest in it beyond the right of way to and from his premises.

The defendant uses his premises as a place where athletic sports are carried on by persons resorting thereto for that purpose for their own amusement. His customers finding themselves annoyed by persons coming along the road in question in carts and vehicles and stationing themselves opposite to his grounds and overlooking the sports, the height of the carts and vehicles enabling them to see over the fence, the defendant erected a barrier across the road for the purpose of preventing vehicles from getting as far as his grounds.

This barrier consisted of a hurdle set up lengthways next to the footpath, then two wooden barriers armed with spikes, commonly called *chevaux de frise*, then there was left an open space through *which a vehicle could pass; then [329 came another large hurdle set up lengthways, which blocked up the rest of the road. At ordinary times the space between the two divisions of the barrier was left open for vehicles to pass which might be going to any of the other premises to which the road in question led. But at the times when the sports were going on, a pole attached by suitable apparatus was carried across from the one part of the barrier to the other, and so the road was effectually blocked.

Amongst the houses and grounds to which this private road led was that of a Mr. Bruen. On the evening on which the accident which gave rise to the present action occurred the plaintiff, who occupied premises in the immediate neighborhood, accompanied Mr. Bruen, by the invitation of the latter, to Bruen's house. It was extremely dark, but being aware of the barrier and the opening in it, they found the opening, the pole not being set across it, and passed through it in safety; but on his return, later in the evening, the plaintiff was not equally fortunate. It appears that, in the course of that day or the day previous, some one had removed one of the *chevaux de frise* hurdles from the place where it had stood, and had placed it in an upright position across the footpath. Coming back along the middle of the road, the plaintiff, feeling his way, passed safely through the opening in the centre of the barrier; having done which, being wholly unaware, it being much too dark to see, that there was any obstruction on the footpath, he turned on to the latter, intending to walk along it the rest of the way. He had advanced only two or three steps when his eye came into collision with one of the spikes, the effect of which was that the eye was forced out of its socket. It did not appear by whom the *chevaux de frise* hurdle had been thus re-

1878

Clark v. Chambers.

moved, but it was expressly found by the jury that this was not done by the defendant or by his authority. The question is, whether the defendant can be held liable for the injury thus occasioned. It is admitted that what the defendant did in erecting this barrier across the road was unauthorized and wrongful, and it is not disputed that the plaintiff was lawfully using the road. There is no ground for imputing to him any negligence contributing to the accident. The jury have expressly found, in answer to a question put to them by me, that the use of the *chevaux de frise in the road was dangerous to the safety of persons using it. The ground of defence in point of law taken at the trial and on the argument on the rule was, that, although if the injury had resulted from the use of the chevaux de frise hurdle as placed by the defendant on the road, the defendant, on the facts as admitted or as found by the jury, might have been liable; yet, as the immediate cause of the accident was not the act of the defendant, but that of the person, whoever he may have been, who removed the spiked hurdle from where the defendant had fixed it and placed it across the footway, the defendant could not be held liable for an injury resulting from the act of another. On the part of the plaintiff it was contended that as the act of the defendant in placing a dangerous instrument on the road had been the primary cause of the evil, by affording the occasion for its being removed and placed on the footpath, and so causing the injury to the plaintiff, he was responsible in law for the consequences. Numerous authorities were cited in support of this position. The first is the case of *Scott v. Shepherd* (*). In that case the defendant threw a lighted squib into a market house where several persons were assembled. It fell upon a standing, the owner of which, in self defence, took it up and threw it across the market house. It fell upon another standing, the owner of which, in self defence, took it up and threw it to another part of the market house, and in its course it struck the plaintiff, and exploded and put out his eye. The defendant was held liable, although without the intervention of a third person the squib would not have injured the plaintiff.

In *Dixon v. Bell* (*) the defendant, having left a loaded gun with another man, sent a young girl to fetch it, with a message to the man in whose custody it was to remove the priming, which the latter, as he thought, did, but, as it turned out, did not do it effectually. The girl brought it home, and, thinking that the priming having been removed

(*) 3 Wils., 403; 2 W. Bl., 892.

(*) 5 M. & S., 198.

the gun could not go off, pointed it at the plaintiff's son, a child, and pulled the trigger. The gun went off and injured the child. The defendant was held liable, "as by this want of care," says Lord Ellenborough—that is, by leaving the gun without drawing the charge or seeing that the priming *had been properly removed—"the instrument was [331] left in a state capable of doing mischief, the law will hold the defendant responsible. It is a hard case, undoubtedly; but I think the action is maintainable."

In *Ilott v. Wilkes* (*)—the well-known case as to spring-guns—it became unnecessary to determine how far a person setting spring-guns would be liable to a person injured by such a gun going off, even though such person were a trespasser, inasmuch as the plaintiff, having had notice that spring-guns were set in a particular wood, had voluntarily exposed himself to the danger. But both Mr. Justice Bayley and Mr. Justice Holroyd appear to have thought that without such notice the action would have lain, the use of such instruments being unreasonably disproportioned to the end to be obtained, and dangerous to the lives of persons who might be innocently trespassing. Looking to their language, it can scarcely be doubted that if, instead of injuring the plaintiff, the gun which he caused to go off had struck a person passing lawfully along a path leading through the wood, they would have held the defendant liable.

In *Jordin v. Crump* (*) the use of dog spears was held not illegal; but there the injury done to the plaintiff's dog was alone in question. If the use of such an instrument had been productive of injury to a human being, the result might have been different.

In *Illidge v. Goodwin* (*) the defendant's cart and horse were left standing in the street without any one to attend to them. A person passing by whipped the horse, which caused it to back the cart against the plaintiff's window. It was urged that the man who whipped the horse, and not the defendant, was liable. It was also contended that the bad management of the plaintiff's shopman had contributed to the accident. But Tindal, C.J., ruled that, even if this were believed, it would not avail as a defence. "If," he says, "a man chooses to leave a cart standing on the street, he must take the risk of any mischief that may be done." *Lynch v. Nurdin* (*) is a still more striking case. There, as in the former case, the defendant's cart and horse had been left standing *in the street. The plain- [332

(*) 3 B. & A., 304.

(*) 5 C. & P., 192.

(*) 8 M. & W., 782.

(*) 1 Q. B., 29.

tiff, a child of seven years of age, playing in the street with other boys, was getting into the cart when another boy made the horse move on. The plaintiff was thrown down, and the wheel of the cart went over his leg and fractured it. A considered judgment was delivered by Lord Denman. He says, "It is urged that the mischief was not produced by the mere negligence of the servant as asserted in the declaration, but at most by that negligence in combination with two other active causes, the advance of the horse in consequence of his being excited by the other boy, and the plaintiff's improper conduct in mounting the cart and committing a trespass on the defendant's chattel. On the former of these two causes no great stress was laid, and I do not apprehend that it can be necessary to dwell on it at any length. For if I am guilty of negligence in leaving anything dangerous where I know it to be extremely probable that some other person will unjustifiably set it in motion to the injury of a third, and if that injury should be so brought about, I presume that the sufferer might have redress by action against both or either of the two, but unquestionably against the first." And then, by way of illustration, the Chief Justice puts the case of a gamekeeper leaving a loaded gun against the wall of a play-ground where school boys were at play, and one of the boys in play letting it off and wounding another. "I think it will not be doubted," says Lord Denman, "that the gamekeeper must answer in damages to the wounded party." "This," he adds, "might possibly be assumed as clear in principle, but there is also the authority of the present Chief Justice of the Common Pleas in its support in *Illidge v. Goodwin*"⁽¹⁾. It is unnecessary to follow the judgment in the consideration of the second part of the case, namely, whether the plaintiff, having contributed to the accident by getting into the cart, was prevented from recovering in the action, as no such question arises here. In *Daniels v. Potter*⁽²⁾ the defendants had a cellar opening to the street. The flap of the cellar had been set back while the defendants' men were lowering casks into it, as the plaintiff contended, without proper care having been taken to secure it; the flap fell and injured the plaintiff. The defendant maintained that the flap had been properly fastened, but 333] also set up *as a defence that its fall had been caused by some children playing with it. But the only question left to the jury by Tindal, C.J., was whether the defendants' men had used reasonable care to secure the flap. His direction implies that in that case only would

⁽¹⁾ 5 C. & P., 190.⁽²⁾ 4 C. & P., 262.

the intervention of a third party causing the injury be a defence.

The cases of *Hughes v. Macfie and others* (1) and *Abbott v. Macfie and others* (2), two actions arising out of the same circumstances, and tried in the Passage Court at Liverpool, though at variance with some of the foregoing, so far as relates to the effect on the plaintiff's right to recover where his own act as a trespasser has contributed to the injury of which he complains, is in accordance with them as respects the defendant's liability for his own act, where that act is the primary cause, though the act of another may have led to the immediate result.

The defendants had a cellar opening to the street. Their men had taken up the flap of the cellar for the purpose of lowering casks into it, and, having reared it against the wall nearly upright with its lower face, on which there were cross-bars, towards the street, had gone away. The plaintiff in one of the actions, a child five years old, got upon the cross-bars of the flap, and in jumping off them brought down the flap on himself and another child, the plaintiff in the other action, and both were injured. It was held, that while the plaintiff whose act had caused the flap to fall could not recover, the other plaintiff who had been injured could, provided he had not been playing with the other so as to be a joint actor with him.

Bird v. Holbrook (3) is another striking case, as there the plaintiff was undoubtedly a trespasser. The defendant being the owner of a garden, which was at some distance from his dwelling house, and which was subject to depredations, had set in it without notice a spring-gun for the protection of his property. The plaintiff, who was not aware that a spring-gun was set in the garden in order to catch a peafowl, the property of a neighbor, which had escaped into the garden, got over the wall, and his foot coming, in his pursuit of the bird, into contact with the wire which communicated with the gun, the latter went off and *injured [334 him. It was held, though his own act had been the immediate cause of the gun going off, yet that the unlawful act of the defendant in setting it rendered the latter liable for the consequences.

In the course of the discussion a similar case of *Jay v. Whitfield* (4) was mentioned—tried before Richards, C.B.,—in which a plaintiff who had trespassed upon premises in

(1) 2 H. & C., 744; 33 L. J. (Ex.), 177. (2) 4 Bing., 628. (3) At p. 644.

1878

Clark v. Chambers.

order to cut a stick and had been similarly injured, had recovered substantial damages, and no attempt had been made to disturb the verdict.

In *Hill v. New River Company* (*) the defendants created a nuisance in a public highway by allowing a stream of water to spout up open and unfenced in the road. The plaintiff's horses passing along the road with his carriage took fright at the water thus spouting up, and swerved to the other side of the road. It so happened that there was in the road an open ditch or cutting, which had been made by contractors who were constructing a sewer, and which had been left unfenced and unguarded, which it ought not to have been. Into this ditch or cutting, owing to its being unfenced, the horses fell, and injured themselves and the carriage. It was contended that the remedy, if any, was against the contractors; but it was held that the plaintiff was entitled to recover against the company.

In *Burrows v. March Gas and Coke Company* (†) it was held in the Exchequer Chamber, affirming a judgment of the Court of Exchequer, that where, through a breach of contract by the defendants in not serving the plaintiff with a proper pipe to convey gas from their main into his premises, an escape of gas had taken place, whereupon the servant of a gasfitter at work on the premises having gone into the part of the premises where the escape had occurred, with a lighted candle, and examining the pipe with the candle in his hand, an explosion took place, by which the premises were injured, the defendants were liable, though the explosion had been immediately caused by the imprudence of the gasfitter's man in examining the pipe with a lighted candle in his hand.

In *Collins v. Middle Level Commissioners* (*) the defendants were bound under an act of Parliament to construct a cut with proper walls, gates, and sluices, to keep out the waters of a tidal river, and also a culvert under the cut, to carry off the drainage of the lands lying east of the cut, and to keep the same open at all times. In consequence of the defective construction of the gates and sluices, the waters of the river flowed into the cut, and, bursting its western bank, flooded the adjoining lands. The plaintiff and other proprietors on the eastern side closed the culvert, and so protected their lands; but the proprietors on the western side, to lessen the evil to themselves, reopened the

(*) 7 B. & S., 308.

(†) Law Rep., 7 Ex., 96; 1 Eng. R., 202.

(*) Law Rep., 4 C. P., 279.

culvert, and so increased the overflow on the plaintiff's land, and caused injury to it. The defendants sought to ascribe the injury to the act of the western proprietors in removing the obstruction which those on the other side had placed at the culvert. But it was held that the negligence of the defendants was the substantial cause of the mischief. "The defendants," says Mr. Justice Montague Smith, "cannot excuse themselves from the natural consequences of their negligence by reason of the act, whether rightful or wrongful, of those who removed the obstruction placed in the culvert under the circumstances found in this case." "The primary and substantial cause of the injury," says Mr. Justice Brett, "was the negligence of the defendants, and it is not competent to them to say that they are absolved from the consequences of their wrongful act by what the plaintiff or some one else did."—"I cannot see how the defendants can excuse themselves by urging that the plaintiff was prevented by other wrongdoers from preventing a part of the injury."

The case of *Harrison v. Great Northern Railway Company* (*) belongs to the same class. The defendants were bound under an act of Parliament to maintain a delph or drain with banks for carrying off water for the protection of the adjoining lands. At the same time certain commissioners, appointed under an act of Parliament, were bound to maintain the navigation of the River Witham, with which the delph communicated. There having been an extraordinary fall of rain, the water in the delph rose nearly to the height of its banks, when one of them gave way and caused the damage of which the plaintiff complained. It was found *that the bank of the delph was not in a proper con- [336 dition, but it was also found, and it was on this that the defendants relied as a defence, that the breaking of the bank had been caused by the water in it having been penned back, owing to the neglect of the commissioners to maintain in a proper state certain works which it was their duty to keep up under their act. Nevertheless, the defendants were held liable.

These authorities would appear to be sufficient to maintain the plaintiff's right of action under the circumstances of this case. It must, however, be admitted that in one or two recent cases the courts have shown a disposition to confine the liability arising from unlawful acts, negligence, or omissions of duty within narrower limits, by holding a defendant liable for those consequences only which in the or-

(*) 3 H. & C., 231; 33 L. J. (Ex.), 266.

1878

Clark v. Chambers.

dinary course of things were likely to arise, and which might therefore reasonably be expected to arise, or which it was contemplated by the parties might arise, from such acts, negligence, or omissions. In *Greenland v. Chaplin* ⁽¹⁾ Pollock, C.B., says: "I entertain considerable doubt whether a person who is guilty of negligence is responsible for all the consequences which may under any circumstances arise, and in respect of mischief which could by no possibility have been foreseen, and which no reasonable person would have anticipated." Acting on this principle, the Court of Common Pleas, in a recent case of *Sharp v. Powell* ⁽²⁾, held that the action would not lie where the injury, though arising from the unlawful act of the defendant, could not have been reasonably expected to follow from it. The defendant had, contrary to the provisions of the Police Act, washed a van in the street, and suffered the water used for the purpose to flow down a gutter towards a sewer at some little distance. The weather being frosty, a grating, through which water flowing down the gutter passed into the sewer, had become frozen over, in consequence of which the water sent down by the defendant, instead of passing into the sewer, spread over the street and became frozen, rendering the street slippery. The plaintiff's horse coming along fell in consequence, and was injured. It was held that as there was nothing to show that the defendant was aware of the obstruction of the grating, and as the stoppage of the water 337] was not the *necessary or probable consequence of the defendant's act, he was not responsible for what had happened.

Bovill, C.J., there says: "No doubt, one who commits a wrongful act is responsible for the ordinary consequences which are likely to result therefrom, but, generally speaking, he is not liable for damage which is not the natural or ordinary consequence of such act, unless it be shown that he knows, or has reasonable means of knowing, that consequences not usually resulting from the act are, by reason of some existing cause, likely to intervene so as to occasion damage to a third person. Where there is no reason to expect it, and no knowledge in the person doing the wrongful act that such a state of things exists as to render the damage probable, if injury does result to a third person it is generally considered that the wrongful act is not the proximate cause of the injury so as to render the wrongdoer liable to an action." And Grove, J., said: "I am entirely of the same opinion. I think the act of the defendant

⁽¹⁾ 5 Ex., 243, at p. 248.⁽²⁾ Law Rep., 7 C. P., 253; 2 Eng. R., 567.

was not the ordinary or proximate cause of the damage to the plaintiff's horse, or within the ordinary consequences which the defendant may be presumed to have contemplated, or for which he is responsible. The expression, the 'natural' consequence, which has been used in so many cases, and which I myself have no doubt often used, by no means conveys to the mind an adequate notion of what is meant; 'probable' would perhaps be a better expression. If on the present occasion the water had been allowed to accumulate round the spot where the washing of the van took place, and had there frozen obviously within the sight of the defendant, and the plaintiff's horse had fallen there, I should have been inclined to think that the defendant would have been responsible for the consequences which had resulted." And Mr. Justice Keating said: "The damage did not immediately flow from the wrongful act of the defendant, nor was such a probable or likely result as to make him responsible for it. The natural consequence, if that be a correct expression, of the wrongful act of the defendant would have been that the water would under ordinary circumstances have flowed along the gutter or channel, and so down the grating to the sewer. The stoppage and accumulation of the water was caused by ice or other obstruction at the drain, not shown to have been known to the defendant, *and for which he was in no degree responsible. [338 That being so, it would obviously be unreasonable to trace the damage indirectly back to the defendant."

We acquiesce in the doctrine thus laid down as applicable to the circumstances of the particular case, but we doubt its applicability to the present, which appears to us to come within the principle of *Scott v. Shepherd* ⁽¹⁾ and *Dixon v. Bell* ⁽²⁾, and the other cases to which we have referred. At the same time, it appears to us that the case before us will stand the test thus said to be the true one. For a man who unlawfully places an obstruction across either a public or private way may anticipate the removal of the obstruction, by some one entitled to use the way, as a thing likely to happen; and if this should be done, the probability is that the obstruction so removed will, instead of being carried away altogether, be placed somewhere near; thus, if the obstruction be to the carriageway, it will very likely be placed, as was the case here, on the footpath. If the obstruction be a dangerous one, wheresoever placed, it may, as was the case here, become a source of damage, from

⁽¹⁾ 3 Wils., 403; 2 W. Bl. 895.

⁽²⁾ 5 M. & S., 198.

which, should injury to an innocent party occur, the original author of the mischief should be held responsible. Moreover, we are of opinion that, if a person places a dangerous obstruction in a highway, or in a private road, over which persons have a right of way, he is bound to take all necessary precaution to protect persons exercising their right of way, and that if he neglects to do so he is liable for the consequences. It is unnecessary to consider how the matter would have stood had the plaintiff been a trespasser. The case of *Mangan v. Atterton* ⁽¹⁾ was cited before us as a strong authority in favor of the defendant. The defendant had there exposed in a public market place a machine for crushing oilcake without its being thrown out of gear, or the handle being fastened, or any person having the care of it. The plaintiff, a boy of four years of age, returning from school with his brother a boy of seven, and some other boys, stopped at the machine. One of the boys began to turn the handle; the plaintiff, at the suggestion of his brother, placed his hand on the cogs of the wheels, and the machine 339] being *set in motion, three of his fingers were crushed. It was held by the Court of Exchequer that the defendant was not liable, first, because there was no negligence on the part of the defendant, or, if there was negligence, it was too remote; and secondly, because the injury was caused by the act of the boy who turned the handle, and of the plaintiff himself who was a trespasser. With the latter ground of the decision we have in the present case nothing to do; otherwise we should have to consider whether it should prevail against the cases cited, with which it is obviously in conflict. If the decision as to negligence is in conflict with our judgment in this case, we can only say we do not acquiesce in it. It appears to us that a man who leaves in a public place, along which persons, and amongst them children, have to pass, a dangerous machine which may be fatal to any one who touches it, without any precaution against mischief, is not only guilty of negligence, but of negligence of a very reprehensible character, and not the less so because the imprudent and unauthorized act of another may be necessary to realize the mischief to which the unlawful act or negligence of the defendant has given occasion. But be this as it may, the case cannot govern the present. For the decision proceeded expressly on the ground that there had been no default in the defendant; here it cannot be disputed that the act of the defendant was unlawful.

(1) 4 H. & C., 388; Law Rep., 1 Ex., 239.

On the whole, we are of opinion, both on principle and authority, that the plaintiff is entitled to our judgment.

Judgment for the plaintiff.

Solicitor for plaintiff: *J. C. Button.*

Solicitor for defendant: *J. H. Williams.*

See 21 Eng. R., 307 note; 21 Eng. Rep., 35 note; 17 Eng. Rep., 200 note; 1 Thompson on Neg., 283, 298-325 note.

One who does an illegal or mischievous act, which is likely to prove injurious to others, is answerable to the consequences which may directly and naturally result from his conduct, though he did not intend to do the particular injury which followed.

Therefore, where the defendant, having had a quarrel with a boy in the street in a city, took up a pick axe and followed him into the plaintiff's store, and, in endeavoring to keep out of defendant's reach, the boy ran against and knocked out the faucet from a cask of wine, by means of which a quantity of the wine ran out and was wasted: Held, that defendant was liable to plaintiff for the damages: *Vandenburgh v. Truax*, 4 Denio, 464.

The owner of machinery or other property, which may, by being trifled with by children, result in injury to them, is liable if he negligently leave it, even upon his own land, where children, by interfering therewith, may be injured: *Birge v. Gardner*, 19 Conn., 507; *Chicago v. Mayor*, 18 Ills., 360.

Where a child strayed upon the grounds of a railroad company and was injured by a turn table being moved by other children, the company was held liable on the ground that it was a question of fact for the jury whether the turn table was not a place where children would be likely to go, and whether the company was not guilty of negligence in failing to lock or fasten it so it could not be moved by children going there to play: *R. R. Co. v. Stout*, 17 Wall., 657; *Keefe v. Milwaukee*, etc., 21 Minn., 207, 210-2; *Whirley v. Whiteman*, 1 Head (Tenn.), 610.

But see *Koons v. St. Louis*, etc., 65 Mo., 592; *McAlpin v. Powell*, 70 N. Y., 126, 26 Am. Rep., 555, 562 note.

Where the defendant left his horse and cart in a crowded street, and during his absence a company of children began to play with the horse and to climb into the cart, and whilst they were so occupied the horse moved on and one of the children under seven years of age fell under the wheel of the cart and broke his leg: Held, that the jury were warranted in awarding damages to the child for the injury: *Lynch v. Nurdan, Arn. & Hodges*, 158, 1 Q. B., 29.

[3 Queen's Bench Division, 340.]

Dec. 19, 1877.

[IN THE COURT OF APPEAL.]

*DOYLE V. KAUFMAN.

[340]

Practice—Writ of Summons, Renewal of—Time, Extension of—Statute of Limitations
(21 Jac. 1, c. 16).

Semble, the time for renewing a writ of summons cannot be extended under Order LVII, Rule 6, where the plaintiff's claim would, in the absence of such renewal, be barred by the Statute of Limitations (21 Jac. 1, c. 16).

APPEAL from the decision of the Queen's Bench Division (1) refusing an application to renew a writ of summons

(1) *Ante*, p. 7.

1878

Francis v. Maas.

after the period of twelve months had elapsed. The plaintiff's claim was at the date of the application barred by the Statute of Limitations.

The plaintiff, a solicitor, had instructed his managing clerk to renew the writ under Order VIII, Rule 1. The clerk failed to do so, and was subsequently dismissed. Before the twelve months had expired, the plaintiff became aware that the clerk had omitted to renew the writ.

Willis, Q.C., for the plaintiff, cited *Lakin v. Watson* (¹), *Culverwell v. Nugee* (²), and *Cornish v. Hocking* (³).

THE COURT (Bramwell, Brett and Cotton, L.JJ.) intimated that in their opinion the principle of the judgment in the Queen's Bench Division was right, but dismissed the application on the ground that the plaintiff himself had been guilty of such laches as disentitled him to a renewal of the writ.

Appeal dismissed.

Solicitors for plaintiff: *E. Doyle & Sons.*

(¹) 2 C. & M., 685. (²) 15 M. & W., 559. (³) 1 E. & B., 602; 22 L. J. (Q.B.), 142.

[3 Queen's Bench Division, 341.]

Feb. 21, 1878.

341] *FRANCIS, Appellant; MAAS and Others, Respondents.

Adulteration—Adulteration of Seeds Act (32 & 33 Vict. c. 112), s. 2—Dyeing Seeds—Seeds of "another kind."

Under 32 & 33 Vict. c. 112, which by s. 2 defines the term "to dye seeds," as giving to seeds by any process of coloring, dyeing, sulphur smoking, or other artificial means, the appearance of seeds of another kind, and by s. 3 imposes a penalty upon any person, who with intent to defraud, "dyes any seeds, or sells any dyed seed," no offence is committed by subjecting seeds to a process by sulphur smoking, so as to improve them in appearance, and to make old and inferior seed appear to be new seed, so long as such seed is not made to appear of a different species or description from that to which it actually belongs.

CASE stated by a metropolitan police magistrate under 20 & 21 Vict. c. 43.

The defendants, seed merchants, appeared to a summons taken out against them by Alexander Francis, under the Seeds Adulteration Act, 32 & 33 Vict. c. 112 (¹): "For that

(¹) By "The Adulteration of Seeds Act, 1869," 32 & 33 Vict. c. 112, s. 2, the term "to dye seeds," means to give to seeds, by any process of coloring, dyeing, sulphur smoking, or other artificial means, the appearance of seeds of another kind.

By s. 3: Every person who with in-

tent to defraud, or to enable another person to defraud, does any of the following things, that is to say (2), dyes, or causes to be dyed, any seeds, or (3), sells, or causes to be sold, any . . . dyed seeds, shall (1), for the first offence, be liable to a penalty not exceeding £5.

they did unlawfully with intent to enable some other person to defraud, cause to be dyed certain seeds within the true intent and meaning of the act, viz., clover seeds," &c.

It was proved that the defendants had, in fact, submitted the seeds in question to a certain process of sulphur smoking, whereby their appearance had been greatly improved, and that, in short, a very inferior and comparatively worthless sample of old clover seed had by the process been made to resemble new and valuable clover seed; but it was not proved nor alleged that there was any representation that the seed was other in sort than what it really was, viz., clover seed.

In the interpretation clause of the act "the term to dye seeds means to give seeds, by any process of coloring, dyeing, sulphur smoking, or other artificial means, the appearance of *seeds of another kind." It was argued for [342 the complainant that these words would include manipulation of seeds by such process or artificial means, in order fraudulently to present the appearance of improved quality.

The magistrate was of opinion that the words of the statute, "seeds of another kind," meant a totally different thing from old and inferior seeds of the same kind, altered so as to pass for new and reliable seeds, and holding that the conduct of the defendants, however reprehensible, did not bring them within the penalties of the act, he dismissed the summons.

G. E. Lyon, for the respondents: The magistrate was right. What was done to the clover seed did not give it the appearance of seed of another kind, taking the word "kind" in its ordinary meaning. No foreign substance was mixed with it, and it could never be supposed to be anything but clover seed. [He was then stopped.]

Grain, for the appellant: There can be no doubt of the fraudulent intention of the appellants, and if by some process inferior seed is to be made to look like that which it is not—seed of a superior quality—the case is within the act. Smoking the seed with sulphur is much the same as if another seed were actually mixed with it.

COCKBURN, C.J.: I regret that I am compelled to arrive at the conclusion that this case is not within the act. There can be no doubt that what was done was a wicked fraud, which ought to be provided against by the Legislature; but we cannot, without doing violence to the language of the section before us, hold that the respondents were liable. We are called upon to say whether the facts bring the case within a penal act, and whether it embraces the particular

1878

Francis v. Maa.

fraud which is shown to have been practised. The preamble of the act states that the practice of adulterating seeds, in fraud of Her Majesty's subjects, and to the great detriment of agriculture, requires to be repressed by more effectual laws, &c., and it proceeds to impose a penalty upon any one who dyes seeds, so as to give them the appearance of seeds of another kind. Now, construing the word "kind," according to the meaning given to it in the 343] *standard dictionaries, the act cannot be taken to apply to something done with the object of improving the appearance of the seed without introducing foreign substances in it, and passing it off as a thing substantially different from that which it is. Here nothing of the character of admixture takes place. The seeds are not made to assume the appearance of seeds of a kind other than they are, that is, white clover seed. The words, "another kind," do not apply to a mere improvement in appearance, and nothing could have been easier than for the Legislature to have included this case in the enactment. Without express words I do not think that we can treat the word "quality" as synonymous with "kind." The seeds always retained the appearance of that which they actually were, and it was not the case of the seeds of some noxious weed being made to acquire the appearance of the seeds of some other plant. They were only altered as regards quality.

MANISTY, J.: I share the regret expressed by the Lord Chief Justice in holding that this information cannot succeed. The preamble is a key to the construction of the act, though there is of course nothing to prevent a clause from going further. Now the preamble suggests that the act was aimed at the adulteration of seeds, and though the word "kind," which is used afterwards, is not free from ambiguity, it ought not, if there is real doubt, be construed so as to create an offence and impose a penalty. Now, reading the enactment in conjunction with the interpretation clause, I think the natural conclusion is that it applies to something which makes the seeds appear to be of a different sort from that which they are, and not to something which merely gives them the appearance of seed of a better quality.

Judgment for the respondents.

Solicitors for appellant: *Tahourdins & Hargreaves.*

Solicitors for respondents: *Simpson & Palmer.*

[3 Queen's Bench Division, 344.]

May 5, 1878.

***GUARDIANS OF KEYNSHAM UNION, Appellants; [344
GUARDIANS OF BEDMINSTER UNION, Respondents.***Poor Law—Divided Parishes Act (39 & 40 Vict. c. 61), s. 35—Child under Sixteen—Mother Marrying again.*

Under the Divided Parishes Act (39 & 40 Vict. c. 61), s. 35, which enacts that—no person shall be deemed to have derived a settlement from any other person, whether by parentage, estate, or otherwise, except in the case of a wife from her husband, and in the case of a child under the age of sixteen, which child shall take the settlement of its father or of its widowed mother, as the case may be, up to that age, and shall retain the settlement so taken until it shall acquire another—children under the age of sixteen gain no settlement by a second marriage of their widowed mother.

[3 Queen's Bench Division, 356.]

Feb. 14, 1878.

BULLOCK & CO. V. CORRY & CO. [356Practice—Discovery—Correspondence in Suit between Plaintiff and Third Party—Order xxxi, Rules 11, 12, 13, 18.*

In an action by the plaintiffs against the defendants for not unloading at the port of discharge a cargo of rice purchased by the defendants from the plaintiffs, whereby the plaintiffs, who had entered into a charterparty upon terms as to the discharge of the ship similar to those contained in the contract of sale, were sued by and had to pay damages to the shipowner:

Held, that the defendants were not entitled to inspection of the papers in the plaintiffs' possession relating to the action brought against them by the shipowner, including correspondence between them and their solicitor, and between their solicitor and other persons; for such papers would have been privileged from discovery in the former action, and the fact that such action had terminated did not deprive them of their privilege.

CLAIM stating that the defendants purchased from the plaintiffs a cargo of rice, to arrive by a vessel thereafter to be declared, upon the terms, amongst others, that the vessel should be ordered at the defendants' option to any good and safe port in the United Kingdom, or on the continent, between Havre and Hamburg, both inclusive, or as near to such port as she could safely get without breaking bulk, and that the defendants should take the cargo from the ship's side as per charterparty, and should pay weighing, lighterage, &c. That for the purpose of performing this contract, the plaintiffs entered into a contract for the charter of the ship Nydia, upon terms as to the discharge of the ship similar to those contained in the contract. That a cargo was

1878

Bullock v. Corry.

shipped by the *Nydia*, and the vessel was duly declared according to the terms of the contract by the plaintiffs with the defendants, and the defendants thereupon ordered the vessel to proceed to Ghent, and there discharge her cargo. The vessel accordingly proceeded as near to Ghent as she could safely get without breaking bulk, and all things happened, &c., to enable the plaintiffs to have the cargo taken by the defendants from the ship's side, and the defendants became and were bound to pay weighing, lighterage, &c., and all other expenses of the discharge of the cargo, according to the terms of their contract. Breach, that the defendants did not, nor would accept delivery of the cargo, nor [357] take it from the *ship's side, and did not pay the weighing, lighterage, &c., and the other expenses of the discharge of the cargo according to the terms of the contract, whereby the plaintiffs were put to great expense, &c., and sustained a loss by the detention of the vessel through the defendants' breach of their contract, and were compelled to pay costs and charges in defending an action brought against them by the owner of the ship in respect of the default in the discharge of the vessel, and the defendants became liable to indemnify the plaintiffs in respect of all costs, charges, and expenses aforesaid, and the damages recovered against the plaintiffs in the aforesaid action.

The defendants by their defence denied the material allegations in the statement of claim, and further alleged that they were not the purchasers of the cargo, and acted in the transaction merely as brokers.

The plaintiffs admitted on affidavit the possession of the following documents—Correspondence between the plaintiffs and their solicitors relating to the questions in dispute in this action, and also the action of *Evans* [the shipowner] v. *Bullock*; correspondence between the plaintiffs' solicitors and Messrs. Bateson & Co. [Evans' solicitors]—but objected to the production of them, on the ground that they consisted of instructions to counsel, and the papers in this action, and in that brought by the shipowner against the now plaintiffs. A summons was taken out by the defendants before Field, J., calling upon the plaintiffs to show cause why they should not produce for inspection the documents above mentioned. The learned judge having dismissed the summons on the ground that the documents were privileged, the defendants appealed.

Maurice Powell (*Finlay* with him), in support of the motion: The papers are not privileged from inspection. They clearly relate to the matters in question in this action,

and are of a similar character to the agreement of compromise in *Hutchinson v. Glover* (¹), which was made in a previous action relating to the same subject-matter, but which was nevertheless held to be subject to inspection.

A. *Wilson*, for the plaintiffs: The defendants are not entitled to *inspection of a confidential correspondence [358 in a previous action between the plaintiffs and a third person. The decisions in equity show that, although inspection is granted of documents which go to make up the record in an action, and also of the indorsements of counsel on a brief, yet that anything in the nature of private instructions for an action is privileged. This is distinctly shown by the two cases of *Nicholl v. Jones* (²) and *Walsham v. Stainton* (³), where the reports of an accountant employed by a solicitor, instructions to counsel, and notes and observations made by him, were held to be privileged, and in the later case of *Wilson v. Northampton and Banbury Junction Railway* (⁴), the privilege was extended to correspondence with a solicitor upon a contract which had not then led to litigation. It may be assumed, therefore, that this application could not have been made while the action, "*Evans v. Bullock*," was in progress. But the present action involves the same question, and there is no reason why the privilege should be limited to an existing suit. In *Hutchinson v. Glover* (¹) the agreement of compromise was an operative act, like the judgment of a court, and could not be regarded as a private communication.

M. *Powell*, in reply: The papers are relevant to the defendants' case; for, had it not been for the previous action, the damages for breach of the defendants' contract would have been nominal.

COCKBURN, C.J.: I entertain not doubt that my Brother Field was right. The privilege which attaches by the invariable practice of our courts to communications between solicitor and client ought to be carefully preserved. In my opinion the rule is, once privileged, always privileged. This will apply, *à fortiori*, where the succeeding action is substantially the same as that in which the documents were used. Let us suppose an action and cross-action to be brought between the same parties. Could it be said that what passed between the client and his solicitor in the action was not privileged from inspection in the cross-action? But this is substantially the same question which is now brought

(¹) 1 Q. B. D., 138.

(²) 2 H. & M., 588.

28 ENG. REP.

(³) 2 H. & M., 1.

(⁴) Law Rep., 14 Eq., 477; 8 Eng. R., 866.

1878

Bishop of St. Albans v. Battersby.

before us. In the first action the shipowners sued the 359] charterer for not *discharging the cargo according to the terms of the charterparty, and in the present action the charterer resorts to his remedy over against the merchant on the contract of sale. In both actions the facts are the same; the difference, if any, is that in the former suit the present plaintiffs were defendants. The fact that their position is reversed can make no difference with regard to their privilege. The present plaintiffs knew in the former action that they had become liable to the shipowner by the terms of the charterparty, and they would naturally lay before their solicitor the whole of the facts from beginning to end. To hold that such communications are not privileged would be contrary to common sense and justice.

MELLOR, J.: I am entirely of the same opinion. It is plain that the papers which the defendants desire to inspect are the confidential communications between the plaintiffs and their solicitor, and no ground has been shown for holding that these communications are not privileged. I am glad to find that our decision is in conformity with the practice in the courts of equity.

Order refused.

Solicitors for plaintiffs: *Hollams, Son & Coward.*

Solicitor for defendants: *W. J. Foster.*

[3 Queen's Bench Division, 359.]

May 21, 1878.

BISHOP OF ST. ALBANS and Others v. BATTERSBY.

Covenant in Lease not to use the demised Premises as a Beer-shop or Public house—Sale of Beer by Retail to be consumed off the Premises—Breach of Covenant.

A lease contained a covenant by the lessees not to permit any house that might have been erected on the land demised to be used as a beer-shop, or public house, or any theatre, or public show, or exhibition.

The assignee of the lease carried on the business of a grocer and baker at a shop erected on the land demised. He obtained an excise retail beer license for the sale of beer to be consumed off the premises, and sold beer in pursuance thereof in his shop:

Held, a breach of the covenant.

SPECIAL CASE, the facts of which were in substance as follows:—

By an indenture of lease, dated the 7th of May, 1868, the 360] *Reverend Brabazon Lowther and the Bishop of Rochester demised to the Haydock Collieries Industrial Co-operative Society a certain plot of land. By the said lease

the lessees covenanted for themselves, their successors and assigns, amongst other things, that they would not carry on certain noisy or offensive businesses specified on the land, and should not nor would permit any house or building, to be erected in pursuance of the covenant in that behalf thereinbefore contained, to be appropriated for or converted into a place of public worship, without the special license in writing of the lessors, and should not nor would permit any house or houses, which might have been erected on the premises, to be used as a beer-shop, or public house, or any theatre, or public show, or exhibition.

The lease contained a proviso for re-entry for breach of covenant.

The plaintiffs were the assignees of the reversion in the lease, and the defendant was the assignee of the term.

Pursuant to one of the covenants in the lease certain buildings, consisting of a shop and warehouse, were erected after the date thereof on the land.

The defendant, who was a grocer and baker, carried on business in the shop and premises in partnership with his brother, Aaron Battersby. In September, 1876, Aaron Battersby obtained an excise retail beer license, for the sale of beer to be consumed off the premises. In October, 1877, Aaron Battersby obtained a renewal of such license. The plaintiffs were no parties to the granting of such licenses.

Aaron Battersby and the defendant, from the date of the granting of the said license in September, 1876, down to the 12th of November, 1877, in addition to carrying on their ordinary business as grocers and bakers at the said shop and premises, had been in the habit of selling there, under and in pursuance of the beer license, beer by retail to be drunk and consumed off the premises, and not to be drunk or consumed on the premises, and no part of the beer sold by them at the said house, shop, or premises had ever been drunk or consumed therein or thereon.

The plaintiffs brought their action for recovery of the premises as on a forfeiture for breach of the covenant above mentioned.

*The question for the court was, whether the sale [361] of beer as aforesaid constituted a breach of the covenant and a cause of forfeiture.

W. G. Harrison, Q.C., for the plaintiffs: There was clearly a breach of the covenant, and consequently a forfeiture. A place where beer is sold by retail is a beer-shop.

J. Digby, for the defendant: The term "beer-shop" as used in the covenant means the same as a "beer house,"

that is to say, a place where beer is sold to be drunk on the premises. The context shows that what was intended was to prevent the use of the premises for certain purposes tending to create noise and disorder. In *London and North Western Ry. Co. v. Garnett* ⁽¹⁾ it was held that a covenant not to use premises as a beer house was not broken by the sale of beer to be consumed off the premises. James, V.C., says in that case, "The question is, what was the meaning of the parties to the deed, and what was the ordinary meaning of the term 'beer house' at the time when it was executed. Now, a person minded to ascertain the legal meaning of the word would naturally resort to Burns' Justice of the Peace, which was the book in constant use by magistrates who had to decide on granting or refusing licenses. In the edition of 1845, current at that time, it was defined as "a house in which beer, &c., is sold by retail to be drunk or consumed on the premises." *Jones v. Bone* ⁽²⁾ is to the same effect. There the covenant was not to carry on the trade or calling of an hotel or tavern keeper, publican or beer-shop keeper, or seller by retail of wine, beer, spirits, or spirituous liquors, and it was held that the sale of wine and spirits in bottle by a person in the course of his trade was not such a breach of the above covenant as the court would interfere with: see also *Pease v. Coats* ⁽³⁾.

[COCKBURN, C.J.: There the words were, a "public house for the sale of beer."]

Originally the license was general for sale of beer to be consumed either on or off the premises. In the first instance, the license for retailing beer under 11 Geo. 4 & 1 362] Wm. 4, c. 64, authorized the *sale of beer generally, and consequently for consumption off the premises and also on the premises.

The 4 & 5 Wm. 4, c. 85, recited that much evil had arisen from the conduct of such beer houses, and provided that when the license was for consumption on the premises, a certificate of good character should be required, and that the license granted under the former act without such certificate should not authorize the sale of beer to be consumed on the premises. The term "beer house" or "beer-shop" is usually employed, however, in relation to places where beer is sold by retail to be consumed on the premises.

W. G. Harrison, Q.C., in reply.

COCKBURN, C.J.: The contention for the defendant is, that the term "beer-shop" as used in the lease is synony-

⁽¹⁾ Law Rep., 9 Eq., 26.

⁽²⁾ Law Rep., 2 Eq., 688.

⁽³⁾ Law Rep., 9 Eq., 674.

mous with the term "beer house." If at the time the lease was made there had been no such thing as a beer-shop, as distinguished from a "beer house," I should have agreed with Mr. Digby. But at the time of the granting of the lease a state of things had arisen differing from that which had existed at one time, and what was once unknown had come into existence, viz., a house used exclusively for the sale of beer to be drunk off the premises. Such a house would be distinguishable from the "beer house," and to it the term "beer-shop" is quite as applicable as to a beer house. When we find that there is one class of premises capable of being thoroughly ascertained and distinguished by the term "beer house," and that the term "beer-shop" is appropriate to another class of premises altogether, it follows that the two terms "beer house" and "beer-shop" are not synonymous. The term "beer-shop" is large enough to embrace the particular establishment in question. A shop is a place where goods are sold. It most generally happens that they are not consumed where they are sold, and so the term is usually applied to places where goods are sold but not consumed. The result is that the terms used by the lease are large enough to cover this case. It is quite possible that the parties may not have intended to prevent such a sale of beer as this, but as they have used apt words to embrace it, we cannot cut down the natural effect of those words. We are not to make a contract for *the par- [363 ties, but merely to interpret the terms they have used. Our judgment must therefore be for the plaintiffs.

MELLOR, J., concurred.

Judgment for the plaintiffs.

Solicitors for plaintiffs: *Lee & Brodie.*

Solicitors for defendant: *Maples, Teesdale & Co.*

See Woodfall's Landlord and Tenant (11th ed.), 620-6; 23 Eng. Rep., 576 note.

The case of *Cowell v. Colorado Springs Co.*, there cited, is reported 100 U. S. R., 55.

In 1859 the appellee leased, at a nominal rent, for a term of twenty years, renewable, a cottage at Point Lookout, intended as a bathing place. By the terms of the lease, the appellee's right was to become forfeited if the cottage was not "kept in perfect repair and tenantable condition for the occupation of respectable persons frequenting said bathing place" during any bathing

season. The appellee occupied the cottage during the bathing season of 1860. During the war, United States troops occupied the hotel and all the cottages at Point Lookout and left them in bad condition, and the place was not afterwards regularly reopened and kept as a bathing place, though the hotel was kept for three seasons. Appellee's cottage was occupied for a time by his tenants. In 1877 the appellants, owners of the fee of the property, finding that the cottage was not "kept in perfect repair and tenantable condition," and that it had been suffered to be out of repair for more than one bathing season

1878

Watt v. Barnett.

during the term (excluding the time the property was occupied by United States troops), entered upon the property and caused the cottages thereon to be torn down. In an trespass q. c. f., brought by the appellee against the appellants, it was held :

1st. That the covenant on the part of the appellee to keep the cottage in "perfect repair and tenantable condition" was absolute, and that as the evidence showed that this covenant had not been performed, he could not recover.

2d. That this covenant was not de-

pendent upon any covenant on the part of the lessor to keep the hotel and grounds in good order and repair, suitable for a bathing place, and that there being no such covenant on the lessor's part in the lease, none could be implied ; though it was doubtless his intention to do this, as appeared from the recital in the lease : *Moyer v. Mitchell*, 53 Md., 171.

In *Simmons v. Farren*, 1 Bing. N. C., 126, carrying on the business of a retail brewer was held to be no breach of a covenant not to carry on the business of a common brewer or retailer of beer.

[3 Queen's Bench Division, 363.]

March 20, 1878.

[IN THE COURT OF APPEAL.]

WATT V. BARNETT and Others (*).

Practice—Substituted Service—Order ix, r. 2—Absence of Notice of Proceedings—Setting aside Judgment—Discretion.

The plaintiff, being unable to serve one of the defendants with the writ, obtained an order for substituted service against him under Order ix, Rule 2, and the action proceeded to judgment against all the defendants. The defendant against whom the order for substituted service had been made applied to be let in to defend, on the ground that he had a defence on the merits, and that he had never had any notice of the action while pending :

Held, that as an order for substituted service had been properly made and service effected under it, the judgment was regular, and that the defendant could not, *ex debito justitiæ*, claim to be let in to defend the action ; but that the court, in the exercise of its discretion, could allow him to do so if it were shown that he had no knowledge of the proceedings and had a defence on the merits ; and that, as the giving leave was discretionary, the court could impose terms.

THIS was an appeal by Barnett from an order of Cockburn, C.J., and Mellor, J. (*).

The action was against the defendants, who had been the directors of a limited company, to recover damages on the ground that they had, by false representations in a prospectus, induced the plaintiff, J. H. Watt, to take debentures in the company, which debentures had turned out worthless.

The writ was issued on the 1st of September, 1876, and the statement of claim was delivered on the 15th of January following. There were five defendants, of whom Barnett was the first named. Judgment was entered up in February, 1877, against one of the other four for default in pleading. [364] ing. The other three delivered defences, on which issue was joined, but two only of them appeared at the trial.

(*) Affirming, *ante*, p. 169.

(*) 3 Q. B. D., 183 ; *ante*, p. 169.

At the time when the present action was commenced, a similar action of *Weir v. Barnett* was pending in the Exchequer Division against the same defendants, in which Messrs. Trinder & Co. acted as solicitors for Barnett. The plaintiffs applied to Trinder & Co. to accept service for Barnett in this action, but they declined to do so, or to give his address. He was at the time abroad, and had not for some time had any residence or office in England, and the plaintiffs could not discover his address. The plaintiffs, therefore, on the 28th of November, 1876, obtained from Master Hodgson an order for leave to effect substituted service, by sending a copy of the writ in a prepaid letter addressed to Barnett at the office of Trinder & Co. The affidavit on which this order was obtained did not state that Barnett was abroad. Copies of the writ and order were posted accordingly, and at the same time the plaintiffs' solicitors wrote to Trinder & Co., informing them of this having been done. Trinder & Co. returned the packet containing the copy writ and order, and a correspondence ensued in which they complained that the order had been obtained without stating that Barnett was resident abroad, and contended that it ought to be abandoned. The plaintiffs' solicitors ultimately acceded to this view, and informed Trinder & Co. that they should apply for a fresh order to the same effect. They made the application accordingly, on the ground that Trinder & Co. were acting as solicitors for Barnett in another action, knew his address, and refused to give it. An order for substituted service on Trinder & Co. was made accordingly on the 18th of December, under which the service was effected, and on the 20th of February, 1877, Barnett not having appeared, judgment for damages to be assessed was entered up against him.

The action was tried on the 19th of November, 1877, and one of the two defendants who appeared at the trial was Barnett's brother. The plaintiffs obtained a verdict upon which final judgment was entered up, and a considerable part of the damages was recovered from the defendants other than Barnett, leaving £500 unpaid.

Barnett then applied before Field, J., at chambers, for leave *to come in and defend, on the ground that the pro- [365 ceedings had not been brought to his knowledge until after the final judgment. This was supported by an affidavit by Tinder & Co., who stated most distinctly and precisely that, although they had been in communication with Barnett, they had never informed him of the pendency of this action, and, by the affidavit of the appellant himself, that he had never been informed of it.

Field, J., refused the application, and Barnett appealed.

The appeal was heard by Cockburn, C.J., and Mellor, J., who made an order letting in Barnett to defend, but only upon the terms of his giving security for the amount of the judgment that remained unsatisfied, and for costs⁽¹⁾. Barnett appealed.

Barnett had successfully defended a similar action of *Weir v. Barnett* ⁽²⁾, but it was deposed, and the affidavit was not contradicted, that whereas that action was for misrepresentations contained in a prospectus issued after Barnett went abroad, he was in the chair at the meeting of directors at which the prospectus on which the present action was founded was settled.

Wills, Q.C., and *Rolland*, for the appellant: It is *ex debito justitiæ* that a judgment should be set aside when the defendant has had no notice of the proceedings. The judgment therefore ought to be set aside unconditionally.

The result of the similar action of *Weir v. Barnett* ⁽²⁾, shows that Barnett has substantial grounds of defence.

Reginald Brown, contra: The principles on which substituted service is ordered are explained in *Hope v. Hope* ⁽³⁾. If the service was irregular, an application should be made to set it aside, where there is no such application you cannot go behind the order, or Order ix, Rule 2, would be rendered inoperative.

[JESSEL, M.R.: There is no ground for setting aside the order for substituted service; the proceedings were perfectly regular; but still the court has jurisdiction to let the defendant in to defend if he has not had notice of the proceedings.]

The two actions are quite different. *Weir v. Barnett* ⁽²⁾ was for misrepresentations contained in a prospectus issued 366] after Barnett *had left the country; the present action is for misrepresentations contained in a prospectus settled when he was in the chair.

Wills, Q.C., in reply.

JESSEL, M.R.: The first question is what is the effect of Order ix, Rule 2. So far as the opinion of Mellor, J., in this case differed from that of Cockburn, C.J., I concur with Mellor, J. The object of the rule appears to me to be as stated by him. The court, when an application for leave to effect substituted service is made, decides as to the propriety of granting it, and if service is effected according to the order of the court it is, while the order remains undischarged,

⁽¹⁾ 3 Q. B. D., 183; *ante*, p. 169.

⁽²⁾ 2 Ex. D., 32.

⁽³⁾ 19 Beav., 237; 4 De G. M. & G., 328.

equivalent for all purposes to actual service. I agree, however, with both the learned judges that, though the service may have been regular according to the order, still the court has power to set aside the judgment where that is necessary for the purpose of doing substantial justice. The mere fact that the defendant has not had notice of the proceedings is not of itself sufficient; to hold it to be so would in fact be setting aside the order for substituted service. But if he shows that he had no notice, and that he has a good ground of defence, it is reasonable that he should be let in to defend. The first question then is whether the court is satisfied that there is a good defence on the merits, if not, leave to come in ought to be refused. I am not satisfied that there is any defence on the merits. The action was defended by persons who, as far as I can find from the affidavits, were in precisely the same position as Barnett. He urges that he was successful in another action of *Weir v. Barnett* (¹), but it would appear that he was successful because the fraudulent representations complained of were contained in a document with which he was not personally connected. Here it is deposed that the proof of the prospectus complained of was settled at a meeting at which Barnett was chairman, and this statement has not been contradicted. On these materials I should not have been sufficiently convinced of his having a good ground of defence to induce me to allow him to defend. The court below has taken a more favorable view and has allowed him to defend on giving security, which the plaintiff consents to reduce to the amount now remaining *due. The plaintiff not having ap- [367
plied for an alteration of the order we have nothing to do but to dismiss the appeal.

COTTON, L.J.: The plaintiff does not ask us to vary the order but consents to reduce the amount of the security. The defendant contends that he has a right to be admitted to defend without having any terms imposed upon him. I think that he has not. I agree with the Master of the Rolls that substituted service duly effected must be regarded in the same light as personal service. We need not consider the question whether the order for substituted service when made could under the circumstances of this case have been discharged, but it appears to me that it was properly made. There are various grounds on which such an order may be made. Where a solicitor is acting for the party substituted service on him may properly be ordered, and so upon any other persons with whom the court is satisfied that the

(¹) 8 Ex. D., 32.

1878

Ex parte Richards.

party is in communication, and though Trinder & Co. did not in fact communicate the service, yet as they were acting for Barnett in a similar litigation the court had a right to consider that the copy writ served would be sent on. I therefore see no reason for setting aside the service, nor for indirectly setting it aside, by letting in Barnett to defend, on the mere ground that the proceedings never came to his knowledge. Even where personal service has been effected, the court has a discretion to allow a party who has not appeared to come in and defend, but it is a discretionary power, and I am not disposed to relieve Barnett from any condition which the court below has thought fit to impose on him.

THESIGER, L.J.: I am of the same opinion.

Appeal dismissed.

Solicitors for plaintiff: *Linklater, Hackwood, Addison & Benn.*

Solicitor for defendant: *W. W. Wynne.*

See *ante*, p. 172 note.

[3 Queen's Bench Division, 368.]

May 16, 1878.

368]

**Ex parte* RICHARDS.

Local Board of Health—Rescission of Resolution, By-Law as to—Dismissal of Officer—Quo Warranto Information.

The court refused to grant a rule for a *quo warranto* information applied for by the former occupant of an office, on the ground that his dismissal from office had been illegal, when they were satisfied that if reinstated he might legally and would be dismissed again immediately.

Semble, that a resolution of a local board, dismissing an officer, was not a resolution rescinding the resolution by which he was appointed, within the meaning of a by-law with respect to the rescission of resolutions of the local board.

Rez v. Trustees of Wrexham Turnpike Roads (5 A. & E., 581) dissented from.

A RULE *nisi* had been obtained for a *quo warranto* against one Mr. Parry Jones, calling on him to show by what authority he exercised the office of clerk to the local board of the district of Llangollen. The applicant for the rule was one Mr. Richards, who had been the clerk to the board previously.

The local board had been constituted under the Public Health Act, 1848 (11 & 12 Vict. c. 63), in 1857, the number of members of the board being nine. At the first meeting of the board, all the members being present, Mr. Richards had been appointed clerk by a unanimous resolution of the

board. By 11 & 12 Vict. c. 63, s. 37, every officer or servant of the board was removable by the board at their pleasure. The Public Health Act, 1875 (38 & 39 Vict. c. 55), which consolidated the acts relating to the public health, contains in s. 189 a similar provision.

By the 34th section of 11 & 12 Vict. c. 63, the local board are to make by-laws with respect, among other things, to the transaction and management of business by such board under the act. By the 1st schedule to 38 & 39 Vict. c. 55, the local board are to make regulations with respect to the same matters. The local board of Llangollen had made the following by-law under the former act: "No resolution of the local board shall be altered or rescinded unless one month's notice be given by the clerk to each member of the board setting forth the proposed alteration, nor unless there be at least as many members present at such meeting as were present at the meeting when such resolution was adopted; provided," &c.

*In September, 1877, at a meeting of the board, at [369 which eight members were present, a resolution was passed, with only one dissentient, to the effect that Mr. Richards should cease to be the clerk of the board from the 31st of January, 1878.

The rule *nisi* was moved for and obtained on the grounds, 1st, that one month's notice to dismiss Mr. Richards was not given, and 2dly, that at the meeting, whereby Mr. Richards was dismissed, there was not a number of members present equal to that present at the meeting whereby he was appointed, as required by the by-laws.

McIntyre, Q.C. (with him *H. E. McIntyre*), showed cause: A resolution dismissing an officer is not a resolution rescinding a previous resolution, within the meaning of the by-law. It is obvious that the by-law was never intended to apply to such a case as this, but to matters connected with the substantive business of the board with relation to the management of sanitary matters. The resolution to dismiss is an entirely fresh and distinct resolution. Secondly, *quo warranto* does not lie with regard to an office from which a man is removable at pleasure: *In re Fox* (1); *Darley v. Reg.* (2); *Rex v. St. Martin in the Fields* (3).

F. Turner supported the rule: The case of *Rex v. Trustees of Wrexham Turnpike Roads* (4) is directly in point, to show that the resolution to dismiss was a resolution re-

(1) 8 E. & B., 939; 27 L. J. (Q.B.), 151.

(2) 17 Q. B., 149; 20 L. J. (Q.B.), 423.

(3) 5 A. & E., 581.

(4) 12 Cl. & F., 520.

1878

Ex parte Richards.

rescinding a former resolution, within the meaning of the by-law.

There is no authority to show that a *quo warranto* will not lie merely because the party is removable at pleasure. The cases would rather seem to show the contrary.

COCKBURN, C.J.: I entertain a strong opinion that this by-law has no application to the present case. When it is said that no resolution shall be altered or rescinded unless a month's notice is given, and it is rescinded by a meeting consisting of a certain number of members, I think the provision must be intended to apply to some subsisting rule or [370] order of the board as to some of *the substantive matters within their jurisdiction. It cannot be meant that a resolution to appoint a man to an office is altered or rescinded within the meaning of these words by his dismissal from office. The resolution to dismiss is a fresh and independent resolution, not a rescission of the former resolution. If this case had arisen under the Turnpike Acts we might have been bound by the decision cited by Mr. Turner; but I must own the decision appears to me a very questionable one, and one that I should not feel bound to follow except under precisely similar circumstances.

Moreover, the application for a *quo warranto* here appears to be a mere abuse of the process of the court. The local board have resolved, whether rightly or wrongly, to dismiss this gentleman, and it lies entirely within their pleasure to do so or not. In such a case what would be the good of a *quo warranto*? If the gentleman at present holding the office was turned out and the applicant replaced, he might immediately be dismissed again. Under these circumstances the application is only vexatious, and the granting of it could in no respect be beneficial to the applicant.

The application must, therefore, be refused.

MELLOR, J.: I am of the same opinion. It is a question whether the by-law applies at all to the dismissal of persons holding office at pleasure. But, however this may be, and whether the proceedings were regular or not, the applicant was dismissed. If we are satisfied that the only effect of granting this application would be to interpose some further trouble, but the result would be that the applicant would be dismissed all the same, it would be idle to grant the application.

Rule discharged.

Solicitors for applicant: *Simpson, Hammond, Simpson & Richards.*

Solicitors for Mr. Jones: *Dean & Taylor.*

See 27 Eng. Rep., 595 note.

Where parties make an agreement subject to the printed rules of an association of which both are members, such rules become a part of their contract, and they are bound by them. Where such an association has an inspector whose duty it is to inspect goods sold by one member to another, if such inspector, with the seller's consent, fails to make an inspection within a given time, such failure is not a waiver on the buyer's part; the inspector's agency not extending beyond the inspection: *Basset v. Jones*, 8 Mo. App. Rep., 127.

A charitable, benevolent and social association, such as a Lodge of Free Masons, is not a common partnership, but partakes more of the character of a club than a trading association. If the lodge purchases real estate, erect buildings, or borrow money on credit, only those members who participate in the enterprise, either by assenting to the undertaking or by subsequently ratifying it, are liable for the debts contracted therein. Where, in such a venture, certain of the members affixed to a pecuniary obligation the common seal of the lodge, which was not used by the order for such a purpose, the members who advised the affixing of the seal, as well as the officers who attached, are bound by it.

Where suit was brought on such an instrument, and judgment recovered

against the lodge without naming the members, such judgment is not a bar to recovery in a suit on the same instrument against the individual members: *Ash v. Guile*, 28 Pittsb. L. J., 449.

The assignees of stock certificates in a corporation, by assignment from persons to whom the certificates were originally issued, are not, by virtue of such assignments, shareholders, when the transfer of shares is required to be made upon the books of the company. If merely assigned as security, they cannot maintain a suit for equitable relief: *Beecher v. Wells*, etc., 1 McCrary, 62.

Where a subordinate tribunal—i.e., a board of fire commissioners—has jurisdiction, and there is evidence before it legitimately tending to support its decisions, and no rule of law is violated, the decision cannot be reviewed upon a common law *certiorari*: *People v. Board*, etc., 82 N. Y., 358.

An incorporated Lodge of Odd Fellows has the right, through its proper officers and in accordance with its established rules, to determine who are not members thereof, and the courts will leave that question to be determined by the lodge itself, through the judicial action of its proper officers, regardless of whether the character of the lodge in which membership is claimed, gives, in express terms, such power to these officers: *State v. Odd Fellows*, etc., 8 Mo. App. R., 148.

[3 Queen's Bench Division, 371.]

May 23, 1878.

*COHEN V. HALE.

[371

THE MIDLAND RAILWAY COMPANY; Garnishees.

Attachment of Debt—Garnishee Order—Debt for which Check given—Stoppage of Check—Order XLV.

A garnishee order was made under Order XLV, Rule 2, attaching a debt. At the time the order was made the garnishees had given the judgment debtor a check for the amount of the debt. Upon service of the order on the garnishees they stopped payment of the check at the bank, the check not having been presented:

Held, that upon the check being stopped it was as if it had never been given, and that there was therefore an existing debt capable of being attached, and the garnishee order was effectual.

MOTION to set aside an order of the district registrar of Dudley. The facts were as follows:

1878

Cohen v. Hale.

The plaintiff recovered judgment in the action on the 9th of November, 1877, for £35 12s. On the 24th of December the Midland Railway Company, being indebted to the defendant in the sum of £44 8s. 9d., drew a check for that amount on the Wolverhampton Branch of Lloyd's Banking Company, and sent it to the defendant, who received it a day or two afterwards. On the 27th of December the plaintiff applied for and obtained a garnishee order under Order XLV, Rule 2, attaching the debt due from the Midland Railway Company to the defendant. This order was served on the Midland Railway Company on the 30th of December, and they thereupon stopped payment of the check, which still remained in the hands of the defendant unrepresented. The defendant retained the check till the 11th of February, and then took it to the Dudley Branch of Lloyd's Banking Company, and got them to give him cash for it, that branch not being the one on which the check was drawn, and knowing nothing of the stoppage of the check. The Midland Railway Company suggested that Lloyd's Banking Company had a lien or charge on the debt, and Lloyd's Banking Company ultimately appeared on the garnishee proceedings and claimed to have such lien or charge, but the district registrar made an order barring any lien or charge on the debt attached as between them and the garnishees, but not as between them and the judgment debtor, and directing that the [372] *judgment creditor should recover the sum of £35 12s., and that execution should issue against the garnishees for that amount.

R. C. E. Plumptre, moved, on behalf both of the garnishees and Lloyd's Banking Company, to rescind the above mentioned order. There cannot be an attachment of anything but an absolute debt. When the check was given there was no longer an absolute debt. Payment of a debt by check is a conditional payment, and operates as a payment until the check is dishonored: *Chitty on Bills*, 11th ed., p. 356. A creditor who takes a check takes what is equivalent to a cash payment if the check is ultimately paid. If the check is dishonored the debt revives. At the time the garnishee order in the present case was served there was no absolute debt, for the check was then in the hands of the judgment debtor unrepresented. If the debt could be attached under these circumstances, it would follow that the execution creditor could call on any garnishee who had given a check to go and stop it immediately, and hold him responsible if he did not.

[COCKBURN, C.J.: It may be that the garnishees could

have refused to stop the check, but they did stop it; under these circumstances is not the payment gone *ab initio*?

The garnishee order must be good or bad when made, and when it was made there had been a conditional payment of the debt, and it was uncertain whether the debt ever would revive: *Hall v. Pritchett* (').

The garnishees had no right to stop the check. The stopping of the check was wrongful as against the execution debtor.

[COCKBURN, C.J.: The only effect of it would be to remit him to his original right on the consideration for the check.]

[He also cited *Keene v. Beard* (*).]

E. Clarke, for the judgment creditor, was not called upon to show cause.

COCKBURN, C.J.: This is a clear case. It appears to me that the reasoning of the counsel for the garnishees involves a fallacy. It treats the debt as extinguished when the garnishee order was served. It is contended that there must be a subsisting debt on *which the order can operate [373 when it is served. But granting this, the reasoning fails, because it is not in my opinion shown that there was not, as the event happened, an existing debt in this case. It is very true that a man who takes a check may be estopped from proceeding to enforce payment of the debt until presentment of the check, and if the check is ultimately paid the debt is extinguished. All that happens in the meantime is that the right of action is suspended. But when the check is presented and dishonored, the debt, the remedy for which was suspended until presentment of the check, may be treated as a debt subsisting all along, just as if the check had never been given. The giving of the check only suspends the remedy, it does not extinguish the debt. Therefore when the Midland Railway Company stopped this check it was, in my opinion, as if it had never been given. It may be that the garnishee order could not have been made effectual against them if they had declined to stop the check, on the ground that having given it they had so far pledged themselves that it would not be proper for them to stop payment of it, but they did not take this course, and by their direction the check was stopped. The suspension of the remedy then ceased, and the debt remained just as if the check had never been given. Under these circumstances I think the garnishee order could be enforced against the Midland Railway Company.

(') 3 Q. B. D., 215.

(*) 8 C. B. (N.S.), 372; 29 L. J. (C.P.), 287.

1878

Cohen v. Hale.

MELLOR, J.: I am of the same opinion. The fallacy of the garnishees' contention in my opinion is, that it does not sufficiently distinguish between the mere suspension of the remedy and the extinguishment of the debt. Till the check is presented the remedy is in suspense, but the debt itself is not affected. The debt has never been paid, and remains in the event, I think, the proper subject of a garnishee order, though the remedy was suspended till a date subsequent to the service of the order.

Order refused.

Solicitor for judgment creditor: *Cole*, for *Lowe*.

Solicitors for garnishees and Lloyd's Banking Company: *Emmett*, for *Saunders, Smith & Parish*.

See 27 Eng. R., 155 note.

A bill of exchange drawn upon a general fund and not accepted by the drawee does not operate as an assignment of the fund, but is merely evidence to be considered, with other circumstances, in determining the intention of the parties: *First, etc.*, v. *Dubuque*, etc., 52 Iowa, 378; *Risley v. Phoenix*, etc., 83 N. Y. 318.

Though see *German, etc.*, v. *Adae*, 1 *McCrary*, 501, 8 Fed. Repr., 106.

Where, for a valuable consideration received from the payee, an order is drawn upon a third person, payable out of a particular fund then due or to become due from him to the drawer, the delivery of the order to the payee operates as an assignment *pro tanto* of the fund; the drawee is bound, after notice thereof, to apply the fund, as it accrues, to the payment of the order, and the payee may, by action, compel such application: *Brill v. Tuttle*, 81 N. Y., 454.

Where a draft is drawn generally, to be paid by the drawee in the first instance on the credit of the drawer, the designation by the drawer of a particular fund, out of which the drawee may subsequently be reimbursed, does not convert the draft into an assignment of the fund, and the payee can have no action thereon against the drawee unless he duly accepts: *Brill v. Tuttle*, 81 N. Y., 454.

Where a particular fund to accrue in *futuro* is designated in the instrument, and the language thereof is ambiguous, evidence of the surrounding circum-

stances may be resorted to for the purpose of determining whether the intention was that the payment should only be made out of the designated fund, or whether the direction to pay was intended to be absolute, and the fund was mentioned only as a means of reimbursement: *Brill v. Tuttle*, 81 N. Y., 454.

An order by a contractor on a city to pay a certain proportion of the amount due to him to plaintiff, and notice to the comptroller of the city of such order, operates as an equitable assignment: *Phoenix, etc.*, v. *Philadelphia*, etc., 11 Phila. Rep., 203; *Brill v. Tuttle*, 81 N. Y., 454, reversing 15 Hun, 289; *Gray v. Mayor, etc.*, 46 N. Y. Superior Ct. R., 494.

If one sell a portion of an account to his credit in bank and give a check as a means of transfer, the check will operate as an equitable assignment: *Risley v. Phoenix, etc.*, 12 N. Y. Weekly Dig., 59, 83 N. Y., 318.

Two bills of exchange, belonging to the plaintiff at Chicago, were indorsed for collection to a bank at Atchison, Kansas, and by said Atchison bank to a bank at Kansas City, Missouri, and by the latter to defendant, a bank at Hutchinson, Kansas: Held, that they remain the property of plaintiff, all the indorsements being restrictive.

An indorsement on a bill of exchange directing the drawee to pay to another, "on account of" the indorser, or "for collection," is a restrictive indorsement, the effect of which is to restrict the further negotiability of the bill, and

Ex parte Smith.

1878

to give notice that the indorser does not thereby give title to the bill, or to its proceeds when collected.

Although there may be no privity between the owner of the bill and the last indorsee, yet, if the latter collects the bill, he is bound to pay the proceeds to the owner, and the latter may

recover in assumpsit, on the ground that the defendant has property in his possession which belongs to the plaintiff, and refuses to pay the same over: *First Nat. Bank of Chicago v. Rens. Co. Bank*, 1 McCrary, 491: *Fawcett v. U. S.*, etc., 97 Ills., 11.

[8 Queen's Bench Division, 374.]

May 30, 1878.

* *Ex parte* SMITH.

[374

Licensing Acts (32 & 33 Vict. c. 27), s. 8; (35 & 36 Vict. c. 94), s. 69—*Licenses to retail Beer, Wine and Spirits not to be consumed on the Premises—Justices bound to state Ground of refusal—Mandamus to hear and determine.*

By the provisions of the statutes relating to licensing, certain licenses for the sale of intoxicating drinks not to be consumed on the premises are not to be refused, except on one or more of four grounds specified. Justices on refusing to grant such a license did not state any ground for such refusal. They were not, however, asked to state their ground for such refusal; and on an application for a mandamus against them to hear and determine the application for the license, the chairman of the justices made an affidavit that they had in fact acted on one of the grounds on which they were empowered to refuse the license:

Held, on the authority of *Reg. v. Sykes* (1 Q. B. D., 52), that the justices were bound to state their grounds at the time of refusing the application, and the mandamus therefore went.

RULE calling upon certain justices of Surrey to show cause why a mandamus should not issue commanding them to hold an adjourned licensing meeting, and to hear and determine the application of one William Julian Smith for licenses to sell beer, wines, and spirits by retail not to be consumed on his premises.

The 69th section of 35 & 36 Vict. c. 94, provides that "a license for the sale of liquors and spirits by retail not to be consumed on the premises may, where such license is required by this act, be granted in the same manner in all respects in which a license for selling wine not to be consumed on the premises may by law be granted, and an application for such license shall not be refused, except upon one or more of the grounds on which a certificate in respect of a license to sell by retail beer, cider, or wine not to be consumed on the premises may be refused." By 32 & 33 Vict. c. 27, s. 8, "No application for a certificate under this act in respect of a license to sell by retail beer, cider, or wine not to be consumed on the premises shall be refused, except on one or more of the following grounds, viz., 1. That the applicant has failed to produce satisfactory evidence of good character," &c., &c.

It appeared from the affidavit of the applicant that the

1878

Ex parte Smith.

justices had refused the license without specifying any grounds for such refusal. They were not, however, asked to specify their grounds.

375] *In the affidavit made by the chairman of the justices in answer to the rule, he stated that, though the justices had not expressed any grounds for refusing the license, they had in fact refused to grant the license because the only evidence as to character that the applicant brought forward was that of his own landlord, whom the justices considered to be so biased in favor of the application that his testimony could not be relied on as satisfactory evidence of good character.

F. Turner, showed cause: This case is distinguishable from *Reg. v. Sykes* ⁽¹⁾. There the justices refused to state their grounds at the hearing, though they were asked to do so, and persisted in such refusal, inasmuch as they did not in their affidavit state their grounds. Here the justices were not asked to state their grounds at the hearing, and they now state a valid ground of refusal.

Anderson, in support of the rule, contended that the case was governed by *Reg. v. Sykes* ⁽¹⁾.

THE COURT (Cockburn, C.J., and Mellor, J.) were of opinion that the case was within the authority of *Reg. v. Sykes* ⁽¹⁾. They therefore made the rule absolute.

Rule absolute.

Solicitors for applicant: *Stokes, Saunders & Stokes*.

Solicitor for justices: *Jenkins*.

⁽¹⁾ 1 Q. B. D., 52.

The duties devolved upon commissioners of excise by the New York statute to regulate the sale of liquors, call for the exercise of discretion and judgment, and are to some extent discretionary and judicial. They cannot be coerced in the exercise of their discretion, by mandamus or otherwise,

and for a mere mistake are not liable, either civilly or criminally. But for an unlawful and corrupt exercise of the powers vested in them, they are answerable criminally: *People v. Jones*, 45 Barb., 311; *People v. Commissioners*, 7 Abb., 34; *People v. Norton*, 7 Barb., 477.

[8 Queen's Bench Division, 376.]

May 21, 1878.

*COVERDALE V. CHARLTON.

[376]

Local Board—"Street"—Highway, Soil of—Letting Pasturage by the Side of the Road—38 & 39 Vict. c. 55, ss. 4, 144, 149—"Vest," Meaning of.

The local board of a district had let the pasturage of the strips of grass which formed the sides of a certain lane within such district, being a highway repairable by the inhabitants at large, to the plaintiff.

The defendant, without any right to do so, turned his cattle on to these strips of land to graze. The plaintiff having brought an action against the defendant for so doing, the latter denied the plaintiff's right to the pasturage:

Held, that the lane in question, being by virtue of s. 4 (the interpretation section) of the Public Health Act, 1875, a "street," vested in the local board under the provisions of s. 149; and that the "vesting," intended by that section was not merely of the use and control of the lane so far as might be necessary for highway purposes, but an actual vesting of the property in the lane, and consequently that the lease from the local board entitled the plaintiff to maintain the action.

[8 Queen's Bench Division, 379.]

March 7, 1878.

*THE QUEEN V. SANKEY and Others.

[379]

Elementary Education Acts, 1870 and 1873 (33 & 34 Vict. c. 75), ss. 74, 84, 90, Second Schedule, Second Part (36 & 37 Vict. c. 86), Second Schedule—Personation—Passing of Resolution for application for School Board—By-law creating Offence.

The Elementary Education Acts, 33 & 34 Vict. c. 75, s. 90, and 36 & 37 Vict. c. 86, second schedule, which impose a penalty for the offence of personating any one entitled to vote at the election of a school board, do not include the offence of personation at the voting for a resolution for application for a school board; and an Order in Council purporting to be made under the above acts, and imposing a penalty upon any one guilty of such offence, is invalid.

[8 Queen's Bench Division, 384.]

May 11, 1878.

*BRADLEY, Appellant; THE BOARD OF WORKS FOR
THE GREENWICH DISTRICT, Respondents. [384]

Metropolitan Local Management Act (25 & 26 Vict. c. 102), s. 53—Construction of New Sewer—Limitation of Time for making Apportionment.

The Metropolis Management Amendment Act (25 & 26 Vict. c. 102), s. 53, enacts that, "where any sewer shall be constructed by any vestry or district board in a street in which previously to such construction there had been no sewer, &c., but where sewers rates have been levied previously to such construction, the expense of constructing such sewer and the works appertaining thereto shall be borne in part only by the owners of the houses situate in and of the land bounding and abutting on such street respectively, and the amount to be borne by such owners shall be de-

1878

Lamb v. Walker.

terminated by the vestry or district board in each particular case, and the residue of such expenses shall be defrayed out of the sewers rate," but there is no limitation of the time within which the amount payable by the owners of such land and houses is to be apportioned.

Where therefore a sewer had been constructed within the meaning of the section in 1868, and no apportionment of the amount of the cost of constructing it, to be borne by the owners of the houses in the street, was made until 1876:

Held, that the apportionment was valid.

[3 Queen's Bench Division, 389.]

Feb. 22; May 18, 1878.

389]

*LAMB V. WALKER.

Damages, Recovery of prospective—Support from adjacent Land, Right to.

In an action for injury to the plaintiff's land and buildings, by removal of lateral support through mining operations carried on by the defendant on his own land adjoining, it was found by a referee to whom the amount of damage was referred that, in addition to existing damage, there would be future damage to the extent of £150:

Held, by Mellor and Manisty, JJ. (Cockburn, C.J., dissenting), that such damage was recoverable in the action:

By Cockburn, C.J.: Inasmuch as, according to *Backhouse v. Bonomi* (9 H. L. C., 503), the damage was the gist of the action, only the damage actually accrued could be recovered in the action, and any further damage must be recovered when it actually occurred in a subsequent action.

Nicklin v. Williams (10 Ex., 259) and *Backhouse v. Bonomi* (9 H. L. C., 503) considered.

THE nature of the action and the pleadings, the facts, and the respective applications made to the court by the parties, sufficiently appear from the judgments.

Feb. 22. *Cave*, Q.C., for the plaintiff: All damage, whether actual or prospective, must be assessed in one action. The case of *Nicklin v. Williams* (1) is a conclusive authority in the plaintiff's favor. *Backhouse v. Bonomi* (2) has not overruled *Nicklin v. Williams* (1) on this point. Great difficulties would otherwise arise. If the plaintiff must bring a second action when fresh damage accrues there would 390] be great difficulty in discriminating *between damage that had actually happened at the date of the first action, and so was included in the first assessment of damages, and the subsequent damage. The damage does not *per se* constitute the cause of action. There is no fresh cause of action when fresh damage arises. The cause of action is complete as soon as any damage arises. Consequently the proposition is, that two or more actions can be brought in respect of the same cause of action, which appears to be contrary to well established principle. The same point arises in respect of actions for injuries produced by railway

(1) 10 Ex., 259; 23 L. J. (Ex.), 335.

(2) 9 H. L. C., 503.

accidents. It could hardly be contended that a person injured in a railway accident could not recover for the prospective mischief to his constitution, but must prove only from time to time for the mischief already developed.

[He cited *Stroyan v. Knowles* and *Hamer v. Knowles* (¹); *Mayne on Damages*, 2d ed., pp. 58-63; *Roberts v. Read* (²); *Gillon v. Boddington* (³).]

Gainsford Bruce, for the defendant: The essential element in this cause of action is the damage occasioned to the land. The cause of action is in respect of the damage accrued, not in respect of the act done, which is not tortious apart from the damage. The plaintiff is really seeking to recover in respect of a cause of action which has not yet happened and never may. There is no analogy between this case and cases where the act done is wrongful, as in the case of railway accidents. If the essential ingredient of the cause of action is damage, then the damage actually existing at the time of action brought is the measure of damage. There is the greatest difficulty and uncertainty in assessing prospective damage. A plaintiff may recover a large sum for damage that never actually happens, or, on the other hand, his claim for prospective damage may be rejected, and a large increase of damage may subsequently happen.

Cave, Q.C., in reply: If the defendant's contention is correct it is strange that it has never been put forward before. In practice it has always heretofore been assumed that the prospective damages may be recovered.

*[He cited *Hodsoll v. Stallebrass* (⁴) and *Lord* [391 *Townshend v. Hughes* (⁵).]

Cur. adv. vult.

May 13. The following judgments were delivered:

MANISTY, J.: The plaintiff by his statement of claim alleged that his reversionary estate in certain land and buildings occupied by his tenants had been impaired and injured, first, by the defendant excavating and getting coal underneath his (the plaintiff's) land and buildings; and, secondly, by the defendant mining under his own land adjoining the plaintiff's land, and thereby withdrawing the support to which the plaintiff's land and buildings were entitled, whereby the plaintiff's land sank and gave way, and his buildings were weakened, cracked, and otherwise injured, and his estates in the said land and buildings were impaired.

(¹) 6 H. & N., 464; 30 L. J. (Ex.), 102.

(⁴) 11 Ad. & E. 301.

(²) 16 East, 215.

(⁵) 2 Mod., 150.

(³) Ry. & Mood., 161.

1878

Lamb v. Walker.

The 4th, 5th, and 6th paragraphs of the plaintiff's statement of claim are in these terms :

"4. The defendant has wrongfully excavated under the plaintiff's said land, and has taken away and disposed of coals and minerals of the plaintiff under the plaintiff's said land of the value of £100.

"5. The defendant's said land was of right supported by the said adjoining land. The defendant, by mining under the said adjoining land, has withdrawn support to which the plaintiff was entitled.

"6. The plaintiff was also entitled to have the said public house, cottages, and buildings supported by the said adjoining land. The defendant, by mining under the same, has withdrawn such support, to which the plaintiff was so entitled."

It is unnecessary to say anything about the first ground of complaint, because the damages in respect of it are found to be nominal.

The defendant brought into court the sum of £150, and by his statement of defence alleged that it was enough to satisfy the claim of the plaintiff.

The plaintiff replied, denying that £150 was enough to satisfy his claim, upon which issue was joined, and that was the only issue to be tried.

392] *By an order made by Master Manley Smith on the 19th of April, 1877, it was ordered that the action should be tried before Mr. Jacob Higson, of Manchester, civil engineer, as special referee, and that order was made a rule of this court.

On the 18th of August, 1877, Mr. Higson made his certificate and report as follows :

"1. The plaintiff is entitled to recover from the defendant, in respect of the causes of action mentioned in the 4th paragraph of the statement of claim and admitted by defendant, the sum of one farthing only.

"2. I estimate the damage actually sustained by the plaintiff at the date of the commencement of the action, by reason of the wrongful acts of the defendant complained of by the plaintiff in the 5th and 6th paragraphs of the statement of claim, at the sum of £400.

"3. I estimate the future damage which will be sustained by the plaintiff, by reason of the wrongful acts of the defendant complained of in the 5th and 6th paragraphs of the statement of claim, of £150.

"4. The defendant has paid into court the sum of £150,

but the items of damage above mentioned are estimated without the deduction of the said sum of £150.

"5. I find the total damage sustained by the plaintiff, by reason of the wrongful acts of the defendant complained of by the plaintiff in the statement of claim, is the sum of £550 0s. 0½d., and deducting the £150 paid into court, the judgment ought to be entered for the plaintiff for the sum of £400 0s. 0½d."

It is noteworthy that the referee finds as a fact that further damage, to the extent of the £150 now in question, will be sustained by the plaintiff, by reason of the wrongful acts of the defendant complained of in the 5th and 6th paragraphs of the statement of claim.

On the 11th of September, 1877, the plaintiff took out a summons calling upon the defendant to show cause why he should not be at liberty to sign judgment for £400 and one farthing, pursuant to Mr. Higson's certificate and report and costs to be taxed. That summons was referred to this court. On the 6th of November, 1877, a rule was granted by this court calling upon the plaintiff *to show cause why, [393 in the event of his not accepting judgment for £250 over and above the sum paid into court, the damages given by the certificate and report of Mr. Higson should not be reduced to such sum as the court might think fit, or why the trial should not be set aside and a new trial had, on the ground that the damages are excessive and contrary to the weight of evidence.

The case was argued on the 12th of January, 1878, before the Lord Chief Justice and myself, and we then declined to set aside the trial and grant a new trial, and we took time to consider whether the plaintiff was in the point of law entitled to recover the sum of £150, the amount of future damage, which the referee finds will be sustained by the plaintiff by reason of the defendant's acts.

That question was again argued before the Lord Chief Justice, Mr. Justice Mellor, and myself on the 22d of February, and we took time to consider our judgment. I am of opinion that the plaintiff is entitled to recover the £150, and that, consequently, the rule to reduce the damages should be discharged, and the plaintiff should be at liberty to sign the judgment for £400 and one farthing and taxed costs.

The defendant, by paying money into court generally, has admitted all the material averments contained in the plaintiff's statement of claim. But it was contended on his behalf that inasmuch as his mining operations in his own

1878

Lamb v. Walker.

land were not, *per se*, wrongful acts, the plaintiff's only cause of action was the "consequential damage" done to the plaintiff's property up to the time of the commencement of the action.

It was contended on the part of the plaintiff that, although he had no cause of action against the defendant until his land and buildings were injured, nevertheless, as soon as they were injured by the withdrawal by the defendant of the support to which they were entitled, he had a good cause of action, and that he could only recover damages once for all. It was further contended on his behalf that the true measure of his damages was the extent to which his reversionary estate was impaired or rendered less valuable by reason of the defendant's alleged wrongful act. I am of opinion that the plaintiff's contention is correct.

The cases relied upon by the defendant only decide that 394] without "consequential damage" there was no cause of action. But there is no authority, so far as I know, for the proposition that damage, *per se* and apart from a wrongful act, can constitute a cause of action.

The plaintiff's right of action was to have his land and buildings supported by the subjacent and adjacent soil or strata, and so long as they were in fact supported, he had no cause of action; but so soon as the support which was left proved to be insufficient, and injury to the plaintiff's property ensued, then the defendant's act in withdrawing the necessary support became wrongful. *Damnum* and *injuria* concurred, and the plaintiff's cause of action then accrued. That point is, as it seems to me, concluded by the judgment of the House of Lords in *Backhouse v. Bonomi* (*). But it is said on the part of the defendant that, assuming this to be so, the true measure of the damage recoverable in this action is the injury actually done to the plaintiff's land and buildings up to the time of the commencement of the action, and that his remedy for subsequent injury is by bringing actions from time to time as and when further injury accrues.

I am of opinion, both upon principle and authority, that such is not the law: see *Nicklin v. Williams* (*), as explained and approved (upon this point) by the Exchequer Chamber in *Bonomi v. Backhouse* (*), and by the House of Lords in *Backhouse v. Bonomi* (*); see also *Hamer v. Knowles* (*). It is a well settled rule of law that damages resulting from one and the same cause of action must be

(*) 9 H. L. C., 508.

(*) E. B. & E., 646, 658.

(*) 10 Ex., 259; 23 L. J. (Ex.), 335.

(*) 6 H. & N., 454.

assessed and recovered once for all. And it seems to me that in the present case there is but one and the same cause of action, namely, that which I have already mentioned.

It may be said that it would be more just and equitable in a case like the present that the plaintiff should only be entitled to recover the amount of damage actually done to his property up to the time of bringing his action, leaving him to recover subsequent damage, if any, by a subsequent action, or, if need be, by a series of subsequent actions. The same might have been said in many cases in which, however, the contrary principle has for a very long time been, and as I think wisely, acted upon. Take, for instance, *the case of the wrongful obstruction of light by [395 means of the erection of a new building lawful in itself. In that case it might be said the plaintiff ought only to be allowed to recover the damage sustained up to the time of the commencement of his action, because possibly the obstruction may be removed, and therefore it would be unjust to permit the plaintiff to recover prospective damage unless and until it is actually incurred.

If that principle were adopted, one consequence would be that the Statute of Limitations would cease to be operative. A plaintiff might lie by until after the expiration of six years, without bringing any action, and then not only bring an action for the damage sustained during the period of six years next before action brought, but he would be entitled to bring a series of subsequent actions for the damage subsequently accruing. Again, take the case of slander actionable only by reason of special damage. The speaking of the defamatory word is *damnum absque injuria*, and consequently not actionable without special damage, just as the removal of the necessary support in the present case was *damnum absque injuria*, and not actionable until the plaintiff's property was injured, but I should suppose it would not be suggested that in such a case the plaintiff could only recover the damage actually sustained up to the time of bringing his action, and that for subsequent damage he might bring a subsequent action or a series of subsequent actions.

The fact is that the principle hitherto acted upon, namely, that a plaintiff must recover once for all, by one and the same action, all damage, past, present, and future, resulting from one and the same cause of action, may not always insure perfect justice, but as a rule it is, in my opinion a wholesome principle, and I doubt whether any better could be devised. It may be that in some exceptional cases, such, for instance, as injury sustained by a passenger, owing to

1878

Lamb v. Walker.

the negligence of the carrier, some useful change might be made in the law. If so, that is a matter for the Legislature. As the law stands, the passenger must recover once for all, because there is only one cause of action, and it seems to me that anything more disastrous than allowing a series of actions to be brought for damage arising from time to time in respect of the same cause of action could not well be conceived. If in the present case the reversioner must resort to 396] successive actions for injury to his *reversion, so must his several tenants for injury to their possession, and the consequence to the defendant would, I should think, be very much worse than that of having the damages assessed once for all in one and the same action.

In my opinion, the plaintiff is entitled to judgment for £400 and one farthing and costs.

MELLOR, J.: The facts of this case are set out in the judgment of my Brother Manisty, and it is not necessary for me to repeat them.

If I thought that the present case was not concluded by authority, and that we were at liberty to consider whether a better or more equitable rule might not be found in the reasons relied upon by the Lord Chief Justice, as leading to the conclusion at which he has arrived, I might hesitate as to the judgment I might form, but I think that this case is concluded by authority, and that I am not at liberty to treat the question as an open one.

The plaintiff in this action complained that he was damaged in respect of his reversionary interest in certain land and buildings, not only by mining excavations made by the defendant under his, the plaintiff's, premises, but also by mining excavations by the defendant made in his own land adjoining, the effect of which was to cause actual damage to the lands and houses to which the plaintiff was so entitled as reversioner, and it is with regard to the latter head of damage that the question upon which we differ arises. It cannot be disputed, since the case of *Backhouse v. Bonomi and Wife* (1), that the owner of land and minerals adjoining the land or lands and houses of another person cannot be prevented from the fullest exercise of his rights of property and dominion in his own land, so long as in the exercise of those rights he does not injuriously affect the corresponding right of the owner of the adjoining property, and no cause of action can arise to the owner of land by the exercise of such rights of ownership by an adjoining owner on his own property, until some actual damage has been thereby occasioned

(1) 9 H. L. C., 503.

to his property. In the language of Lord Wensleydale in *Backhouse v. Bonomi* (¹), "The plaintiff's right is not in the nature of an easement, but that the right is to the enjoyment *of his own property, and that the obligation is [397 cast upon the owner of the neighboring property not to interrupt that enjoyment."

The act of the defendant in this case, therefore, only became wrongful when it interrupted the enjoyment by the plaintiff of his own property. The *damnum* and *injuria* both combined as soon as the act of the defendant became wrongful. It is extremely important to ascertain at this point what it was which constituted the cause of action on the part of the plaintiff. The act done by the defendant, so long as he confined his excavations to his own property, was a lawful exercise of his right, but as soon as he, in the otherwise lawful exercise of his rights, excavated on his own land to an extent and in a manner which caused actual damage to the plaintiff's property, then the act, *ipso facto*, became tortious, and the plaintiff became entitled to maintain his action. It appears to me that it is not correct to say that the action is for damage only, because it will not lie until actual damage occurs. It is still the combination of the "injuria and damnum" which gives the right of action to the plaintiff, and the defendant becomes liable at once to the plaintiff for all the injurious consequences, whether present or in future, which result from the acts of the defendant, so become tortious, and whether he will bring his action immediately upon the manifestation of damage, or wait for further development of it, is at his option, but whether he elects to bring his action immediately or prefers to wait for the complete development of the mischief, subject to the risk arising under the Statute of Limitations, he can only, as it appears to me, have one action and one recovery for all the damage occasioned by the defendant's wrongful acts. This result is clearly established by the case of *Nicklin v. Williams* (²), which, although it must be considered as overruled by the case of *Backhouse v. Bonomi* (¹), so far as it decided that, under circumstances exactly like the present, the cause of action really arose in respect of injury to the right of the plaintiff to have his premises supported by the land of the defendant, independently of actual damage thereto, still is, as it appears to me, a conclusive authority on the point of difference in this case; and Parke, B., in delivering the judgment of the court *upon the argu- [398 ment on the demurrer in that case, said, "For this wrong

(¹) 9 H. L. C., 503.

(²) 10 Ex., 259; 23 L. J. (Ex.), 335.

1878

Lamb v. Walker.

the plaintiffs would have a right to recover a full compensation, including the probable damage to the fabric; and if they had already obtained a verdict with damages, they must be presumed to be satisfied for all the consequences of the wrong; and if, instead of having a verdict, they receive with their own consent a satisfaction, such satisfaction is to be considered to compensate for all the consequences of the wrong."

The question in that case was distinctly raised by the new assignments, and was whether on fresh damage arising after an agreement by way of accord and satisfaction had been made, a new cause of action could arise. That the case of *Nicklin v. Williams* ⁽¹⁾ was rightly decided, so far as it affects the matter now in controversy, appears from the judgment of the House of Lords in *Backhouse v. Bonomi* ⁽²⁾, in which the Lord Chancellor, Lord Westbury, referring to it, says: "With regard to *Nicklin v. Williams* ⁽¹⁾ the decision of that case is beyond all question. Some of the dicta which have been relied upon by the counsel in that case are not necessary for the decision that was there pronounced." I cannot see any distinction between the present case and that. In the present case the tortious act which occasioned the damage is identical in character with that in *Nicklin v. Williams* ⁽¹⁾, and compensation for the resulting damage must be obtained by one and the same recovery. It might in the present case be a convenient course to wait and see whether further damage will actually result instead of assessing it as probable, but I can only answer that the same suggestion has frequently arisen and been constantly overruled, as being inconsistent with an elementary rule of law. In *Bonomi v. Backhouse* ⁽³⁾ Wightman, J., says: "The plaintiffs can only recover to the extent of the damage they have actually sustained, which may include not merely what they are obliged to lay out in actual repair, but the diminution in the value of the premises by reason of the damage;" and Coleridge, J. ⁽⁴⁾, said: "Where a right of action is thus vested, and an action is brought for the act alleged to have so injured it, the damages given by the jury for that 399] act must *be taken to embrace all the injurious consequences of that act, unknown as well as known, which shall arise hereafter as well as those which have arisen. For the right of action is satisfied by one recovery." And in the same case in error Willes, J., delivering the judgment of

⁽¹⁾ 10 Ex. 259; 23 L. J. (Ex.), 335.

⁽³⁾ E. B. & E., 646.

⁽²⁾ 9 H. L. C., 503.

⁽⁴⁾ E. B. & E., at p. 641.

the Court of Error (¹), commenting on *Nicklin v. Williams* (²), says: "For before the former action was commenced it was obvious that actual damage had been sustained; in which case another principle applies, viz., that no second or fresh action can under such circumstances be brought for subsequently accruing damage; all the damage consequent upon the unlawful act is in contemplation of law satisfied by one judgment or accord." I am unable to see anything in the present case to take it out of the rule so clearly established, viz., that there can only be one recovery for all the damage resulting from the same wrongful act, whether it be all then manifest, or is only likely to result from it; as it appears to me you cannot divide the injurious consequences into sections, and refer each new damage as it occurs to some new tortious act by the defendant, there being in fact only one tortious act committed, and to stop at a given point, and so divide the damage already accrued from the damage which may be still further developed would be a violation of the rule as to one recovery or one award to which I have referred. If I am right in what I have said, that in every cause of action there must combine an "injuria and a damnum," then I cannot doubt that the arbitrator was right in assessing not only the actual manifest damage, but also in assessing the future damage within the 5th and 6th paragraphs of the plaintiff's claim; and that consequently the plaintiff is entitled to the judgment of the court.

COCKBURN, C.J.: This is a case of considerable importance as a corollary on the leading case of *Backhouse v. Bonomi* (³), and which, as it seems to me, depends in a great measure on the effect to be given to the decision in that case.

Taking the view I do of that decision, I am unable to concur in holding that, in addition to the amount to which he may be entitled for actual damage sustained through the excavation of the *adjacent soil by the defendant, [400] the plaintiff is entitled to recover in respect of prospective damage, that is to say anticipated damage expected to occur, but which has not actually occurred and which never may arise. The fundamental principle on which the decision in *Backhouse v. Bonomi* (³) proceeds is, that no cause of action arises in respect of what a man does on his own land, until actual damage arises therefrom to the property of the adjoining owner. According to that decision there is no abstract right of support, independent of acquired easement, from adjacent strata, and the removal of such strata consti-

(¹) E. B. & E., 658.

(²) 10 Ex., 259; 23 L. J. (Ex.), 335.

(³) 9 H. L. C., 503.

1878

Lamb v. Walker

tutes in itself no wrong. No wrong arises to A., from the excavation of B., on his own soil though the stability of A.'s adjoining land may be thereby endangered, unless and until A. sustains actual damage therefrom. And the reason is that the law does not recognize any right in A. to the support of the adjacent soil, otherwise than as involved in the larger proposition that he is entitled to the enjoyment of his own property undiminished and unaltered by any use which B. may make of his. B. may use his own property as he pleases, provided in so doing he does not do actual damage to his neighbor's property or diminish or disturb his neighbor's enjoyment of it. This view of the law, ably expounded in the judgment of Mr. Justice Wightman, when the case of *Bonomi v. Backhouse* (') was in the Court of Queen's Bench, was fully adopted and made the basis of their judgments by Lords Cranworth, Wensleydale, and Chelmsford in the House of Lords ('), and is quite consistent with the reasoning of Willes, J., in delivering the judgment of the Exchequer Chamber ('). The learned judge there speaks of the right of action as "arising from the damage, not from the act of the adjoining owner on his own land," observing that "the law favors the right of dominion by every one upon his own land and his using it for the most beneficial purpose to himself." The language of Lord Cranworth is express on the point. He says, "I think the error in the view which has sometimes been taken on the subject is this; it has been supposed that the right of the party, whose land is interfered with, is a right to what is called the pillars or the support. In truth, his right is a right to the ordinary enjoyment of his land; and till that ordinary enjoyment is interfered 401] with, *he has nothing of which to complain. That seems to be the principle on which this case ought to be disposed of." The language of Lord Wensleydale was to the like effect. He says, "the plaintiff's right was to the enjoyment of his own property, and the obligation cast on the owner of the neighboring property was not to interrupt that enjoyment." Lord Chelmsford concurred in what had been said.

In this view the mere withdrawal of the support afforded by the adjacent or subjacent strata, by the excavation of the adjoining soil, gives of itself no right of action to the adjoining owner, not even though, from the knowledge of the fact of such excavation having been made, and the apprehension of possible consequential damage, or even the certainty that such damage must result, the value of

(') E. B. & E., 622

(') 9 H. L. C., 503.

(') E. B. & E., 654.

the property should be prejudicially affected. Hence, too, if, by the substitution of artificial for the natural support, the excavating owner can avert the mischief which would otherwise arise, no wrong is done and no cause of action accrues. In both cases the owner has only done what he pleased with his own; in neither has there been any actual interference with his neighbor's enjoyment of his property. It is true that the case might have admitted of a different view, a view quite as much in accord with legal principle, and which had previously been adopted by text writers and indeed by the courts, as in *Humphries v. Brogden* (') and other cases, namely, that the owner of adjoining property was entitled, as an incident of property, to the support of the adjoining soil; and that if that support was withdrawn and his property was thereby endangered, and its value consequently lessened, there was both *injuria* and *damnum*, and therefore a right of action. But this view included the difficulty and embarrassment which in *Bonomi v. Backhouse* (') it was sought to avoid, arising from the operation of the Statute of Limitations. Or, independently of any assumption of the right of support, it might be said that a man who by thus dealing with his own property diminishes, from the possibility of future damage, the value of his neighbor's, violates thereby the maxim, "*Sic utere tuo ut alienum non lædas*," a maxim which our law has adopted with regard to the enjoyment of adjoining properties, though here again the same difficulty would occur: [402 a cause of action having once arisen, though possibly unknown to the party whose right was affected, the statute would begin to run. But such was not the view taken in the Exchequer Chamber and the House of Lords in *Bonomi v. Backhouse* ('), judgments by which we of course are bound. The decisions—decisions of the two highest courts, in that case establish conclusively and incontrovertibly that it is not the withdrawal of the support previously afforded by the adjacent strata—a support to which, according to the view there taken, the adjoining owner had abstractedly no right—but the actual disturbance of his enjoyment of his property which constitutes a wrong and gives a legal ground of complaint. The effect of the decision is that there is no abstract right to the support of the soil; consequently, that the withdrawal of the support does not create a wrong—an *injuria absque damno*; it is only when the *damnum* presents itself, that that which has been done becomes wrongful. The *injuria* is the effect of the *damnum*. The act of

(') 12 Q. B., 739; 20 L. J. (Q.B.), 10.

(') E. B. & E., 658; 9 H. L. C., 503.

1878

Lamb v. Walker.

the excavating owner is not tortious *in se*; it is tortious only when it produces, and, as it seems to me to follow logically, to the extent to which it produces, actual damage. This being so, it appears to me not only logically, but practically, inconsistent with this principle to hold that, because an adjoining owner has sustained actual damage to a limited extent, from excavation of adjoining soil, he can recover in the same action not only in respect of damage actually sustained, but also in respect of prospective damage which has not yet arisen, and which possibly never may arise at all. If permitted to do so he would thus be entitled to recover compensation in respect of a wrong which he has not as yet sustained, a wrong as yet undeveloped and which has not yet in the legal view of the matter come into existence, a proceeding at variance with all principle. Equally at variance with principle is it, when it is borne in mind that it is only by reason of and to the extent of realized damage that the act of the defendant becomes wrongful, to hold him responsible for that which, though it may possibly become wrongful hereafter, as yet is not so. Moreover, the defendant has, I apprehend, at any time before the damage has actually occurred, a perfect right to have recourse to any artificial means of 403] which he can avail himself to *prevent its occurrence. What, if some damage having occurred, so as to give the plaintiff a cause of action, the defendant were to have recourse to some possible means to arrest the further progress of the mischief; would the plaintiff be entitled, notwithstanding this, to recover in respect of the damage which might otherwise have arisen, but which has thus been averted? Can the plaintiff, by bringing his action immediately on the happening of a slight amount of damage, and claiming therein for prospective damage, which it is assumed will happen at some future time, thereby deprive the defendant of his right to prevent such future damage by recourse to artificial means? The law, beyond all question, allows him to avert all liability on account of possible damage in respect of the entire amount of damage which may result from his operations. If finding that some damage has arisen, possibly contrary to his expectations, he seeks to prevent further mischief, I am at a loss to see on what principle he is to be prevented from taking measures to do so. Yet such would be the effect of this decision.

Of course I do not lose sight of the rule that damages resulting from one and the same cause of action must be assessed and recovered once and for all. But the rule seems to me to have no application in the present case, it being, in

my view of the effect of *Backhouse v. Bonomi* (¹), a mistake to say that the plaintiff had a right to the support of the adjacent strata, and that the removal of these constituted a violation of this right, by reason of which, when damage supervened, a cause of action arose. The plaintiff, as I read the judgment in *Backhouse v. Bonomi* (¹), had no right to the support of the strata. His only right was to the undisturbed enjoyment of his own property, and it was only when, and so far as that enjoyment was interfered with, that he sustained a wrong. It is not enough to say that the value of the plaintiff's property has been diminished by the withdrawal of the support. It is not the diminished value of the property which makes the withdrawal of the support wrongful; otherwise any appreciable diminution in the value, consequent on the removal of the support, from prospective damage which might properly be anticipated to result from it, would constitute, independently of actual *damage, a *damnum* in respect of which a plaintiff [404 could recover, a position which, according to *Backhouse v. Bonomi* (¹), certainly cannot be maintained.

It being thus the present and actual interruption of the plaintiff's enjoyment, and not the removal of the support, which constitutes the wrong and gives a cause of action, it must, as it seems to me, follow that a present interruption can only give a cause of action to the extent to which it has gone. It cannot constitute a cause of action in respect of a future interruption which has not yet occurred. The subsidence of a hundred yards which takes place to-day is one thing; the subsidence of another hundred yards, which takes place twelve months later, is not the effect of the first. It is in no way connected with it except so far as both are the effect of a common cause. Both, it is true, spring from the same cause, namely, the excavation of the subjacent strata; but as the excavation and the consequent removal of the support is not in itself wrongful, or a cause of action, the damage which happens at one time and that which happens at another, though arising physically from the same cause, cannot be said to arise from a common cause, or consequently from a common cause of action. Each fresh interference with the enjoyment of property is, as it arises, a wrong done, and creates a further cause of action. It is not damage referable to a cause of action antecedent to itself. The rule relied on does not therefore seem to me to apply to such a case. My Brother Mellor puts the argument in favor of the opposite view in a

(¹) 9 II. L. C., 503.

1878

Lamb v. Walker.

the negligence of the carrier, some useful change might be made in the law. If so, that is a matter for the Legislature. As the law stands, the passenger must recover once for all, because there is only one cause of action, and it seems to me that anything more disastrous than allowing a series of actions to be brought for damage arising from time to time in respect of the same cause of action could not well be conceived. If in the present case the reversioner must resort to 396] successive actions for injury to his *reversion, so must his several tenants for injury to their possession, and the consequence to the defendant would, I should think, be very much worse than that of having the damages assessed once for all in one and the same action.

In my opinion, the plaintiff is entitled to judgment for £400 and one farthing and costs.

MELLOR, J.: The facts of this case are set out in the judgment of my Brother Manisty, and it is not necessary for me to repeat them.

If I thought that the present case was not concluded by authority, and that we were at liberty to consider whether a better or more equitable rule might not be found in the reasons relied upon by the Lord Chief Justice, as leading to the conclusion at which he has arrived, I might hesitate as to the judgment I might form, but I think that this case is concluded by authority, and that I am not at liberty to treat the question as an open one.

The plaintiff in this action complained that he was damaged in respect of his reversionary interest in certain land and buildings, not only by mining excavations made by the defendant under his, the plaintiff's, premises, but also by mining excavations by the defendant made in his own land adjoining, the effect of which was to cause actual damage to the lands and houses to which the plaintiff was so entitled as reversioner, and it is with regard to the latter head of damage that the question upon which we differ arises. It cannot be disputed, since the case of *Backhouse v. Bonomi and Wife*⁽¹⁾, that the owner of land and minerals adjoining the land or lands and houses of another person cannot be prevented from the fullest exercise of his rights of property and dominion in his own land, so long as in the exercise of those rights he does not injuriously affect the corresponding right of the owner of the adjoining property, and no cause of action can arise to the owner of land by the exercise of such rights of ownership by an adjoining owner on his own property, until some actual damage has been thereby occasioned

(¹) 9 H. L. C., 503.

to his property. In the language of Lord Wensleydale in *Backhouse v. Bonomi* ⁽¹⁾, "The plaintiff's right is not in the nature of an easement, but that the right is to the enjoyment *of his own property, and that the obligation is [397 cast upon the owner of the neighboring property not to interrupt that enjoyment."

The act of the defendant in this case, therefore, only became wrongful when it interrupted the enjoyment by the plaintiff of his own property. The *damnum* and *injuria* both combined as soon as the act of the defendant became wrongful. It is extremely important to ascertain at this point what it was which constituted the cause of action on the part of the plaintiff. The act done by the defendant, so long as he confined his excavations to his own property, was a lawful exercise of his right, but as soon as he, in the otherwise lawful exercise of his rights, excavated on his own land to an extent and in a manner which caused actual damage to the plaintiff's property, then the act, *ipso facto*, became tortious, and the plaintiff became entitled to maintain his action. It appears to me that it is not correct to say that the action is for damage only, because it will not lie until actual damage occurs. It is still the combination of the "injuria and damnum" which gives the right of action to the plaintiff, and the defendant becomes liable at once to the plaintiff for all the injurious consequences, whether present or in future, which result from the acts of the defendant, so become tortious, and whether he will bring his action immediately upon the manifestation of damage, or wait for further development of it, is at his option, but whether he elects to bring his action immediately or prefers to wait for the complete development of the mischief, subject to the risk arising under the Statute of Limitations, he can only, as it appears to me, have one action and one recovery for all the damage occasioned by the defendant's wrongful acts. This result is clearly established by the case of *Nicklin v. Williams* ⁽²⁾, which, although it must be considered as overruled by the case of *Backhouse v. Bonomi* ⁽¹⁾, so far as it decided that, under circumstances exactly like the present, the cause of action really arose in respect of injury to the right of the plaintiff to have his premises supported by the land of the defendant, independently of actual damage thereto, still is, as it appears to me, a conclusive authority on the point of difference in this case; and Parke, B., in delivering the judgment of the court *upon the argu- [398 ment on the demurrer in that case, said, "For this wrong

(1) 9 H. L. C., 503.

(2) 10 Ex., 259; 23 L. J. (Ex.), 335.

1878

Ex parte Todd.

See 27 Eng. Rep., 357 note.

A lease under the Canadian act contained a covenant on the part of a lessee to erect a dwelling house on the premises worth \$2,000, to rebuild in case of fire, and to surrender the premises, with the appurtenances, to the lessor at the determination of the term. The

houses having been destroyed by fire were rebuilt by the lessee. Held, that this had not the effect of exhausting the covenant to rebuild, and that the lessee was bound, on a second fire destroying the building, to rebuild the same: *Emmett v. Quinn*, 27 Grant's (U.C.) Chy., 420.

[3 Queen's Bench Division, 407.]

May 13, 1878.

407]

*Ex parte TODD.

Public house—License to sell Excisable Liquors—Licensed Person giving up possession of Premises during the continuance of the License—New Tenant—Application to Special Sessions—9 Geo. 4, c. 61, ss. 4, 13, 14.

The power of granting a license at special sessions under 9 Geo. 4, c. 61, s. 14, to a new tenant, where a person duly licensed under that act gives up possession of the house during the continuance of his license, extends only to the period for which the former tenant's license would have lasted.

F., duly licensed under 9 Geo. 4, c. 61, on the 3d of August, 1877, gave up possession of the licensed premises, and B. became tenant. The license expired on the 10th of October following. At the general annual licensing meeting, held on the 28th of August, 1877, B. applied for a transfer of the license to him, but the justices refused the application on the ground of his previous misconduct. On the 28th of September B. gave up his tenancy, and was succeeded by G., who on the 29th of November also gave up the tenancy, and was succeeded by T. After giving the proper notices, T. applied at a special sessions, under s. 14 of 9 Geo. 4, c. 61, for a license in respect of the premises. The justices declined to entertain the application, on the ground that they had no jurisdiction:

Held, that, inasmuch as the application was made after the expiration of the period for which the previous license remained in force, the decision of the justices was right.

Semble (per Cockburn, C.J., and Manisty, J.), that the power to grant a license under s. 14 is not confined to the case of the tenant immediately succeeding the outgoing holder of the license.

A license to keep an inn, tavern or hotel, is a personal trust; one cannot justify under a license given to his lessor, nor under one assigned to him by a vendor. A contract to sell or assign such a license is illegal: *Alger v. Weston*, 14 Johns. 231; *Sanderson v. Goodrich*, 46 Barb. 616; *Strahan v. Hamilton*, 38 Ind., 57; *Runyon v. State*, 52 Id., 320.

Though, in New Jersey, it has been

held that there is nothing illegal in an agreement to transfer a license to keep an inn, although the license after its transfer will be inoperative: *Hoagland v. Hall*, 38 N. J. L., 350.

A licensee who has not forfeited his license may carry on the business by an agent at the place designated in the license, and the agent will not be responsible as for selling without a license: *Runyon v. State* 52 Ind., 320.

[3 Queen's Bench Division, 412.]

May 18, 1878.

***STALLARD and Others, Appellants; MARKS, [412
Respondent.**

Spirituous Liquors and Wines—Selling by Retail without Excise License—Orders taken by Traveller occupying House and Premises—Spirits not stored on Premises where Orders received—6 Geo. 4, c. 81, s. 2—23 & 24 Vict. c. 27, s. 19—30 & 31 Vict. c. 90, s. 17.

The appellants were convicted under 6 Geo. 4, c. 81, s. 2, for retailing spirits in Cheltenham without a retailer's excise license. They carried on business as wine and spirit merchants in Worcester, and held all the necessary licenses for dealing in and retailing spirits there. They did not hold a license to retail spirits at Cheltenham; but they caused premises at Cheltenham to be let to D., one of their travellers, for their own use, took out a license for the purpose of carrying on there the business of dealers in beer, and put up a board inscribed with their names as "Distillers, Wine Merchants, and Brewers, Worcester." D. took orders for spirits at these premises and transmitted them to Worcester, where the appellants executed them by sending spirits from Worcester:

Held, that the conviction must be affirmed, for the appellants must be taken to carry on business at Cheltenham as retailers of spirits, although the spirits they sold were kept in and delivered from a store in another town.

[3 Queen's Bench Division, 418.]

May 24, 1878.

***SCHUSTER and Others v. FLETCHER. [418**

Ship and Shipping—General Average—Special Charges—Remuneration to Shipowner for Services in transhipping and identifying Cargo, and arranging with Consignees for sale of part unidentified—Commission on Disbursements.

A ship during her voyage from India to London was stranded on the coast of France. The shipowner dispatched his manager and other persons to take part in the necessary salvage operations, and the whole of the cargo was saved, transhipped, and brought forward to London and the freight earned. Part of the cargo which could not be identified was sold by the shipowner by arrangement with the consignees through a broker, who received his brokerage. The shipowner incurred considerable trouble in chartering ships to carry on the cargo from France to London, and in sending out lighters and necessary appliances to France, and in the identification of the cargo, preparing for the sale, answering the inquiries of and arranging with the consignees. In the average statement a remuneration to the shipowner for "arranging for salvage operations, receiving cargo, meeting and arranging with consignees, and receiving and paying proceeds, and generally conducting the business," was charged partly to general average, and partly as particular average on the several interests ratably, the average stater thinking that the amount was a reasonable remuneration to the shipowner for his services and for commission on the sale of unidentified cargo, and on disbursements:

Held, that under the circumstances the amount was improperly charged and could not be recovered, there being no contract on the part of the owners of the cargo to remunerate the shipowner for his services, a great part of which had been rendered with the object of earning his freight.

1878

Schuster v. Fletcher.

REPORT by a special referee under s. 56 of the Supreme Court of Judicature Act, 1873.

1. & 2. The plaintiffs are merchants in London. The defendant is sole owner of the ship *Victoria Nyanza*.

3. In December, 1873, the plaintiffs shipped on board the *Victoria Nyanza* at Calcutta, for delivery at London under bills of lading, 125 chests of indigo, and the ship sailed for London, having on board a valuable cargo of indigo, tea, jute, and linseed, the indigo being the most valuable portion.

4. On the 4th of April, 1874, the *Victoria Nyanza*, while prosecuting her voyage to London, stranded at Étaples, near Boulogne.

5. The defendant was at once informed by telegraph of the disaster, and he forthwith communicated by telegraph 419] with *Messrs. G. H. Fletcher & Co., of Liverpool, a firm of which he had formerly been, but was not then, a member.

6. G. H. Fletcher & Co. at once communicated with the Liverpool Salvage Association, and obtained from that association the services of Captain Chisholm and Captain St. Croix, two gentlemen of experience in salvage operations who, on the 5th of April, started for Etaples.

7. G. H. Fletcher & Co. also, on the 6th of April, sent out their own manager, Mr. Bromehead, to the same place, and the defendant sent him a power of attorney to act for him, and opened a credit of £5,000 in his favor at Boulogne to provide for expenses there. The defendant also procured the necessary pumps, tackle, and other appliances to be sent out from England for the purpose of salvage operations.

8. Under the directions of Mr. Bromehead, with the assistance of Captains Chisholm and St. Croix, a part of the cargo was taken out of the ship as she lay stranded (an operation of considerable difficulty) and sent to Boulogne. On the 25th of April, the ship was got off and towed into Boulogne harbor, whence she ultimately sailed to Liverpool.

9. The whole of the cargo was saved and transhipped at Boulogne, and brought forward by the defendant to London, and the freight earned.

10. The first of the cargo reached London about ten days after the stranding, and the whole by the middle of May.

11. On the 25th of April, 1874, an average agreement was entered into between the defendant and the several consignees of cargo. The several consignees, in accordance with that agreement, paid sums of money to the defendant, the plaintiffs paying £1,212.

12. The cargo as it arrived was landed and warehoused at the London docks.

13. Some portions of the cargo proved difficult of identification by reason of the shipping marks having become obliterated. Other parts it was impossible to identify. All the goods which were identified were given up to the consignees under the terms of the average agreement. The goods which were not identified were *sold by the defendant by [420 arrangement with the consignees thereof through a broker, who received his brokerage.

14. The defendant incurred considerable trouble in chartering ships to carry on the cargo from Boulogne to London, and in sending out lighters and necessary appliances to Boulogne, and in the identification of so much of the cargo as was identified, and in the endeavor to identify the residue, and in ascertaining and answering the inquiries of and arranging with the consignees, and in preparing for the sale of and selling the unidentified cargo and distributing the proceeds.

15. Mr. Elmslie, of the firm of Elmslie & Son, the average staters, mentioned in the average agreement hereinbefore mentioned prepared an average statement, dated the 16th of November, 1875.

16. In that statement all disbursements by the defendant are included, and duly distributed among the several interests, including charges for the services of Captains Chisholm and St. Croix, and of the Liverpool Salvage Association, and of Mr. Bromehead, and the accounts paid to the dock company.

17. The statement also includes a charge as follows: "G. H. Fletcher & Co. agency, arranging for salvage operations, receiving cargo, meeting and arranging with consignees, receiving and paying proceeds, and generally conducting the business, £2,500." This charge the plaintiffs object to, and seek to recover back their proportion thereof.

18. The sum of £2,500 does not represent any sum which the defendant has paid, or rendered himself liable to pay, to G. H. Fletcher & Co. It was arrived at and distributed in the following manner. Mr. Elmslie formed the opinion upon all the circumstances of the case, that £2,500 was a reasonable remuneration to the defendant as shipowner, in respect of his services hereinbefore mentioned, and in respect of his advances for disbursements. And he proceeded to distribute that sum as follows. He took thereout a sum amounting to two and a half per cent. on the proceeds of the unidentified goods sold, and debited this to cargo in the cargo col-

umn. He took thereout further, a sum amounting to two and a half per cent. upon the total disbursements, and this 421] he debited *to the several interests ratably, in their respective columns. The balance of the £2,500 he debited to general average, in the general average column.

19. The effect is, that the sum of £2,500 thus distributed, is made up of three heads of charge—

1. A commission on the sale of unidentified cargo.
2. A commission on disbursements.
3. A charge by way of remuneration for trouble, in respect of the matters mentioned in paragraph 14.

20. There was no contract on the part of the consignees, or any of them, to pay the defendant the remuneration claimed, or any part thereof, under any of the heads above mentioned, unless such a contract is to be found in the average agreement above mentioned.

21. No custom has been proved, entitling a shipowner, under such circumstances, to any remuneration under any of those heads. But a charge for remuneration by shipowner in respect of his trouble and labor in such cases, has, for the last few years, been often inserted in average statements and with increasing frequency. The charge has often been allowed, and sometimes resisted, by underwriters.

22. Where unidentified goods have to be sold, and the sale is managed not by the shipowner himself, but by the ship broker or some third person, a commission to such person (in addition to the selling broker's brokerage) is charged and allowed.

23. Where money for disbursements upon salvage of cargo is provided not by cargo owner or shipowner, but by some third person, commission upon such disbursements is charged and allowed.

24. Where, in case of wreck, the shipowner abandons the voyage and the Salvage Association of London, Liverpool, or elsewhere, intervenes and saves the cargo, a sum by way of remuneration under the name of office charges, in addition to disbursements, analogous to the third head of charge in the present case, is always charged by and allowed to the association.

25. With reference to the first head of claim—If the defendant is entitled in point of law, to charge a commission on the sale of unidentified goods, the commission of two and 422] a half per cent. *charged, being an ordinary merchant's commission, is not an unreasonable commission to charge.

26. With reference to the second head of charge, the de-

fendant was never out of pocket throughout the transactions hereinbefore mentioned, to any large amount, or for any considerable length of time, and unless he be entitled by reason of any general rule to charge a commission on disbursements, there are no special circumstances in the present case, making it reasonable to do so in this instance.

27. With reference to the third head of charge, if the defendant is entitled in point of law to remuneration for his trouble in and about the matters hereinbefore mentioned, a sum of £200 is a reasonable remuneration in respect thereof.

The agreement was annexed to the case. It was between the defendant and the plaintiffs and other consignees, and recited that it was alleged by the defendant that the ship whilst in the prosecution of a voyage from Calcutta to London, with a general cargo of indigo, jute, and other produce, was by perils and accidents of the seas stranded on the French coast, about twenty miles south of Boulogne, and that steps were at once taken by the master and the owner of the ship for the safety and preservation of the ship and cargo, and a large portion of the cargo was discharged from the ship and landed, and the same had since been forwarded to London by the defendant, and other large portions of the cargo had been saved and had arrived in London or elsewhere in England either in the ship or otherwise. And the defendant alleged that he has paid and expended or had become liable to pay and expend large sums of money and had incurred great expenses and made certain sacrifices in and about the saving and preservation of the ship and cargo and the forwarding of the same cargo to London and otherwise in consequence of the stranding, and that part of such sums of money, expenses, and sacrifices, would be a charge upon the cargo, and that other portion thereof would be a charge on the ship or on the freight of the goods, and that other portion thereof would be a charge in the nature of general average on the ship, her cargo, and freight. And that the said sums of money, expenses, sacrifices, and damages could not yet be ascertained and adjusted, and the respective amounts and contributions due from *the respective [423 owners or consignees of goods by the ship in respect thereof could not yet be ascertained. And that the consignees had respectively applied to the defendant for delivery of the goods consigned to them respectively by the vessel, or of which they are respectively authorized to claim and take delivery as aforesaid, and the defendant had agreed to deliver the goods to them respectively, on the freight due thereon being duly paid or secured to him and upon receiving such

payment on account of and security for the amounts and contributions which might be due from or in respect of the goods for general average or charges or otherwise, on account of the sums of money and expenses expended or incurred by the defendant, or on account of the sacrifices and damages as hereinbefore mentioned. And that the consignees, in consideration of the delivery of their goods in manner aforesaid, had respectively agreed to pay and had paid to the defendant on account of the amounts and contributions due from or in respect of their goods the sums of money respectively set against their signatures, and the receipt whereof was acknowledged, and they had also respectively agreed to sign the undertaking hereinafter contained. And it was witnessed that for the consideration aforesaid the consignees did respectively promise and agree to and with the defendant that they would as soon as conveniently might be, and within a reasonable time after the date of the agreement, respectively give to the defendant, or his agents, true and correct particulars of the goods which should be so delivered to them respectively as aforesaid, and of the value of such goods, for the purpose of the adjustment of the general average and charges thereon. And further, that when and so soon as the said sums of money, expenses, sacrifices, and damages should have been duly adjusted, and the respective amounts or proportion due to the defendant from or in respect of the goods so delivered to them respectively, whether for general average or charges, or otherwise on account of the said sums of money and expenses expended or incurred by the defendant as aforesaid, or on account of such sacrifices or damage to the ship or goods as aforesaid had been duly ascertained, they would respectively pay to the defendant the amount or proportion so due in respect of their goods, after deducting therefrom the amount so paid 424] by them on account *as aforesaid, and for the considerations aforesaid the defendant promised and agreed to and with the consignees respectively that he should and would use all reasonable diligence to cause the said sum of money, expenses and damages to be ascertained and adjusted, and the amounts and contributions due from the consignees respectively in respect thereof to be ascertained according to law, and that in case the amount so paid to him on account of the said consignees, or any or either of them, should, on the final adjustment, appear to exceed the amount due from such consignees or consignee respectively to the defendant, should and would forthwith return the balance or excess to such consignees or consignee respectively.

J. C. Mathew (*Hollams* with him), for the plaintiffs: The claim of the defendant is wholly unfounded, for it is opposed to the leading principles of general average, and the case discloses nothing in the nature of a custom or special agreement to support it. The services relied upon are stated in paragraph 14, and show that there was no sacrifice for the benefit of the cargo. Every one of the consignees would have a right of action against the shipowner if he did not act with all the care in his power in conveying the cargo to its place of destination. There is nothing to explain the allowance of 2½ per cent. on the proceeds of the unidentified goods. The fact that there has been for several years a growing tendency on the part of shipowners to put forward claims like the present, makes it important that the law should be declared by the court, but the facts present no novelty whatever.

J. A. McLeod, for the defendant: The charges which the defendant claims are reasonable. By taking more than ordinary trouble for the protection of the cargo, he prevented it from falling into the hands of local salvors, which would have caused the consignees to incur great expense. The defendant was not bound to take the trouble which he took with respect to the unidentified goods. Upon the consignee failing to identify them, and therefore to enter and take delivery of them within the meaning of the Merchant Shipping Act, 1862, 25 & 26 Vict. c. 63, s. 67, he was at liberty, under the powers conferred by that and the subsequent sections, to himself land and enter the goods, and to retain his lien on the freight.

*[COCKBURN, C.J.: The answer to that is that he [425 chose to take a different course.]

The plaintiffs made no objection to the course adopted by the defendant, and ought not to benefit by the extra trouble without making any return. Secondly, the defendant claims under the average agreement, which gives him larger rights than he would have by the ordinary mercantile law.

J. C. Mathew, in reply: The average agreement is in the ordinary form, and cannot support a claim for services which were not contemplated when it was made.

COCKBURN, C.J.: I am of opinion that our judgment must be for the plaintiffs and against the shipowner, for the charge is one which cannot be supported. It divides itself into two heads,—one for getting the ship away from the place where she stranded, and the other for trouble taken in transshipping the cargo, identifying part of it, and arranging for the sale of another part which could not be

1878

Schuster v. F

payment on account of and contributions which might be made for general average of the sums of money incurred by the defendant, damages as hereinbefore signees, in consideration of manner aforesaid, he paid to the defendant contributions due from money respectively receipt whereof was duly agreed to. And it was agreed that the consignee, in respect of the articles which were with the defendant, should be bound for his own benefit, for unless he might be bound to deliver goods to the proper owner he would not agree to pay his freight. And as to those unidentified, he true and honest broker, but sold them through a broker delivered his brokerage. In every respect, therefore, of such charges cannot be supported.

WELLER, J.: I am of the same opinion on both points. 426] Mr. *McLeod has argued that the consignees stood by while the shipowner was taking extraordinary trouble, and ought therefore to recompense him for it. But the defendant was really doing nothing more than his own interests required him to do. I also think that the agreement affords no countenance for the present claim.

Judgment for the plaintiffs.

Solicitors for plaintiffs: *Hollams, Son & Coward.*

Solicitors for defendant: *Waltons, Bubb & Walton.*

[3 Queen's Bench Division, 426.]

May 11, 1878.

[CROWN CASES RESERVED.]

THE QUEEN V. WELLINGS.

Evidence—Deposition of Witness—Practice—Criminal Law—Statute 11 & 12 Vict. c. 42, s. 17.

Pregnancy may create an "illness" within the meaning of 11 & 12 Vict. c. 42, s. 17, so as to give the presiding judge discretionary power to admit in evidence upon a criminal trial the deposition of a witness, duly taken, who owing to pregnancy is proved to be unable to travel.

ed by th

ngs

sec

ugh, i

is applicat.

proved that he

iles distant from the

his wife on that morning she

out considerable difficulty, that su

wn, and had been so during the greater

week, though able to get up for a few minutes at

als. The husband further stated, that his wife thought her

confinement might not take place until the middle of the

following week, but might, she also thought, occur at any

hour.

*No medical evidence was tendered.

[427

Counsel for the prisoner objected that this was not such an illness as was contemplated by the statute 11 & 12 Vict. c. 42, s. 17 (1).

The court, however, ruled that the deposition might be received in evidence.

It was accordingly put in, and the prisoner was convicted.

The question for the opinion of this court was whether such deposition was rightly received in evidence.

Selfe, for the prisoner: The case shows that nothing except pregnancy operated to prevent the deponent from attending at the trial. Pregnancy is not an illness or disease, but a natural condition; therefore, although the witness may have been in fact unable to travel, such inability is not within the statute 11 & 12 Vict. c. 42, s. 17, and the deposition should have been rejected. *Willes, J.*, in *Reg. v. Walker* (1), is reported to have said, "illness from confinement is an ordinary state, and not such an illness as is contemplated by the statute." *Reg. v. Wilton* (2) is almost to

(1) "... if upon the trial of the person so accused . . . it shall be proved, by the oath or affirmation of any credible witness, that any person whose deposition shall have been taken as aforesaid is dead, or so ill as not to be able to travel, and if also it be proved that such deposition was taken in the presence of the person so accused, and that he or his counsel or attorney had a full opportunity of cross-examining the witness, then,

if such deposition purport to be signed by the justice by or before whom the same purports to have been taken, it shall be lawful to read such deposition as evidence in such prosecution, without further proof thereof, unless it shall be proved that such deposition was not in fact signed by the justice purporting to sign the same."

(2) 1 F. & F., 534.

(3) 1 F. & F., 309.

428.]

SAUNDERS V.

tion for loss of

ster-General

every offi

ed, who

and in

ser-

ess

the same effect. In Archbold's Criminal Cases, 18th ed. at p. 267, a case is cited of *Reg. v. Parker and Ashworth*, in which Mellor, J., is reported to have ruled that pregnancy alone was not such an illness as was contemplated by the statute. The case of *Reg. v. Stephenson* (') is not an authority to the contrary, because in that case the deponent was not merely pregnant, but was "otherwise poorly."

Godson, who appeared in support of the conviction, was stopped by the court.

428] *LORD COLERIDGE, C.J.: We all think that this conviction should be affirmed. Pregnancy may be a source of such illness as to render the witness unable to travel, and be an illness within the statute. It is in each case a matter for the presiding judge to determine. The presiding judge has in this case decided that the evidence was sufficient to satisfy him that the deponent was "so ill as not to be able to travel," and we see nothing to lead us to the conclusion that he was wrong.

MELLOR and LUSH, JJ., CLEASBY, B., and GROVE, J., concurred.

Conviction affirmed.

Solicitors for prosecution: *Hunt & Sons*, for Corbett & Co., Kidderminster.

Solicitor for prisoner: *Lambert*, Worcester.

(') L. & C., 165; 31 L. J. (M.C.), 147; 9 Cox's C. C., 156; 8 Jur. (N.S.), 522; 6 L. T. (N.S.), 334.

See 1 Bish. Crim. Proc. (3d ed.), §§ 1194-1206; Wharton's Crim. Ev. (8th ed.), §§ 227-231; Weeks on Depositions, § 45; N. Y. Code Crim. Proc., §§ 8, 206, 219-220, 620-635; *Regina v. Herson*, 20 Eng. Rep., 384.

Under the English statute, where a prisoner was charged before a magistrate with obtaining money by false pretences, and afterwards indicted for uttering a forged promissory note, the charges arising out of one and the same transaction, and being in fact identical, and the prisoner having had the opportunity of cross-examination before the magistrate; held, that the deposition of a witness taken at such hearing, and who was afterwards unable to travel to give evidence, was admissible, and might be read at the trial for uttering the forged promissory note: *Regina v. Williams*, 12 Cox's Cr. Cas., 101.

Where the testimony of a witness is taken before a coroner, the deposition

should be proved by the coroner who took it. The object of taking depositions is not to afford information to the prisoner, but to secure the testimony: *Regina v. Hamilton*, 16 U. C. Com. Pl., 340.

On a criminal trial, the evidence of a witness taken at the coroner's inquest, but who was not recognized, and who has since removed beyond the jurisdiction of the court, and whose presence cannot therefore be obtained at the trial, although efforts were made by the prisoner for that purpose, cannot be read. *Quere*, Could it be read if the witness had died? *Crite v. Com.*, 5 Va. Law Jour., 568.

The defendant, in a criminal case, may consent that depositions of witnesses taken *de bene esse* by his consent, and in his presence, may be read: *Wightman v. People*, 67 Barb., 44; 1 Bish. Cr. Proc. (3d ed.), § 1205.

See also *People v. Hadden*, 3 Den., 221.

[3 Queen's Bench Division, 428.]

Jan. 28, 1878.

[IN THE COURT OF APPEAL.]

THE QUEEN on the Prosecution of J. B. SAUNDERS v.
THE POSTMASTER-GENERAL (¹).

Telegraph Act, 1868 (31 & 32 Vict. c. 110), s. 8, subs. 7—Compensation for loss of office—Annual Emolument—Allowance for Travelling Expenses.

The Telegraph Act, 1868 (31 & 32 Vict. c. 110), enables the Postmaster-General to purchase the undertakings of telegraph companies. By s. 8, subs. 7, every officer and clerk of any company, the undertaking of which may be so purchased, who has been not less than five years in the service of the telegraph companies and in the receipt of a yearly salary, or who has been not less than seven years in the service of telegraph companies and is in receipt of remuneration at a rate of not less than £50 a year, shall, if he receives no offer of an appointment by the Postmaster-General in the telegraphic department, &c., receive during his life from the Postmaster-General by way of compensation for the loss of his office from the time at which the government takes possession of the company's telegraph, an annuity payable half yearly, equal, if he shall have been in the service of telegraph companies twenty years, to two-thirds of the annual emolument derived by him from his office on the 24th of June, 1868.

Mandamus to the Postmaster-General to assess compensation to S., an officer of a telegraph company, in respect of the expenses allowed him as a part of the emolument of his office. Return that it was the duty of S. from time to time, when required, to travel upon the company's business, and that the company had agreed with him upon rates of allowance, as an indemnity against the extra personal expenditure incurred, or assumed to be incurred, by him while travelling on the business of the company, beyond his ordinary expenditure, namely, 12s. 6d. *for [429 twenty-four hours' absence from headquarters, and 5s. for twelve hours' like absence, when such last mentioned absence did not oblige him to stop away from home, and that the allowances so made did not form any part of his yearly salary or remuneration, but were made for the purpose of indemnifying him against extra personal expenditure, and that the refusal to assess compensation was only so far as regarded these allowances. Plea, that the allowances were not made as an indemnity, but were made to the company's officers when travelling, whether extra expense was incurred by them or not, and were fixed payments; that the company's officers when travelling received the allowances, and saved a large part of the money which they would otherwise have expended at home for board and lodging, and that the allowances were part of the annual emoluments of the officers:

Held, on demurrer, affirming the judgment of the Queen's Bench Division, that anything which S.'s allowance enabled him to save from his ordinary expenses was an "emolument," and therefore a subject for compensation.

APPEAL against the judgment of the Queen's Bench Division, in favor of the prosecutor on demurrer to a plea to a return to a mandamus (¹).

The pleadings sufficiently appear from the head-note.

Gorst, Q.C. (*Casserley* with him), for the defendant: There are two points for argument. First, the mandamus commands the Postmaster-General to assess the compensation due to the prosecutor. The Postmaster-General has no

(¹) Affirming 1 Q. B. Div., 658.

1878

The Queen v. Postmaster-General.

authority under the act (31 & 32 Vict. c. 110) to assess any compensation to the officers and clerks of a telegraph company, and he is not bound to do so: further, there is no machinery provided by the act by which he could assess compensation. The mandamus is therefore bad.

[BRAMWELL, L.J.: If the court hold that the mandamus is bad on that ground, the consequence will be that the prosecutor will have to begin *de novo*. The mandamus will have to state the emolument is so much, and that the Postmaster-General has not paid compensation in respect of it.]

Gorst, Q.C., intimated that the Postmaster-General did not desire to put the parties to unnecessary expense, and withdrew the objection.

Secondly, the prosecutor on losing his office has not been deprived of an "emolument" within the meaning of s. 8, subs. 7, of 31 & 32 Vict. c. 110. The words "yearly salary" and the "rate of remuneration" in that section have the 430] same meaning. *The allowance for travelling does not form part of either, and compensation is to be given only for a loss of salary or rate of remuneration. No compensation is provided for a loss in respect of expenses incurred in travelling.

Sir H. James, Q.C., and *A. Charles*, Q.C., for the prosecutor, were not heard.

BRAMWELL, L.J.: I must say I think that the Postmaster-General has behaved very liberally in refraining to press a technical objection to this mandamus, and although I feel a reluctance to give judgment upon a matter which does not come before the court in a proper form, yet for the purpose of saving expense I will in the present case do so as our opinion has been invited.

I think this a very plain case. The object of the statute was to indemnify a man against—I cannot use a more comprehensive word—the loss of the emoluments he got out of his office, if he is a person whose remuneration brings him within the act of Parliament. Then what is his annual emolument? A portion of it is what he can save out of the allowances made to him during the time he is absent from home. The Legislature could not have used a word more comprehensive, and the reasonable construction of the statute requires us to extend it to a case like the present. What is the office worth to the prosecutor? It is worth so much in salary and so much profit out of the allowances, made not surreptitiously or wrongly. I would illustrate my meaning thus. Suppose a man's salary is £400, and out of that he would have to pay his travelling expenses, he would

not be entitled to say his emolument is £400 a year, because from that sum he must deduct his expenses. I do not agree with the argument that the prosecutor ought to be put in the position as if he had been wrongfully dismissed, that is not his position; for had he been wrongfully dismissed and brought an action, and his case was that he was engaged by the year, and therefore had lost the power of earning £400, and these incidents; the answer would be that the telegraph company were not bound to send him travelling on their business, it was a matter entirely at their option. And if, therefore, the words of the statute had been "emoluments which the prosecutor would have been entitled to make in future," there might have been some ground for the argument, *but the words are "annual emolu- [431 ments derived," that is, actually derived from the office on the 24th of June, 1868.

I think the intention of the Legislature is clear, and the word "emolument" is most comprehensive. The prosecutor is therefore entitled to have the judgment below affirmed.

BRETT, L.J.: The contention in the court below was upon the construction of the statute, and the judgment was against the Postmaster-General. The appeal is on the ground that that judgment was erroneous; we ought therefore to treat the appeal as if the question before us was the true construction of the act of Parliament.

I think that what the prosecutor would be entitled to be paid is an annuity, neither in respect of his salary nor his remuneration, but in respect of his emolument, and by this is meant that which in another part of the statute is called "the value of his appointment," and it seems to me that these words give the construction to "emoluments." We have first to inquire whether a person in a telegraph office, receiving a salary or a remuneration or both, has been offered an appointment equal in value to the appointment which he had before the passing of the act; and if he has had no such offer then he is to receive an annuity—it is not stated by way of compensation or in what respect—but he is to receive an annuity equal to two-thirds of the annual emolument. That annual emolument is the value of his appointment. If a person only receives a salary, what is the value of his appointment? If there is nothing to be added to the salary or deducted from it, the value of the appointment is the salary; but if the salary is subject to his finding certain materials, it would be impossible to say that the salary is the proper measure of the value of the appointment or of his emolument. The emolument would be the

1878

Eastland v. Burchell.

amount of the salary, less the cost of the materials he had to supply. Then if he receives a salary and something additional by way of remuneration, the value of the appointment or of the emolument must be the salary and anything which he gains by the remuneration. In the present case the prosecutor has a salary that is taken into account admittedly without deduction; and he has an allowance of 12s. 432] 6d. a day when he travels, *and when he does travel, it is obvious that he saves the expense of his living at home. I should say that what he is entitled to in the way of emolument upon that is the difference between what he spends abroad and what he saves out of his expenses at home with his 12s. 6d. a day: his annuity ought to be two-thirds of such sum.

COTTON, L.J.: The substantive question for our decision is whether or no the allowance for travelling expenses is to be taken into account, in estimating the annual emolument derived from the office held by the prosecutor. I am of opinion that the profit the prosecutor makes by reason of the saving he effects from the allowances must be taken into consideration in ascertaining that which is given as a standard, "the annual emolument derived by him from his office."

Judgment affirmed.

Solicitors for prosecution: *R. W. Childs & Batten*, for John Taunton, Taunton.

Solicitor for defendant: *W. H. Ashurst*.

[3 Queen's Bench Division, 432.]

May 17, 1878.

EASTLAND V. BURCHELL AND WIFE.

Husband and Wife—Separation—Authority to pledge Husband's Credit.

Where husband and wife separate by mutual consent, the wife making her own terms as to her income, and that income proves insufficient for her support, the wife has no authority to pledge her husband's credit.

Defendants, husband and wife, executed a deed of separation, by the terms of which the wife retained the income of property settled to her separate use on marriage. The husband covenanted to pay her £20 a year towards the maintenance of three of the children of the marriage, and the wife covenanted to maintain these children until they were twenty-one, and not to apply for further assistance to her husband. The husband had kept up the annual payments of £20 in accordance with the terms of the deed. Plaintiff sued defendants in the county court to recover the price of meat supplied to the wife after the separation, and the judge at the trial, on hearing the wife's evidence, found that her income was insufficient for her support, and ruled that she had authority to pledge her husband's credit for the price of the meat. On appeal:

Held, that this ruling was wrong, and that the wife, after the separation, had no implied authority to pledge her husband's credit.

APPEAL from the Tonbridge County Court upon a case stated for the opinion of the Queen's Bench Division.

*The action was to recover from the defendants, [433 who were husband and wife, the price of some butcher's meat supplied to the wife whilst living apart from her husband. The case was heard before the county court judge, without a jury, and he gave judgment for the plaintiff against the husband for the amount claimed.

The husband appealed.

The material facts set out in the special case, and the proceedings at the hearing in the county court, are fully stated in the judgment.

May 8. *Watkin Williams*, Q.C., for the defendant: There are two questions in the case: first, whether the judge was right in ruling that, if the wife's income was insufficient to support her, she could pledge the husband's credit; and, secondly, whether he was right in rejecting the evidence of the defendant's advocate who proposed to prove the defendant's income and position.

As to the first question, a wife can only bind her husband as his agent, and her authority to pledge his credit ceases when the agency is at an end. Where there is a separation by mutual agreement, the wife making her own bargain, she is no longer the husband's agent, and her authority to bind him ceases.

The *onus* of showing that the wife had authority to bind her husband lies on the person seeking to charge him with her debts: *Jolly v. Rees* ⁽¹⁾.

[He also referred to Smith's Leading Cases, vol. ii, 7th ed., p. 486 (note to *Manby v. Scott*), and cases there cited.]

As to the second question, *Cobbett v. Hudson* ⁽²⁾ shows conclusively that an advocate may give evidence in the cause he is conducting.

D. Kingsford, for the plaintiff: On the first question the authorities are clear that where husband and wife have separated by mutual consent, and an income has been allowed to the wife, the adequacy of that income is a question for the jury, and if it is found to be inadequate an authority to pledge the husband's credit may be implied. By separation a *prima facie* presumption *is raised that the au- [434 thority to pledge the husband's credit is revoked, but that presumption may be rebutted by evidence. Here the inadequacy of the wife's income has been proved as a fact against

⁽¹⁾ 15 C. B. (N.S.), 628; 33 L. J. (C.P.), 177.

⁽²⁾ 1 E. & B., 11; 22 L. J. (Q.B.), 11.

1878

Eastland v. Burchell.

the defendant. The principle is correctly stated in Addison on Contracts, 7th ed., p. 135, and Bullen & Leake's Precedents of Pleading, 3d ed., p. 172.

[He also cited *Hodgkinson v. Fletcher* (*); *Hunt v. De Blaquiere* (*); *Nurse v. Craig* (*); *Johnston v. Sumner* (*); *Biffin v. Bignell* (*); *Beale v. Arabin* (*).]

As to the second point, the county court judge rightly rejected the evidence of the defendant's advocate, on the ground that it must of necessity be hearsay.

Watkin Williams, Q.C., in reply.

Cur. adv. vult.

May 17. The judgment of the Court (Mellor and Lush, JJ.) was delivered by

LUSH, J.: The questions arising in this appeal are: 1st, whether the defendant is liable for butcher's meat supplied to his wife between the 13th of March and the 3d of October, 1877, under the circumstances stated in the case; and, 2dly, whether the county court judge was right in excluding the evidence of his solicitor, who tendered himself to prove from his personal knowledge what the exact income of the defendant was; the ground of rejection being, that the solicitor was acting as advocate for him in the cause, and that he could only give hearsay evidence.

The defendant and his wife were married in 1850. On the 6th of January, 1876, they separated by mutual consent, the defendant taking charge of the four elder children, the three younger ones remaining with his wife. By their marriage settlement all the property then belonging to the wife, together with the property which would come to her on the death of her mother, was settled to her separate use. A deed of separation was executed, by which she was to take and enjoy all articles of personal ornament and dress, and all property and income to which she then was, or should 435] *thereafter become possessed or entitled, and the savings of all income. The defendant covenanted to pay to the trustee £5 a quarter so long as the three children, or any of them, should be under the age of twenty-one years, and continued to reside with her. The wife covenanted that she would maintain and educate the children out of her separate income and the £5 per quarter, and not apply to the defendant for any further pecuniary assistance, and the trustee covenanted to indemnify him from all debts and liabilities thereafter to be contracted by the wife.

(1) 4 Campb., 70.

(2) 5 Bing., 550.

(3) 2 B. & P. (N.R.), 148.

(4) 3 H. & N., 261; 27 L. J. (Ex.), 341.

(5) 7 H. & N., 877; 31 L. J. (Ex.), 189.

(6) 36 L. T. Rep., 249.

The parties continued to live separate under this arrangement, and the defendant had paid the £5 per quarter up to a period subsequent to the accruing of the debt in question.

The plaintiff had never known the defendant, and had only dealt with the wife subsequently to the deed of separation. He supplied the goods supposing her to be a married woman, but without making any inquiries in the matter. The only evidence on which the learned judge acted was that of the wife (it being admitted that the goods had been supplied), and she stated that she had been ever since the separation, in receipt of her separate income, which brought in £297 15s. 2d. per annum, and the £20 a year paid by the defendant; and that she found such income insufficient to enable her to maintain herself and such of her children as resided with her, and to educate them. The case states that she also gave evidence as to the position and income of the defendant prior to her separation, but does not state what that position and income were.

The learned judge decided upon this evidence, that the income of the wife was insufficient for the maintenance and education of herself and the children under her care, and thereupon held as a matter of law, that she had authority to pledge her husband's credit, and did pledge it to the plaintiff in respect of the meat supplied to her.

We are of opinion that this ruling is erroneous. The authority of a wife to pledge the credit of her husband is a delegated, not an inherent, authority. If she binds him, she binds him only as his agent. This is a well established doctrine. If she leaves him without cause and without consent, she carries no implied authority with her, to maintain herself at his expense. But if he wrongfully *compels [436 her to leave his home, he is bound to maintain her elsewhere, and if he makes no adequate provision for this purpose, she becomes an agent of necessity to supply her wants upon his credit. In such a case, inasmuch as she is entitled to a provision suitable to her husband's means and position, the sufficiency of any allowance which he makes under these circumstances, is necessarily a question for the jury. Where, however, the parties separate by mutual consent, they may make their own terms; and so long as they continue the separation, these terms are binding on both. Where the terms are, as in this case, that the wife shall receive a specified income for her maintenance, and shall not apply to the husband for anything more, how can any authority to claim more be implied? It is excluded by the express terms of

1878

Eastland v. Burchell.

the arrangement. It is obviously immaterial whether the income is derived from the wife's separate property or from the allowance of the husband, or partly from one source and partly from the other. It is enough that she has a provision which she agrees to accept as sufficient. She cannot avail herself of her husband's consent to the separation, which alone justifies her in living apart from him, and repudiate the conditions upon which that consent was given. And it seems superfluous to add, that no third person can claim to disturb the arrangement made between the husband and the wife, and to say that he will, by supplying goods to the wife on credit, compel the husband to pay more than the wife could have claimed, that is, the stipulated allowance. He can derive no authority from the wife which she is incompetent to give. We are therefore of opinion that any inquiry into the husband's means was irrelevant, and for that reason we abstain from saying more upon the second question than that, if evidence upon that point had been relevant, we see no reason why the evidence should be rejected.

We do not think it necessary to go through the various cases cited. They are no guide to us except so far as they exhibit the principle on which the authority of a wife to pledge the credit of her husband rests. Upon that point they are conclusive to show that the capacity of a wife to contract debts upon the credit of her husband is derived from an authority either expressly or impliedly given by him.

437] *We need only refer to the two more recent cases of *Johnston v. Sumner* (¹), and *Biffin v. Bignell* (²).

We are not concerned to inquire whether in this or that particular case this principle has been rightly applied. We have only to deal with the facts of this case, and applying the principle to them, we hold that the defendant is not liable for the debt contracted with the plaintiff.

Being satisfied that we have all the materials before us necessary for the determination of the question, it would be a useless expense to the parties to send the case back for a new trial.

We therefore act upon the wholesome provision of the Judicature Act, 1875, Order XI, Rule 10, and direct that the judgment for the plaintiff below be set aside, and judgment be entered for the defendant.

Judgment for the defendant.

Solicitors for plaintiff: *Price, Bigg & Co.*

Solicitor for defendant: *Wilde.*

(¹) 3 H. & N., 261; 27 L. J. (Ex.), 341. (²) 7 H. & N., 877; 31 L. J. (Ex.), 189.

See 20 Am. Law Reg. (N.S.), 324 note; 2 Smith's Lead. Cas. (7th Am. ed.), 441-454; Freeman's Rep., K. B., 2d ed., 249 note.

In an action against a husband for necessities furnished to his wife, it is sufficient for the plaintiff's case to show that the marriage ceremony between the defendant and his alleged wife took place, and that he held her out to the plaintiff as his wife. In such an action, testimony that the marriage was void by reason of the wife's having had a husband by a previous marriage still living, held, properly excluded. Third persons dealing with the wife on the strength of her conjugal rights, cannot be confronted with the illegality of a marriage which has in effect been declared valid and been acted upon by the assumed husband and the wife: *Johnston v. Allen*, 3 Daly, 48.

The husband's liability for necessities provided by other persons, for her support, rests upon the ground of his neglect or default: *Board, etc., v. Budlong*, 51 Barb., 493; *Lord v. Thompson*, 41 N. Y. Superior Ct. R., 115.

If the husband neglect or refuse to provide his wife with articles necessary for her use, notice not to sell on his credit is not a defence to an action for goods so sold: *Lord v. Thompson*, 41 N. Y. Super. Ct. R., 115; *Cromwell v. Benjamin*, 41 Barb., 558; *Keller v. Phillips*, 39 N. Y., 351, 40 Barb., 390.

Even though a husband turn his wife out of doors, or she be otherwise justified in leaving him, he is only liable for necessities suitable to his situation and condition in life.

Illinois: *Bevier v. Galloway*, 71 Ills., 517.

Maine: *Thorpe v. Sharpleigh*, 67 Maine, 235.

Vermont: *Stevens v. Story*, 43 Verm., 327.

The articles must be necessities suitable and proper, regard being had to the condition of the parties: *Thorpe v. Sharpleigh*, 67 Maine, 235; *Keller v. Phillips*, 39 N. Y., 351, 40 Barb., 390.

In determining what is a reasonable expenditure of money for one's family, the income or the capacity to earn or produce one is fully as important a subject of inquiry as the amount of property possessed: *Clark v. Cox*, 32 Mich., 405.

Whether articles not wholly ornamental, bought for the wife's personal use, are necessities, is for the jury. It cannot be ruled as matter of law that two gold chains, a gold locket, and a gold watch, are not necessities: *Raynes v. Bennett*, 114 Mass., 424.

In an action involving the right and authority of a married woman to bind her husband by purchases made in his name without his knowledge or express assent, evidence of the style of living and expenditure in the circle to which he introduces her, and where he expects her to find her intimates and associates, is pertinent: *Clark v. Cox*, 32 Mich., 405.

If a husband have forbidden a merchant to trust his wife on his credit, one who seeks to charge the husband for purchases made by her must show affirmatively that the articles were suitable to the husband's circumstances in life, and were needed for her then present use, and that the husband had so neglected his duty to furnish the same that it was necessary for the wife to procure the articles in order to supply her then wants.

New York: *Keller v. Phillips*, 39 N. Y., 351, 40 Barb., 390.

Vermont: *Woodward v. Barnes*, 43 Verm., 330.

The rule is the same where husband and wife are living apart: *Biffin v. Bignell*, 8 Jur. (N.S.), 647; *Johnston v. Sumner*, 3 H. & N., 261.

In an action against a husband for jewelry purchased by his wife, evidence that the articles were such as women usually wore who dressed as the wife did, is not admissible to show they were necessities; but evidence that the husband wore diamonds and kept a fast horse is admissible for that purpose, and so is evidence that he had paid for silk dresses bought by her: *Raynes v. Bennett*, 114 Mass., 424.

In a suit between a third person and the husband, the wife's declarations, oral or written, in his absence, are not admissible against her husband: *Underwood v. Linton*, 45 Ind., 72.

So evidence that the wife made other purchases in the husband's name of other dealers at about the same time: *Clark v. Cox*, 32 Mich., 405.

Though from the necessity of the case the wife is, at common law, a competent witness to prove the acts of

1878

Eastland v. Burchell.

the husband, by which he turned her away under such circumstances as to make him liable for necessities so furnished: *Bach v. Parmely*, 35 Wisc., 238.

But see, in a proceeding against the husband as a disorderly person for not supporting his wife, *People v. Crandon*, 17 Hun, 490; *People v. Briggs*, 60 How. Pr., 17.

Evidence of the amount of tax for which a man is assessed, although he pay it, is inadmissible against him to show his condition in life in a suit for the price of goods furnished his wife as necessary: *Raynes v. Bennett*, 114, Mass., 424.

Mere marital relation will not render a husband liable, nor will it raise a presumption of agency in a wife, where the orders are of so extravagant a nature that the husband would never have authorized them: *Lane v. Ironmonger*, 1 New Prac. Cas., 105.

A husband is not liable for necessities furnished his wife without his consent, except under special circumstances.

In an action against the husband, therefore, a complaint which merely alleges that the plaintiff furnished necessities to the wife, at her request, and that their value "thereupon became due" from defendant to plaintiff, without stating the special circumstances which made him liable, is insufficient on demurrer *ore tenus* at the trial. If the complaint had averred that the goods were sold or furnished to the defendant, it seems that evidence would have been admissible under it to show that the wife was the authorized agent of her husband in purchasing them: *Brown v. Worden*, 39 Wisc., 432.

Where defendant's wife bought goods of the plaintiff which defendant paid for; and the defendant and wife separated, when the wife bought more goods of the plaintiff before he had notice of separation: Held, defendant was liable. Otherwise if she had, after the separation, purchased goods of a stranger: *Hinton v. Hudson*, *Freeman* (K.B.), 249, 2d ed. and note.

See *Cox v. Clark*, 32 Mich., 405; *Bray v. Beard*, 5 Mo. App. R., 584.

Where husband and wife live together, the wife is presumptively the agent of the husband to purchase ar-

ticles suitable to her husband's rank and condition in life. The presumption is, however, one of fact, and may be rebutted.

English: *Debenham v. Mellen*, 6 App. Cas., 24, 20 Am. Law Reg. (N.S.), 316, affirming 5 Q. B. Div., 394; *Jolly v. Rees*, 15 C. B. (N.S.), 628, 109 Eng. C. L. Illinois: *Gotts v. Clark*, 78 Ills., 229.

Indiana: *Smith v. Fletcher*, 1 Wilson's Super. Ct. R., 34.

New York: *Keller v. Phillips*, 40 Barb., 390, 39 N. Y., 351.

Vermont: *Woodward v. Barnes*, 43 Verm., 330.

Victoria: *Stevens v. Sloan*, 5 Victorian L. R. (Law), 83.

Where a husband prohibits his wife from obtaining goods on credit, he will not be liable for anything afterwards supplied on her order, though the prohibition was not published or communicated to the person supplying the goods: *Stevens v. Sloan*, 5 Victorian L. R. (Law), 83.

Though husband and wife live together, the husband may show that at the time of the wife's purchase on his credit she was properly supplied, and the purchase was unnecessary in order to supply the wife with articles suitable to her position.

English: *Debenham v. Mellen*, 6 App. Cas., 24, 20 Am. Law Reg. (N.S.), 316, affirming 5 Q. B. Div., 394.

Indiana: *Smith v. Fletcher*, 1 Wils. Super. Ct. R., 34.

Massachusetts: *Raynes v. Bennett*, 114 Mass., 424.

Michigan: *Clark v. Cox*, 32 Mich., 405.

New York: *Keller v. Phillips*, 39 N. Y., 352, 40 Barb., 390.

Where a husband makes his wife a suitable allowance for clothes and forbids her to pledge his credit for them, such facts rebut the presumption of agency in the wife, though the merchant trusting her had no notice of the husband's having forbidden her to purchase on his credit.

English: *Debenham v. Mellen*, 6 App. Cas., 24, 20 Am. Law Reg. (N.S.), 316, 5 Q. B. Div., 394; *Jolly v. Rees*, 15 C. B. (N.S.), 628, 109 Eng. C. L.

Indiana: *Smith v. Fletcher*, 1 Wils. Super. Ct. R., 34.

Michigan: *Clark v. Cox*, 32 Mich., 405; *Chittenden v. Schermerhorn*, 39 id., 661.

New York: Keller v. Phillips, 39 N. Y., 351, 40 Barb., 390.

Where a husband makes his wife a suitable allowance and forbids her purchasing on credit, but do not pay the allowance in full, he is not liable for necessities sold to the wife if *he did not know she was purchasing on credit*: Jolly v. Rees, 15 C. B. (N.S.), 628, 109 Eng. C. L.

Where a husband allows goods purchased by his wife to be brought to his house and used for his family, knowing that they were purchased on his credit, this may amount to such a ratification as to render him chargeable for such goods: Woodward v. Barnes, 43 Verm., 330.

And this, though he have given her an allowance, and have forbidden her to purchase on credit, if the allowance were insufficient and he knew she was purchasing on credit and did not apprise plaintiff that he had forbidden her purchasing on credit: Ryan v. Nolan, Irish Rep., 3 C. L., 319; Shoobred v. Baker, 16 L. T. Rep. (N.S.), 359.

So where alimony, fixed in a divorce suit by the wife, has been duly paid, the husband is not liable for necessities afterwards furnished to her: Crittenden v. Schermerhorn, 39 Mich., 661.

See Catlin v. Martin, 69 N. Y., 393.

A suit pending for limited divorce, report of referee fixing alimony, but not confirmed, is not a defence to an action for necessities furnished the wife. Subsequent confirmation of the report and payment of the alimony will not relate back so as to affect the rights of one who had previously furnished necessities: Lord v. Thompson, 41 N. Y. Super. Ct. R., 115.

An offer by the husband to supply the wife if connected with conditions with which the wife is not bound to comply, is no defence.

Previous provision by the husband is not, if the husband, on separation, withheld from the wife that which he had provided: Lord v. Thompson, 41 N. Y. Super. Ct. R., 115.

Where a wife leaves her husband's house in consequence of his adultery and lives apart from him, she is entitled to her support from her husband, and he is liable for necessities furnished to her, although he forbid all persons from trusting her on his account. Such conduct of the husband is equivalent

to turning the wife away. The wife is not bound to accept board and a separate apartment in the house where her husband resides while prosecuting a suit against him for a divorce, and an offer of the same will not exempt him from liability for necessities supplied to her: Sykes v. Halsted, 1 Sandf., 483, 485 note.

One who in consequence of a disagreement arising between himself and his wife carried her to her father's house and left her there, where she remained until she obtained a divorce, was held liable to her father for her board while there, without any express contract between them, notwithstanding the fact that defendant paid his wife an agreed sum in lieu of alimony upon her proceedings for divorce: Burkett v. Trowbridge, 61 Maine, 251.

See Catlin v. Martin, 69 N. Y., 393.

Defendant's wife, with his consent, and upon his promise to pay for her support, was taken home by her father, the plaintiff. Defendant subsequently published a notice forbidding all persons to trust her on his account, as he would thereafter pay no debts of her contracting. In an action to recover for the wife's board, held, that the notice, even if it came to plaintiff's knowledge, neither operated as a revocation of the contract, nor relieved defendant from the obligation to furnish suitable support for his wife.

Defendant's wife, while living with her father, went to the house where defendant was boarding; he offered to receive and take care of her. Her mother sent for her, defendant consented that she might go, and she returned home. Held, that this did not affect plaintiff's right to recover thereafter; that he was not affected by the unauthorized act of another, or by the provision of a home for his wife by defendant, of which he (plaintiff) had no knowledge: Daubney v. Hughes, 60 N. Y., 187, affirming 3 Thomp. & Cook, 350.

See Catlin v. Martin, 69 N. Y., 393.

Where a man, in contemplation of marriage, agrees to make a settlement on his wife, in consideration of which she agrees to relinquish her rights in his property at his decease, and he fails to make the settlement, the widow is not barred of any right which she might have asserted if no such agree-

1878

Eastland *v.* Burchell.

ment had been made: *Pierce v. Pierce*, 9 Hun, 50, 71 N. Y., 154.

Where a husband and wife separated, the husband agreeing to pay her an annuity, which he secured by conveyance of land to a trustee, it was held, the trustee might maintain ejectment against the husband though the wife had eloped with another: *Moore v. Moore*, West's Chy., 35.

If a wife leave her husband without just cause, he is not answerable for her support, or to any one who trusts her upon his credit.

English: *Manby v. Scott*, O'Bridg., 229, 245, 2 Smith's Lead. Cas. (7th ed.), 419.

Illinois: *Ross v. Ross*, 69 Ills., 569; *Bevier v. Galloway*, 71 id., 517.

Indiana: *Smith v. Fletcher*, 1 Wilson's Super. Ct. R., 35.

Kansas: *Hartmann v. Tegart*, 12 Kans., 177.

New York: *Blowers v. Sturtevant*, 4 Denio, 46; *Catlin v. Martin*, 69 N. Y., 393; *Board, etc.*, v. Budlong, 51 Barb., 493.

Vermont: *Stevens v. Story*, 43 Verm., 327.

A husband who is ready and willing to support his wife, and who gives her no just cause or occasion to abandon him, or to leave his bed and board, cannot be compelled to support her elsewhere than at his own house or home, if he has one, by any private person, or by the town or county, whether she be sane or insane: *Board, etc.*, v. Budlong, 51 Barb., 493.

In an action against a husband for necessaries furnished to his wife while living separate from him, the plaintiff must show affirmatively that the separation took place in consequence of his misconduct. It is not enough that there were quarrels and personal conflicts between them, unless it be shown, that the husband was the offending party.

English: *Edwards v. Terrell*, 6 Scott N. R., 641, 5 M. & Gr., 624.

Illinois: *Bevier v. Galloway*, 71 Ills., 517.

Indiana: *Smith v. Fletcher*, 1 Wilson's Super. Ct. R., 34.

Kansas: *Hartmann v. Tegart*, 12 Kans., 177.

New York: *Blowers v. Sturtevant*, 4 Denio, 46; *Keller v. Phillips*, 39 N. Y., 351, 40 Barb., 390.

Where husband and wife voluntarily, by mutual consent, separate, the wife may pledge her husband's credit for her support. For in such case the mutual agreement between the husband and wife that she should live apart, without any adequate provision for her support, she does not leave without the assent of her husband, and may pledge his credit: *Tait v. Lindsay*, 12 U. C. Com. Pl., 414, 417.

Where a father and mother separate by mutual consent, and the father permits the mother to take the children with her, the father constitutes the mother his agent to provide for his children, and is bound by her contracts for necessaries for them: *McMillen v. Lee*, 78 Ills., 443.

See *Cromwell v. Benjamin*, 41 Barb., 558.

Where husband and wife have agreed to a separation on terms of the husband allowing his wife a certain sum periodically for her maintenance, if such allowance be not paid, the wife may pledge his credit for the supply of necessaries. Under such an agreement it is not incumbent upon the wife to demand the payments periodically; it is the duty of the husband to see that she is furnished with such means of livelihood, and to inform her when and where she may obtain payment: *Morgan v. Clements*, 6 Victorian L. R. (Law), 53.

A husband is liable for reasonable charges for the services of a physician employed by the wife in her illness; showing such employment, and the necessity of medical attention, forms sufficient evidence to establish liability of the husband for such employment. *Kendleberger v. Vandeusen*, 1 Wilson's Super. Ct. R. (Ind.), 239; *Potter v. Virgil*, 67 Barb., 578.

See *McMillen v. Lee*, 78 Ills., 443; *Bevier v. Galloway*, 71 id., 517.

Husband and wife separated, the husband dismissing a female servant. She continued in the service of the wife and sued the husband for her services as necessaries for the wife. Held, that in order to sustain a recovery on this ground, it must be shown that the husband was requested to furnish the necessaries, and that he refused: *Condon v. Callahan*, 9 Abb. N. C., 407.

If a husband turn his wife out of doors, or drive her away by cruel treat-

ment, she carries a credit with her for her necessary support.

English: Manby v. Scott, O'Brigg., 229, 245, 1 Siderf., 109, 2 Smith's Leading Cases (7th Am. ed.), 419; Bolton v. Prentice, 2 Strange, 1214.

Illinois: Ross v. Ross, 69 Ills., 569.

Massachusetts: Eames v. Sweetser, 101 Mass., 78.

New York: Blowers v. Sturtevant, 4 Denio, 46; Cromwell v. Benjamin, 41 Barb., 558.

And so of a child which the wife takes with her: Reynolds v. Sweetser, 15 Gray, 78.

Such liability of the husband is not discharged by the wife's subsequent return to his house: Reynolds v. Sweetser, 15 Gray, 78.

If the facts exist which entitle the wife to pledge her husband's credit, one who sells her necessities may recover though he did not know of such facts: Eames v. Sweetser, 101 Mass., 78.

Where the husband had used violence towards his wife a considerable time before their separation, and there had been other difficulties and quarrels, but when she left his house it was not from any apprehension of ill-treatment, but in order to make a visit; and she refused to return unless his relations who lived with him would go away: Held, that he was not liable for her board furnished by her father during such separation.

New York: Blowers v. Sturtevant, 4 Denio, 46.

Although the wife leave her husband without just cause, if she offer to return, and he refuse to receive her, his liability for her support is revived.

New York: Blowers v. Sturtevant, 4 Denio, 46; Bell v. People, 6 Hun, 302.

So, though the wife may have had just cause to leave her husband, if he offer to receive her back and properly support her according to his condition and means, he is not liable for her support, or to being convicted as a disorderly person if the wife decline to go with him or to allow him to take the children, giving, as a reason, that she would not live with his parents, because his father was intemperate and abusive. If the husband offers to support the wife if she will live with him, and she refuse, because of alleged fear of personal violence, to make the husband amenable to the statute, there

must be a reasonable and substantial apprehension of violence, based upon sufficient facts to enable the court to see that it is well founded: People v. Pettit, 74 N. Y., 320, 7 Weekly Dig., 825.

At common law, where the husband deserts his wife, and refuses to supply her with necessities according to her rank and condition, the proper remedy is by an action at law by the person supplying her with such necessities: Trotter v. Trotter, 77 Ills., 510.

See Garland v. Garland, 50 Miss., 694; Noe v. Noe, 18 Hun, 436; Catlin v. Martin, 69 N. Y., 393.

In this action brought by the plaintiff against her husband, she alleged that shortly after her marriage she had conveyed to him the greater part of all her property, both real and personal; that the defendant had taken possession of the same and spent large sums in gambling and riotous living; that the plaintiff was now living apart from her husband with her mother and had no means of support, and she prayed that a portion of the real estate held by her husband might be conveyed to her for her support and maintenance.

Upon an application for an injunction restraining the defendant from collecting the rents of the real estate, or selling or disposing of the same *pendente lite*, held, that as the wife had voluntarily separated from her husband, and did not charge him with adultery or any act of cruelty or desertion which would entitle her to a limited divorce, the motion was properly denied: Noe v. Noe, 18 Hun, 436.

Where a wife leaves her husband on account of his ill treatment, and lives separate and apart from him for a period of eight years, she has no claim against him, or against his estate, for moneys expended by her during that period for her support and maintenance. In such a case she must obtain a limited separation and an allowance for her support, or she must purchase such articles as are necessary to her support and maintenance on his credit: Pierce v. Pierce, 9 Hun, 50, 71 N. Y., 154.

See Catlin v. Martin, 69 N. Y., 393.

Where a person has advanced money to a wife deserted by her husband, for the purchase of necessities, and the money has been so applied, he can

1878

Laing v. Hollway.

maintain a bill in equity against the husband for the recovery of the money so advanced. And it seems, that it is not necessary that the petitioner should stand upon the rights of any particular person of whom the necessities were purchased, but may maintain a single suit for the recovery of the whole amount so advanced, even though applied to the purchase of necessities from various persons: *Kenyon v. Ferris*, 47 Conn., 510.

One cannot furnish articles which are not necessities and recover a fraction of their value because they might have answered the purposes of other articles which would have been necessities: *Thorpe v. Sharpleigh*, 87 Me., 235.

The husband cannot be made liable, without his consent, upon contracts made by the wife in her own name and on her own behalf, where the credit is given to her and not to him: *Bugbee v. Blood*, 48 Verm., 497; *Salter v. Mastin*, 50 Geo., 242.

Where husband and wife are living together, and the wife purchases articles for domestic use, the law imputes to her the character of an agent for her husband. She may contract for such articles as principal and assume the responsibility of principal debtor. But to fix upon her such a liability, it must appear affirmatively that she made the purchase on her individual credit. There must be either an express contract on her part to pay out of her separate estate, or the circum-

stances must be such as to show clearly that she assumed individual responsibility for payment, exclusive of the liability of the husband: *Wilson v. Hubert*, 41 N. J. Law, 454.

A man who has received into his house and supported a woman and children compelled to leave home by the cruelty of her husband, cannot recover from the husband the expense of supporting the children, if one of his motives for receiving them was that he might maintain an adulterous intercourse with the woman: *Almy v. Wilcox*, 110 Mass., 443.

An express promise, or circumstances from which a promise may be inferred, must be proven before a father can be made liable for goods sold and delivered to his minor child: *Gotts v. Clark*, 78 Ills., 229; *McMillen v. Lee*, 78 id., 443.

Goods which were necessary to the comfort of a minor daughter of defendant were sold to her, while she was living away from home and receiving her own wages, and charged to the father:

Held, that the father was not liable: *Gotts v. Clark*, 78 Ills., 229.

See *Cromwell v. Benjamin*, 41 Barb., 558.

The liability of a father to furnish necessities for his minor and invalid children, who are members of his family and unable to support themselves by their labor, depends upon principles analogous to those which govern the relation of husband and wife: *Cromwell v. Benjamin*, 41 Barb., 558.

[8 Queen's Bench Division, 437.]

May 18, 1878.

[IN THE COURT OF APPEAL.]

LAING V. HOLLWAY and Another.

Ship and Shipping—Charterparty, Construction of—Dispatch Money for Time saved in loading and discharging Cargo.

A charterparty contained the following clause: "Demurrage, if any, at the rate of 20s. per hour, except in case of any hands striking work, frosts or floods, revolution or wars, which may hinder the loading or discharge of the vessel. Dispatch money 10s. per hour on any time saved in loading or for discharging." Four days were saved in loading and five days in discharging cargo, making together nine days, which if calculated at twenty-four hours a day would make 216 hours, or at twelve hours a day 108 hours:

Held, by Baggallay, Bramwell, and Brett, L.JJ., reversing the judgment of the Queen's Bench Division, that "dispatch money" was payable under the charterparty at the rate of 10s. per hour per day of twenty-four hours.

SPECIAL CASE stated by consent of parties and by order of the registrar of the Lord Mayor's Court of London, pursuant to ss. 6 *and 7 of the schedule to the Borough [438 and Local Court of Records Act, 1872 (35 & 36 Vict. c. 86).

1. Action brought by the plaintiff, the owner of the ship Good Hope, to recover £54, balance of freight alleged to be due to the plaintiff from the defendants.

2. On the 24th of March, 1876, a charterparty was entered into between the plaintiff and defendants at London, by which it was agreed that the steamship Good Hope should, after delivery of her outward cargo, proceed with all dispatch to Elba and there load a cargo of ore, say about 1,500 tons; and being so loaded should therewith proceed to the under-noted port, and there deliver the same as customary. . . . Freight to be paid at and after the following rate of 20 cwt. or 1015 kilos.: if destined to Newport, 11s. 9d. per ton; Cardiff, 11s.; Tyne, 11s.

"The cargo to be shipped at the rate 200 tons per running day (Sundays and holidays excepted) and to be discharged as fast as ship can deliver, not exceeding 200 tons per working day, weather permitting.

"The lay days to commence at 12 noon, after steamer is in berth, and in every respect ready to load or discharge respectively, and in free pratique. Charterers undertaking to provide an unoccupied berth on arrival of steamer or time to count.

"Steamer to unload the barges sent alongside with all possible dispatch (so long as this mode of shipment is continued), and any delay incurred by not doing so not to count as part of the lay days.

"Demurrage, if any, at the rate of 20s. per hour, except in case of any hands striking work, frosts or floods, revolution or wars, which may hinder the loading or discharge of the vessel. Dispatch money 10s. per hour on any time saved in loading and for discharging.

"The captain to have an absolute lien on the cargo for all freight, dead freight, and demurrage due under this charterparty.

"The cargo to be brought to, and taken from alongside, the ship free of expense to the ship.

"The captain to employ charterers or consignees, or their nominees, at ports of loading and discharge for custom house business on the usual terms, and failing to do so, the

1878

Laing v. Hollway.

439] charterers, *or their agents, shall be at liberty to deduct 10 guineas when settling freight.

"There is no time clause under this charterparty, but the defendants to have the right of averaging days for loading and discharging in order to avoid demurrage, and steamers are to load and discharge by night as well as by day, and as rapidly as possible when required by shippers, consignees, or charterers.

"Ship to allow two days in case of loading in bad weather."

4. In pursuance of the charterparty the steamship Good Hope proceeded to Elba, and there loaded a full and complete cargo of ore⁽¹⁾, and then proceeded to Newport, and rightly and truly delivered the same pursuant to the charterparty, and thereupon the plaintiff was entitled to receive from the defendants the sum of £1,061 19s. in respect of the freight earned by the carriage of the ore, being at and after the rate of 11s. 9d. per ton.

5. Four days were saved in loading at Elba and five days were saved in discharging at Newport, making together nine days, which if calculated at twenty-four hours a day would make 216 hours, or at twelve hours per day 108 hours.

5. Under the terms of the charterparty the defendants are entitled to dispatch money at and after the rate of 10s. per hour on any time saved in loading or discharging.

7. The defendants have paid the freight so payable to the plaintiff with the exception of the sum of £108 which they claim to deduct as dispatch money, being at the rate of 10s. per hour of nine days of twenty-four hours.

8. The plaintiff admits that the defendants are entitled to dispatch money for nine days, but contends that such dispatch money is only payable at the rate of 10s. per hour per working day of twelve hours, and not of twenty-four hours as contended for by the defendants, and that therefore the defendants were only entitled to £54 as such dispatch money, and not to £108 as claimed by them.

9. If the court shall be of opinion that on the construction 440] of *the charterparty dispatch money at the rate of 10s. per hour is to be paid per working day of twelve hours, the verdict shall be for the plaintiff for £54, with costs of this action; and if the court shall be opinion that dispatch money at the rate of 10s. per hour is to be paid per day of

(1) The cargo shipped was 1,800 tons. The number of lay days was not provided for in the charterparty, and could only be ascertained by dividing the 1,800 tons

of cargo by 200, the number of tons which the defendants as charterers were bound to ship per running day.

twenty-four hours the verdict shall be for the defendants, with costs of the action.

Nov. 3, 1877. *Linklater*, for the defendants.

Hannen, for the plaintiff.

THE COURT (Mellor and Lush, JJ.) decided that the defendants were entitled to deduct dispatch money at the rate of 10s. per hour for every working day of twelve hours only saved in loading and discharging the cargo, and gave judgment for the plaintiff.

The defendants appealed.

May 4. *Linklater*, for the defendants.

A. L. Smith, for the plaintiff.

Cur. adv. vult.

May 18. The judgment of the Court (Baggallay, Bramwell, and Brett, L.JJ.,) was delivered by

BRAMWELL, L.J.: We cannot agree with the judgment in this case. It seems founded on there being something in the charterparty by which days and their length can be ascertained and become of importance. We can find nothing to this effect: there is no such expression as lay day, and nothing which would ascertain how many hours would make a working day. Our law does not fix the number of hours in a working day, and certainly we have no statement what is its length at Elba. We think there is nothing by which time can be measured except hours. The charterers are to ship at the rate of 200 tons per running day, that is to say, at least that quantity unless hindered by strikes, &c., on which nothing turns; weather may excuse them to the extent of two days. But they may ship by night as well as by day, for so the steamer is bound to load; and the steamer is to unload barges sent alongside with all possible dispatch. The charterers, therefore, may ship the whole twenty-four hours round, and ship no more than the 200 tons. The cargo is to be discharged as fast as the ship can deliver, not exceeding *200 tons per working day, weather permitting. [441] The working day here does not mean a day of any particular length, but working as opposed to a Sunday or a holiday. This means that the charterers are to unload at that rate, not that the ship is bound to discharge that quantity only. On the contrary, as in the case of the loading, the steamer is bound to "discharge by night and as rapidly as possible when required by shipper, consignee, or charterer."

There is, therefore, no day of any length mentioned. There is a maximum of obligation on the charterer of 200 tons for loading and discharging on each working day, but the max-

imum of obligation on the ship to receive and discharge has no limit except "as rapidly as possible;" and the charterers have the whole twenty-four hours round in which they may unload the 200 tons. Then, what is the meaning of "time saved in loading or discharging?" The literal meaning we suppose would be doing those things in less time than they might be done in with ordinary dispatch, i.e., if ordinary dispatch with the ordinary number of hands and ordinary diligence would load and unload in twenty days or 240 hours, then extraordinary dispatch,—extraordinary number of hands, and extraordinary diligence—in doing those things in fifteen days or 180 hours, the difference five days, or sixty hours, is time saved. Because, strictly speaking, time is not saved in doing a thing by working twenty-four hours round instead of twelve in one day and twelve another; twenty-four have been consumed in each case. Time is saved by getting from A. to B. if a man runs in one hour instead of walking in two. But nobody suggests that this is the meaning. It is admitted on both sides, and is clear, that "time saved" means if the ship is ready earlier than she would be if the charterers worked up to their maximum obligation only, all the time by which she is the sooner ready is time saved within the meaning of the charterparty. Then the question is by how much time is she sooner ready? The answer is in nine times twenty-four hours. Really the reason of the thing is that way. The owner would sail away by what has happened 216 hours sooner than he would have done, but for the defendants' dispatch.

Suppose, that taking the maximum liability, the charterers had till and on a certain day, say Thursday, to load without incurring demurrage. Suppose they began at 6 442] A.M., and finished at *midday, then they would at least have saved the rest of that day: let us call it seven hours. Now, suppose by working all Wednesday night and Thursday morning, the loading was finished at 6 A.M., they would have saved thirteen hours. Then, suppose they finished at 3 A.M., would they not have saved sixteen hours? and so if they finished on Wednesday at 7 P.M., they would have saved twenty-four hours. It was admitted by the plaintiff that the demurrage would be payable on this footing; then why not the dispatch money? We think the judgment must be reversed.

Judgment reversed.

Solicitors for plaintiff: *Shum, Crossman & Shum.*

Solicitors for defendants: *G. & W. Webb.*

[3 Queen's Bench Division, 442.]

May 20, 1878.

THE QUEEN V. THE GOVERNMENT STOCK INVESTMENT
COMPANY, Limited.

Company—Poll, when duly demanded—"Holding Shares"—Holder of Proxies.

A company was registered under the Companies Act, 1862, with the following articles of association. Article 64: "Upon all questions at every meeting a show of hands shall in the first instance be taken, and unless before or immediately upon such show of hands a poll be duly demanded such question shall be decided by such show of hands." Article 67: "If a poll is demanded by shareholders qualified to vote and holding in the aggregate 2,000 shares or more, it shall be taken in such manner as the chairman shall direct, and the result of such poll shall be deemed to be the resolution of the company in general meeting." Article 75: "Votes may be given either personally or by proxy." Article 79: "Any instrument appointing a proxy shall be in the following form: I — . . . hereby appoint — . . . to be my proxy at the — general meeting of the company . . . and to vote for me and in my name upon all questions before such meeting." Two vacancies arose among the directors, and there were four candidates, of whom the prosecutor was one. At the meeting for election a show of hands was taken, when the prosecutor obtained the largest number of votes. A poll was then demanded by the deputy chairman, who was the holder of twenty shares only, but who held proxies for more than 2,000 shares. At the poll the prosecutor was not elected:

Held, that a mandamus must be granted to admit the prosecutor as having been elected director by the show of hands, for the poll was illegally demanded, as the holder of proxies was not a person holding shares within the meaning of article 67.

RULE calling on the defendant company to show cause why a mandamus should not issue, commanding them to admit F. H. *Fowler as a director of the company [443 in the place of Mr. G. Clerihew, or otherwise.

It appeared from the affidavits that the defendant company was registered under the Companies Act, 1862, and that in accordance with the articles of association, which required the two of the directors who had been longest in office to retire at each annual meeting, it was announced in the report of the directors that two of them, Mr. G. Clerihew and Mr. Andrew Macpherson, would retire at the meeting to be held on the 14th of February, 1878. At this meeting there were four candidates for the two vacancies, the two retiring directors, the prosecutor, and Mr. Griffiths. Upon a show of hands being taken under article 64⁽¹⁾, the

(1) The following articles of association were brought before the court by affidavit:

64. Upon all questions at every meeting a show of hands shall in the first instance be taken, and unless before or immediately upon such show of hands a poll be duly demanded, as

hereinafter mentioned, such question shall be decided by the result of such show of hands.

67. If a poll is demanded by shareholders qualified to vote and holding in the aggregate 2,000 shares or more, it shall be taken in such manner as the chairman shall direct, and the result of

1878

The Queen v. Government Stock Investment Co.

prosecutor obtained the largest number of votes, and was declared elected. A poll was then demanded by the deputy chairman, who was the holder of twenty shares only, but who held proxies for more than 2,000 shares. No objection to the poll was made at the time, the prosecutor being ignorant of the law upon the subject, but after the poll he made a formal protest. The poll was fixed for the 21st of February, and at the close of the poll on the same day the two retiring directors were declared duly elected, the prosecutor receiving the next largest number of *votes. He now claimed to have been elected by the show of hands, on the ground that the poll was illegally demanded, as the holder of proxies was not by virtue of them entitled to demand a poll.

Cave, Q.C., and Wood Hill, showed cause: First, the prosecutor ought to have made his objection at the time when the poll was demanded, and cannot, after taking his chance at the poll, be allowed to say that the whole proceeding was illegal. Secondly, a proxy is entitled under article 67 to demand a poll. A proxy is a person who acts generally as a substitute for another, and the form of proxy in the present case is in larger terms than that in Table A (51), for it appoints the proxy to vote not merely at the meeting but "upon all questions before such meeting."

Bray, in support of the rule: A shareholder whose qualification is made up by proxies cannot demand the poll within article 67. The article speaks of shareholders holding 2,000 shares, and it cannot be construed as if the words were "holding personally or by proxy 2,000 shares." The articles when they speak of shareholders "demanding" a poll, must mean that they are to demand it in person. Sect. 51 of the act provides that resolutions shall be passed by a majority voting "in person or by proxy," unless a poll be demanded by at least five members, omitting the words "in person or by proxy." A proxy is only authorized to vote,

such poll shall be deemed to be the resolution of the company in general meeting.

75. Votes may be given either personally or by proxy.

79. Any instrument appointing a proxy shall be on the proper stamp and in the following form, or such other form as the board may direct:

"The 'Government Stock Investment Company, Limited.'

"I of in the county of , being a shareholder

in the 'Government Stock Investment Company, Limited,' and entitled to vote in respect of shares, hereby appoint of

to be my proxy at the [ordinary or extraordinary, as the case may be] general meeting of the company to be held on the day , or at any adjournment thereof, and to vote for me and in my name upon all questions before such meeting.

"As witness my hand this day of ."

he has no more power to demand a poll than he has to move a resolution. The shareholder demanding a poll must not merely represent the shares, he must actually hold them. The fact that the office is full is no objection to a mandamus: *Rez v. Bedford Level* (').

COOKBURN, C.J.: It is not without considerable regret that I think that this rule must be made absolute. The gentleman on behalf of whom this application is made was no doubt, upon the show of hands, declared elected, but upon a poll being demanded he received a smaller number of votes than two other of the candidates. But the construction which we feel compelled to put on article 67, reading it in connection with article 64, obliges us *to set [445] aside the real election upon an objection which is purely technical. Article 64 directs that "upon all questions at every meeting a show of hands shall in the first instance be taken, and unless before or immediately upon such show of hands a poll be duly demanded as hereinafter mentioned, such question shall be decided by the result of such show of hands." Then article 67 provides that if a poll is demanded by shareholders qualified to vote and holding in the aggregate 2,000 shares or more, it shall be taken in such manner as the chairman shall direct. The poll must therefore be duly demanded, and the question is, was the poll duly demanded? I cannot but think that Mr. Bray is right in his contention that the poll ought to be demanded by the prescribed number of shareholders, and that they must be present and qualified to vote, and although the articles enable votes to be given either personally or by proxy, yet that a proxy has no power to demand a poll. The words in article 67, "if a poll is demanded by shareholders qualified to vote," must, I think, be read as if they were "shareholders themselves qualified to vote," for I think no one can be said to be "holding" shares within the meaning of this article when, instead of holding shares, he is holding the proxies of other persons who do hold them. The result, therefore, is that the rule must be made absolute, and the defendants may, if they please, allow the facts to be put on the record for the purpose of obtaining the opinion of the Court of Appeal.

MELLOR, J.: I am of the same opinion: I thought at first that article 64 might be construed to mean that the objection to the demand of the poll must be taken immediately upon the demand; but I now think that such a construction is inadmissible, and that the poll is not properly

(') 6 East, 356.

1878

Sandys v. Small.

demand unless the demand is by shareholders qualified to vote and holding shares. If it had been intended to give proxies the power contended for, one would surely expect that the description would have stood "holding in the aggregate by themselves or by proxy 2,000 shares or more." And as there seems to be ample authority for granting a mandamus, although the office is full, inasmuch as the office has been filled by votes which cannot be sustained, the rule 446] must be *made absolute, leaving the defendants at liberty, if they think fit, to raise the question upon the return.

Rule absolute.

Solicitors for prosecutor: *Hargrove & Co.*

Solicitors for defendants: *Carr, Bannister & Co.*

[3 Queen's Bench Division, 446.]

June 24, 1878.

Ex parte RAYNER.

Public Health Act, 1875 (38 & 39 Vict. c. 55), ss. 176, 179, 180—Land compulsorily taken—Arbitration as to Disputed Compensation, Costs of—Lands Clauses Consolidation Act, 1845, 1869.

When land has been taken compulsorily by a local board under the powers of the Lands Clauses Consolidation Acts, incorporated by the Public Health Act, 1875, and an arbitration takes place to determine the amount of compensation to be paid to the owner of the land so taken, the procedure with regard to such arbitration and the right to costs are wholly governed by the provisions of the Lands Clauses Consolidation Acts, and not by those of the Public Health Act with regard to arbitrations under that act.

[3 Queen's Bench Division, 449.]

June 26, 1878.

449] *SANDYS, Appellant; SMALL, Respondent.

Sale of Food and Drugs Act (38 & 39 Vict. c. 63), ss. 6, 8—"To the Prejudice of the Purchaser"—Notice posted up that Articles sold is mixed.

Where the seller of an article brings to the purchaser's knowledge the fact that the article sold to him is not of the nature, substance, or quality of the article he demands, the sale is not "to the prejudice of the purchaser," within the meaning of the 6th section of 38 & 39 Vict. c. 63, and consequently no offence is committed within that section.

The 8th section of the act points out a mode of giving notice to the purchaser that is made by the statute sufficient, but it is not intended by that section that, whenever the mode therein specified is not adopted, there shall necessarily be an offence against the 6th section.

CASE stated by justices under 20 & 21 Vict. c. 43, the facts of which were in substance as follows:

The appellant was an inspector of weights and measures of the county of Derby charged with the execution of the Sale of Food and Drugs Act, 1875 (38 & 39 Vict. c. 63), and in such capacity had laid an information against the respondent for an offence *under the 6th section of [450 that act. The justices dismissed the information. The respondent was a licensed victualler at Langley Mill, in the township of Heanor, in the county of Derby. The appellant and one Samuel Slack, his assistant, were together in the performance of their duties under the act near the house of the respondent on the 13th of March last. Slack, acting under the appellant's directions, went into the house and stood at the bar window, and there asked the respondent's wife for half a pint of whiskey. The respondent's wife gave him half a pint of whiskey (for which he paid), placing it in a bottle which was produced by Slack, without making any observation as to its quality or putting a label on the bottle. It was admitted by the appellant that on subsequently going into the house he saw posted in the smoke room a notice as follows: "All spirits sold here are mixed—38 & 39 Vict. c. 63, sections 8 and 9." The said Samuel Slack denied seeing any notice at the moment when he bought the whiskey, although it was proved that a similar notice was posted in full view of persons purchasing at the bar window.

It was proved on behalf of the respondent that the notice referred to was placed in a conspicuous position in the smoke room, and it was also proved that similar notices were conspicuously placed in the bar and in every other room in the house ordinarily used by the respondent for the purpose of his business. The whiskey, when analyzed, proved to be mixed with water and thirty degrees under proof.

It was contended on behalf of the respondent that the posting of the notice referred to, in the smoke room and bar and within view of persons purchasing at the bar window, was equivalent to a declaration on the part of the respondent to the purchaser that the whiskey sold was not of the nature, substance, and quality demanded by the purchaser. The appellant contended that the respondent should have placed a label on the bottle in which the whiskey was put, in accordance with s. 8 of the act.

A copy of the above mentioned notice was annexed to the case. It was a printed notice in large capital letters.

The question for the opinion of the court was whether the posting of the notice as aforesaid was equivalent to a dec-

laration by the respondent that the whiskey sold was not of 451] the nature, *substance, and quality of the article demanded by the purchaser, and relieved him from the penalty (').

Wills, Q.C., for the appellant: The only way in which the seller of an article not of the nature, substance, and quality of the article demanded by the purchaser can protect himself is by giving a label to the purchaser in accordance with the 8th section.

[COCKBURN, C.J.: Can it be said that the sale is "to the prejudice of the purchaser" when he knows that the article is mixed?]

It is contended that the sale is to the prejudice of the purchaser within the meaning of the 6th section, whenever he gets an inferior article to that which he demanded, whether he knows it or not.

[COCKBURN, C.J.: That construction gives no substantial meaning to the words.]

If any other construction be given there is danger that the act will be made a dead letter. If a label is delivered, the knowledge is clearly brought home to the purchaser, but if the question is open whether by any other means the purchaser knew that the article was mixed, doubts and disputes will arise as to whether the notice is brought home to him; there may be a conflict of testimony, and the protection intended to be given by the act to the purchaser is much diminished. The case does not find that the purchaser had seen the notice at the time when he purchased.

[COCKBURN, C.J.: It is found that the notice was conspicuously posted all over the house and in full view of customers at the bar window.]

It is submitted that the case should be sent back to the justices to find distinctly as to this question.

Mellor, Q.C., for the respondent: The intention of the act is to prevent the purchaser from being prejudiced by 452] getting an *inferior article to that which he believes himself to be purchasing. It never could have been intended that, when the purchaser perfectly well knows what he is buying, the seller should be guilty of an offence within the act.

(1) The case contained various other statements of fact, intended to raise questions as to whether the conditions of the act had been complied with with regard to the preliminary steps required to be taken prior to the analysis of the

article, and specific questions were submitted to the court on these points. But it is unnecessary to set out the statements of the case as to these points, as the court ultimately gave no judgment upon them.

Wills, Q. C., in reply (').

COCKBURN, C. J.: I am of opinion that our judgment should be for the respondent. I should be very sorry to diminish the efficacy of a very useful act, intended to protect the public from frauds committed by the sellers of the articles to which the act relates, but we ought, if possible, to construe the words of the act so as not to interfere with due freedom of dealing between the seller and the purchaser, and not unfairly to prejudice either party. I think we should be doing so if we held its provisions to apply to cases such as the present, where both parties perfectly well know what they are dealing with. The provisions of the act were intended to apply to adulterations of a clandestine character, which operate to the prejudice of the purchaser.

The provisions of the 6th section seem to me to apply to cases where a seller professes to sell to the purchaser an article as being of a certain denomination, whereas the article has been altered by an admixture of some other ingredient, and it seems that when the articles is so altered, this must be considered to have been done "to the prejudice of the purchaser," unless it is duly and sufficiently brought to his knowledge; but if the alteration of the article, as of spirits by the admixture of water, is brought to the knowledge of the purchaser and he chooses to *purchase it not- [453] withstanding, it can never have been intended that such a transaction should be interfered with. But, on the other hand, if the seller chooses to sell an article as of a certain denomination and the article is really mixed with foreign ingredients, it lies on him to show that the purchaser knew what he was purchasing.

The statute in the 8th section provides a mode by which the seller may insure himself protection against the possibility of the enactment operating to his prejudice. If he delivers the label as provided by that section, he protects himself against all possibility of being charged with an offense

(') 38 & 39 Vict. c. 63, s. 6, provides, that no person shall sell to the prejudice of the purchaser any article of food or any drug which is not of the nature, substance, or quality of the article demanded by such purchaser, under a penalty not exceeding £20. The section then sets out certain excepted cases in which it shall not be deemed that an offence has been committed under the section.

Sect. 8 provides, that no person shall be guilty of any such offence as afore-

said in respect of the sale of an article of food or a drug mixed with any matter or ingredient not injurious to health and not intended fraudulently to increase its bulk, weight or measure or conceal its inferior quality, if at the time of delivering such article or drug, he shall supply to the person receiving the same a notice by a label distinctly and legibly written or printed on or with the article or drug, to the effect that the same is mixed.

1878

Sandys v. Small.

under the act. If he does not, then I think it is incumbent on him to prove that by some other means (with regard to which he will be subject to be met by counter proof) that the purchaser had notice what he was purchasing. If the seller can show that he had such notice, then I think no offence will be committed, because the sale will not be "to the prejudice of the purchaser." I do not think that the statute means that the affixing of the label is to be the only mode of bringing knowledge home to the purchaser. I think, for instance, if a man puts up in a conspicuous position a notice in large letters, as was done here, and it is clear that it must have come under the observation of the customer, that the 6th section would not apply. Mr. Wills suggested that it was not clear in the present case that the purchaser had seen the notice when he purchased the whiskey, and that the case should go back that the facts may be stated more distinctly as to this. It is found that notices were posted up in all the rooms of the house in conspicuous places, so that customers could not fail to see them.

We are clear that under the circumstances there was no real offence against the provisions of the 6th section, and that being so, it seems to us that we should deal with the case as it stands, and that we ought not to send the case back for the purpose of giving an opportunity of proving that the particular individual who bought the whiskey for the purposes of this prosecution had not seen the notice. On the case as it stands, we think our judgment must be for the respondent.

MELLOR, J.: I am of the same opinion. The statement 454] of the *facts is not very distinct as to whether the purchaser had an intimation by means of the notice that he was purchasing a mixture. It is left to us to draw the inference whether that was so or not, and, from the facts stated, I should rather infer that though the purchaser may not have seen the notice at the exact moment when he asked for the whiskey, yet that he might well have seen it directly afterwards, and before the transaction was completed by the payment of the money and his receipt of the article. With regard to the construction of the statute, I agree with my Lord that no offence was committed under the 6th section.

Decision of justices affirmed.

Solicitor for appellant: *Greenfield.*

Solicitor for respondent: *Warriner.*

See New York Penal Code, §§ 407-409; 29 Pittsb. Leg. Jour. (12 (N.S.)), 29; Penal Code California, § 382 and cases cited by Mr. Desty in his annotated edition; Laws N. Y., 1881, chap. 407, vol. 1, p. 553.

For cases under the English act against adulteration of food, see *Herder v. Scott*, 5 Q. B. Div., 552; *Rouch v. Hall*, 6 id., 17; *Horder v. Medding*, 44 Justice Peace, 234; *Liddiard v. Reece*, 44 id., 233; *Davidson v. McLeod*, 15 Scottish Law Reporter, 198; *Fisher's Dig.*, titles "Health," "Adulteration of Food," etc., 1 Russell on Crimes, 9th Am. ed., 169.

See also 1 Bish. Cr. Law (6th ed.), §§ 491, 558; 2 Bish. Crim. Proc. (3d ed.), § 868; Bish. Stat. Crimes, § 550; 2 Whart. Cr. L. (8th ed.), §§ 1118, 1433-6.

The English statute provides, that "No person shall sell to the prejudice of the purchaser, any article of food, or any drug which is not of the nature, substance, and quality of the article demanded," shall be guilty of an offence. In *Davidson v. McLeod*, 15 Scottish Law Reporter, 198, it was held, 1, that the section refers to the adulteration of articles of food by the introduction of

foreign substances; and 2, that a purchase by a public officer under sections 18 and 17 of the act cannot be followed up by a prosecution under the 6th section, unless it be to "the prejudice of the purchaser."

For requisites of an indictment under the New York statute against adulteration of milk, see *Schrumpf v. People*, 14 Hun, 10. Under the Massachusetts statute against adulteration, *Com. v. Chase*, 125 Mass., 205; *Com. v. Farren*, 9 Allen, 469. Under Rhode Island statute, *State v. Smith*, 10 R. I., 258.

For other prosecutions thereunder, and under city ordinances, see *Polinsky v. People*, 11 Hun, 390, 73 N. Y., 65; *People v. Fauerback*, 5 Park Crim. R., 311; *Lammond v. Polans*, 14 Hun, 268; *Verona, etc., v. Murtaugh*, 50 N. Y., 314, 4 Lans., 17; *Lane v. Wilcox*, 55 Barb., 615; *Stearns v. Ingraham*, 1 Thomp. & Cook, 218; *Thompson v. Howe*, 46 Barb., 287.

[3 Queen's Bench Division, 454.]

July 2, 1878.

BEW, Appellant; HARSTON, Respondent.

"Gaming"—*Game of Skill played for Money or Money's worth—Licensing Act, 1872* (35 & 36 Vict. c. 94), s. 17, subs. 1.—*Suffering Gaming on Licensed Premises.*

The appellant, a licensed person, suffered to be played on the licensed premises a game called puff and dart, the object in which is to hit a mark on a target with a small dart blown through a tube. The players each contributed 2d. as entrance money, the total sum so contributed being applied to the purchase of a rabbit as a prize for the winner of the game:

Held (Cockburn, C.J., doubting), that the appellant was rightly convicted of suffering gaming on the licensed premises under 35 & 36 Vict. c. 94, s. 17, subs. 1.

CASE stated by the stipendiary magistrate for the Potteries, under 20 & 21 Vict. c. 43, the facts of which were in substance as follows:—

The appellant was convicted by the magistrate upon an information laid by the respondent of an offense under 35 & 36 Vict. c. 94, s. 17, subs. 1, which provides that if any licensed person "suffers any gaming or unlawful game to be carried on on his premises," he shall be liable to a penalty. The circumstances under which the appellant was convicted were as follows. He had *permitted certain persons [455 on his licensed premises to play at a game called puff and dart. Each of the players contributed a sum of 2d. as entrance money, the sum so contributed being applied to the

1878

Bew v. Harston.

purchase of a dead rabbit, which formed the prize for which the game was played. The object in the game was to hit a mark on a target with a small dart blown through a tube.

The question was whether the appellant was rightly convicted.

June 1. *J. F. Clerk*, for the appellant: There is no definition of "gaming" in the act. The mere fact that a game is played for money does not make it gaming. It is contended that "gaming" is a term which is only applicable to games of chance, or in which chance is a main element. Some assistance may be given by the various statutes passed at different times making games and gaming unlawful. The object of the early statutes of this description was the encouragement of archery, and therefore the character of the games against which those statutes were aimed would not afford a criterion as to the sort of games that would come within the term "gaming" in later times. All the games which are specially aimed at in later statutes are games in which chance is the principal element. If this game comes within the term "gaming," playing at pool for money, which is done constantly in licensed houses which have a billiard license, would do so also. [He cited 33 Hen. 8, c. 9, s. 11; 16 Car. 2, c. 7; 9 Ann, c. 14; 18 Geo. 2, c. 34; 8 & 9 Vict. 109; *Foot v. Baker* (').]

No counsel appeared for the respondent.

Cur. adv. vult.

July 2. MELLOR, J.: The statute makes it a penal offence if any licensed person suffers gaming to be carried on on the licensed premises, and the question for us is, whether the appellant was guilty of this offence. I think myself that he was rightly convicted. It seems to me that the case falls within the authority of *Reg. v. Ashton* ('). Lord Campbell there says, "The object of the statute was to prevent the contracting of bad habits by the practice of games where money was staked in public houses. If money was staked, that would be gaming." Here money was not in one sense staked on the game, but each man paid his twopence for the chance of winning the rabbit. It comes to the same thing in principle. I think it was gaming within the meaning of the act, which seems to me to have been intended to prevent the contracting of bad habits by the practice of such games in public houses.

COCKBURN, C.J.: I entertain serious doubts whether the view taken by the magistrate, and with which my learned

(') 5 M. & G., 335.

(') 1 E. & B., 286.

Brother Mellor agrees, is correct. The act speaks of gaming and unlawful games. Now this game does not come within the expression "unlawful games," for the expression refers to the games from time to time made unlawful by statute, of which this is not one. I am inclined to think that the term "gaming" implies something which in its nature depends on chance, or in which chance is an element. This game does not appear to be one of chance, but of skill, though the skill may not be of a very lofty character. The result of my differing from the conclusion of my Brother Mellor would be that the conviction would stand. I do not wish to be taken as expressing a very decided opinion as to whether a game of this description comes within the term "gaming." All I desire to say is, that I very much doubt whether it does. I do not regret the result, for I think that this game was within the mischief that the statute meant to guard against. In the result, therefore, the conviction must stand.

Conviction affirmed.

Solicitor for appellant: *Montagu*, for Tennant.

[8 Queen's Bench Division, 457.]

May 18, 1878.

[IN THE COURT OF APPEAL.]

***THE QUEEN on the Prosecution of THE LONDON [457
AND NORTH WESTERN RAILWAY COMPANY, Appellants;
THE OVERSEERS of the Poor of the Township of the
Foreign of WALSALL and Others, Respondents.**

Court of Appeal—Jurisdiction—Case stated by Quarter Sessions—Certiorari—"Judgment or Order"—"Appeal"—Supreme Court of Judicature Act, 1873, ss. 19, 45.

The Court of Appeal has no jurisdiction to entertain an appeal from a decision of the Queen's Bench Division upon a rule for quashing an order of Quarter Sessions as to the validity of a rate (By Cockburn, C.J., and Brett, L.J.; Bramwell and Cotten, L.JJ., dissenting).

[3 Queen's Bench Division, 479.]

June 22, 1878.

479] *THE QUEEN on the Prosecution of THE GUARDIANS OF CARLISLE UNION, Respondents, v. THE GUARDIANS OF BRAMPTON UNION, Appellants.

Poor Law—Settlement by Residence—Removal—39 & 40 Vict. c. 61, s. 84.

Under 39 & 40 Vict. c. 61, s. 84, which enacts that "where any person shall have resided for the term of three years in any parish, in such manner and under such circumstances in each of such years as would in accordance with the several statutes in that behalf render him irremovable, he shall be deemed to be settled therein until he shall acquire a settlement in some other parish by a like residence or otherwise":

Held, that a person who had resided in a parish for a term of three years, and who continued to reside there until the passing of the act, but who, during the period subsequent to the three years, was in receipt of relief from the parish, acquired a settlement therein under the section.

UPON appeal to the Cumberland Quarter Sessions, against an order for the removal of J. Little from Carlisle to the appellant union, the order was confirmed subject to a case.

1 and 2. James Little, the pauper for whose removal the order appealed against was made, was born about 1810, at Williams Gill, in the parish of Farlam, in the appellant union.

3. In the year 1865 he went to reside at Gateshead, Durham, out of the appellant union, and continued to reside in Gateshead from that time till the 2d of April, 1877.

4. He had, in the year 1866, acquired by his residence in Gateshead a status of irremovability from the Gateshead Union, entitling him not to be removed from the union, and the status of irremovability continued throughout his residence to the time of his going to Carlisle hereinafter mentioned.

5. At the latter part of the year 1869, Little, while so residing at Gateshead, met with an accident, and a few weeks afterwards began to receive relief from the Gateshead Union, and continued to receive weekly relief from the union till he went to reside at Carlisle, as stated in next paragraph.

6. On the 22d of April, 1877, he went to Carlisle to stay with his daughter, and shortly afterwards was received into the workhouse of the Carlisle Union, where he has since then remained.

7. On the 6th of October, 1877, an order for the removal of
480] *Little was made by two justices for Cumberland, adjudging that the place of his last legal settlement was the

parish of Farlam, in the appellant union, and ordering his removal to the appellant union.

8. The appellants appealed to the Cumberland Quarter Sessions, holden in January of the present year, against the order of removal, on the ground, amongst others, that Little had, by virtue of the facts stated in paragraphs 3 and 4, obtained a legal settlement in the Gateshead Union, and the sessions being of opinion that Little had not obtained a legal settlement in the Gateshead Union, and that the place of his last legal settlement was the parish of Farlam, in the appellant union, confirmed the order.

The question for the opinion of the court is, whether, on the 6th of October, 1877, Little had a legal settlement in the Gateshead Union.

Poland (*Shee and Mattinson* with him), for the respondents: The question turns entirely upon the true construction of 39 & 40 Vict. c. 61, s. 34. It has been already decided by this court in *Reg. v. Ipswich Union* (¹), that a pauper who had resided in a parish for a term of three years, but whose residence therein had ended before the passing of the act, did not acquire a settlement under this section. This decision must govern the present case. No doubt the pauper was bodily present in the Gateshead Union when the act came into operation in 1876, but for several years he had been in receipt of relief, and as a residence under such circumstances cannot confer a status of irremovability, it is not a residence within the meaning of s. 34.

[COCKBURN, C.J.: The fact of his receiving relief did not make him removable.

LUSH, J.: In *Reg. v. Ipswich Union* (¹) the pauper had left the parish before the passing of the act.]

The effect of the decision is, that the section does not apply to a case where the three years' residence was at some remote period before the act, and the residence now under consideration is of the same character, as it was practically completed in 1869.

Henry (*Elliott* with him), for the appellants, was not heard.

*COCKBURN, C.J.: I think the order of sessions [481 must be quashed. If it were necessary to include the time during which the pauper received relief in order to make up the three years' residence, the case would be different. But he had completed the full term of three years' residence in the Gateshead Union before he became in receipt of relief, and continued to reside in that union till the passing of the

(¹) 2 Q. B. D., 269.

1878

Mulliner v. Florence.

act. Under these circumstances I think he had resided three years in that union within the meaning of the section, and acquired a settlement there.

MELLOR, J., and LUSH, J., concurred.

Order of Sessions quashed.

Solicitors for appellants: *Remnant & Penley.*

Solicitors for respondents: *Gray & Mounsey.*

[3 Queen's Bench Division, 481.]

June 22, 1878.

HINDLEY, Appellant; HALSAM and Others, Respondents.

Employers and Workmen Act (38 & 39 Vict. c. 90), ss. 3, 4—Proceedings taken first in County Court and then before Justices—Res Judicata—Counter-claim.

By the Employers and Workmen Act (38 & 39 Vict. c. 90), s. 3, "In any proceeding before a county court in relation to any dispute between an employer and a workman arising out of or incidental to their relation as such, the court may . . . adjust and set off the one against the other, all such claims on the part either of the employer or of the workman, arising out of or incidental to the relation between them, as the court may find to be subsisting, whether such claims are liquidated or unliquidated and are for wages, damages, or otherwise." By s. 4, "A dispute under the act between an employer and a workman may be heard and determined by a court of summary jurisdiction, and such court for the purposes of this act shall be deemed to be a court of civil jurisdiction, and in a proceeding in relation to any such dispute the court may order payment of any sum which it may find to be due as wages or damages . . . provided that . . . the court shall not exercise jurisdiction when the amount exceeds £10."

The appellant was employed as a spinner by the respondents, and was discharged for neglecting his work, the respondents refusing to pay him wages in lieu of notice. He took proceedings against them in the county court. At the hearing no counter-claim or set-off was filed or set up, but evidence was produced to show that he had been guilty of negligence. A verdict for £3 10s. was given in his favor:

Held, that the respondents were not precluded from preferring a claim before justices against him for wrongfully and negligently damaging their materials, for the only matter decided by the county court was whether there was such negligence on his part as would justify his dismissal without notice.

[3 Queen's Bench Division, 484.]

Jan. 28, 1878.

[IN THE COURT OF APPEAL.]

484]

*MULLINER V. FLORENCE.

Innkeeper—Lien on Goods of Guest—General and Particular Lien—Waiver of Lien by Sale of Chattel subject to it.

The lien of an innkeeper is general, and extends to all goods and chattels belonging to his guest, and therefore a chattel, although deposited with the innkeeper and placed by him apart from the personal goods of the guest, may be detained by him on account of money owing to him for the lodging, food, and entertainment of the guest.

The lien of an innkeeper over a chattel belonging to a guest is waived, if in order to reimburse himself he sells it, and this rule holds good even although the retention of the chattel is attended with expense.

ACTION for the detention and conversion of horses, carriages, and harness.

At the trial at the Warwickshire Summer Assizes, 1877, before *Pollock, B., the following facts were given [485 in evidence. The defendant kept an inn at Coventry, and at the end of September, 1876, one Bennett came to the defendant's inn and stayed there as a guest until the middle of January, 1877, when he quitted the inn. Bennett was received by the defendant as an ordinary guest, and at the time of his departure from the inn he owed the defendant £109 for lodging, food, and entertainment. In November, 1876, a pair of horses, wagonette, and harness came to the defendant's inn for Bennett; he told the defendant that he had bought them from the plaintiff who lived at Leamington. The horses, wagonette, and harness were not taken in at livery, but were received by the defendant as a part of the property of his guest Bennett. At the time when the latter quitted the inn, he was in debt to the defendant for the keep of these horses, and the defendant claimed on this account from him £22 10s. Bennett left the horses, wagonette, and harness behind him at the defendant's inn. It was afterwards ascertained that Bennett was a swindler, and that he had bought the horses from the plaintiff upon the terms that if they should not be paid for they should be returned to him free of expense. Bennett did not pay the price for the horses. The plaintiff demanded from the defendant possession of the horses, wagonette, and harness, and tendered to him a sum of £20 for the keep of the horses; but the defendant refused to give up the horses, wagonette, and harness. The defendant sold the horses by auction for £73, but he retained possession of the wagonette and harness. Bennett was afterwards convicted of fraud, and sentenced to penal servitude. The defendant claimed to keep the proceeds of the sale, and also to retain the wagonette and harness, on account of the sums of £109 and £22 10s.

Upon these facts the learned judge directed judgment to be entered for the defendant.

Jan. 26, 28. *Sir James Stephen, Q.C.*, and *J. S. Dugdale*, for the plaintiff: Two questions arise in this case: first, what is the extent of an innkeeper's lien? secondly, whether the sale of a chattel so entirely destroys a valid lien attaching upon it, that the owner of it can treat the sale as a wrongful conversion?

• *As to the first question, it is admitted for the [486 plaintiff, that an innkeeper is entitled to a general lien for the

1878

Mulliner v. Florence.

amount of his bill over the goods accompanying the person of his guest; but it is contended that when a chattel is deposited with an innkeeper, and is kept by him apart from the personal goods of the guest, his lien for the food, lodging, and entertainment of the latter does not extend to it. The earlier authorities seem, at least indirectly, to show that the lien of an innkeeper over a horse left with him by a guest, is not general: thus in *Moss v. Townsend* (*), the custom of London was stated to be that if a horse is left at an inn and eats up more than his price, the innkeeper may sell the horse to pay for meat supplied to him, but not for meat supplied to other horses. It was held in more cases than one, that if a horse is brought by a stranger to an inn and is there left, the owner cannot take away the horse without paying what is due for the meat thereof, although the horse was brought to the inn without the owner's consent, *Robinson v. Walter* (*), *Stirt v. Drungold* (*); but in the latter case it was questioned whether a saddle, bridle, and cloth brought to the inn together with the horse, could be detained. These decisions are not opposed to the right of the present plaintiff to sue, and the reasons of the judgments seem to favor the view advanced upon his behalf. In *Rosse v. Bramsteed* (*), it was said by Croke, apparently with the approval of the Court of King's Bench, that a horse brought to an inn may be detained for the provender supplied to him but not for the lodging of the guest. The modern cases as to the extent of the innkeeper's lien are not in point; they may show that the innkeeper's lien extends to the goods of a third person, if he receives them in the belief that they belong to his guest, *Turrill v. Crawley* (*); *Threfall v. Borwick* (*); but a different rule prevails where the innkeeper knows that the goods are not the property of the guest: *Broadwood v. Granara* (*).

As to the second point, it is contended that a lien conveys no right to sell, *Coggs v. Bernard* (*), and if a thing subject 487] to a *lien be sold, the lien is destroyed, *Jones v. Pearle* (*); *Jones v. Thurloe* (1), and it is immaterial that the detention of the chattel may be attended with expense: *Thames Ironworks Co. v. Patent Derrick Co.* (1). The distinction between a pledge and a lien is pointed out by Black-

(*) 1 Buls., 207.

(*) 3 Buls., 269.

(*) 3 Buls., 289.

(*) 2 Roll. Rep., 438, cited in Bacon's Abridgment, Inns and Innkeepers (D).

(*) 13 Q. B., 197.

(*) Law Rep., 10 Q. B., 210; 12 Eng. R., 266.

(*) 10 Ex., 417.

(*) 1 Sm. L. C. at p. 217, (7th ed.).

(*) 1 Str., 557.

(1) 8 Mod., 172, per Pratt, C.J.

(1) 1 J. & H., 93; 29 L. J. (Ch.), 714.

burn, J., in *Donald v. Suckling* ⁽¹⁾. A person who, in any manner, voluntarily parts with a chattel loses all right of lien over it: *Jones v. Thurloe* ⁽²⁾; *Jacobs v. Latour* ⁽³⁾; *Clark v. Gilbert* ⁽⁴⁾; *Legg v. Evans* ⁽⁵⁾; *Hartley v. Hitchcock* ⁽⁶⁾. A person entitled to a lien for a debt cannot add to the amount, for which the lien exists, a charge for keeping the chattel until the debt is paid: *Somes v. British Empire Shipping Co.* ⁽⁷⁾.

Mellor, Q.C., and *Graham*, for the defendant: As to the first question, if the argument for the plaintiff were correct, an innkeeper would be compelled to apportion his charges, although the contract under which he receives his guest and his guest's property is entire. It is submitted that such a rule of law would impose an unnecessary burden upon an innkeeper: it would be unreasonable if he could only detain his guest's luggage for personal charges and his guest's horse for provender supplied to it.

As to the second question, it may be assumed against the defendant that the sale was wrongful, but the plaintiff cannot recover in this action because he did not tender the whole amount due from Bennett to the plaintiff. *Halliday v. Holgate* ⁽⁸⁾ shows that upon a sale by a pledgee, the pledgor cannot recover for the conversion without tendering the amount due, and no reason exists why the same rule should not prevail as to a lien.

[COTTON, L.J.: Is there not this distinction between a pledge and a lien? in the former case there has been a contract to repay, whereas in the latter the right to detain is created merely by the common law for the benefit of the creditor.]

The lien of an innkeeper arises out of the contract to receive and entertain made between him and the guest.

*A third question arises as to the damages. As the [488 plaintiff has sustained no legal injury, he is entitled to only nominal damages even if the action be maintainable: *Chinery v. Viall* ⁽⁹⁾; *Johnson v. Stear* ⁽¹⁰⁾; *Donald v. Suckling* ⁽¹¹⁾; *Brierley v. Kendall* ⁽¹²⁾. The plaintiff was not willing to pay the amount actually due, and therefore cannot rely upon *Jones v. Tarleton* ⁽¹³⁾. If the horses had not been sold, the plaintiff could not have obtained possession

⁽¹⁾ Law Rep., 1 Q. B., 585, at p. 612.

⁽²⁾ 8 Mod., 172.

⁽³⁾ 5 Bing., 130.

⁽⁴⁾ 2 Bing. (N.C.), 343.

⁽⁵⁾ 6 M. & W., 36.

⁽⁶⁾ 1 Stark., 408.

⁽⁷⁾ 8 H. L. C., 338.

⁽⁸⁾ Law Rep., 3 Ex., 299.

⁽⁹⁾ 5 H. & N., 288.

⁽¹⁰⁾ 15 C. B. (N.S.), 330; 33 L. J. (C.P.), 180.

⁽¹¹⁾ Law Rep., 1 Q. B., 585.

⁽¹²⁾ 17 Q. B., 937.

⁽¹³⁾ 9 M. & W., 675.

1878

Mulliner v. Florence.

of them without paying the defendant what was due to him in respect of his lien. What, then, has the plaintiff lost by the conversion? He has lost the value of the horses minus what he would have had to pay to get them back. That sum is the measure of the damages if the plaintiff can recover any amount in respect of the horses.

Sir James Stephen, Q.C., in reply.

BRAMWELL, L.J.: The first question for our decision is, what was the innkeeper's lien; was it a lien on the horses for the charges in respect of the horses, and on the carriage in respect of the charges of the carriage and no lien on them for the guest's reasonable expenses, or was it a general lien on the horses and carriage and guest's goods conjointly for the whole amount of the defendant's claim as innkeeper. I am of opinion that the latter was the true view as to his lien, and for this reason, that the debt in respect of which the lien was claimed was one debt, although that debt was made up of several items. An innkeeper may demand the expenses before he receives the guest, but if he does not, and takes him in and finds him in all things that the guest requires it is one contract, and the lien that he has is a lien in respect of the whole contract to pay for the things that are supplied to him while he is a guest. If this was not the case a man might go to an hotel with his wife, and then it might be said that the innkeeper's lien was on the guest's luggage for what he had consumed, and on the wife's luggage for what she had had. The contract was, that the guest and his horses and carriage shall be received and provided for; there was one contract, one debt, and one lien in respect of the whole of the charges. The cases cited 489] *on behalf of the plaintiff are really against him. In order to justify the argument for him, it ought to be shown that if fifty pieces of cloth are sent to a dyer under one contract, he would only have a lien on each piece for the work done in respect of it. It seems to me, therefore, in this case the lien is a general lien. So far our judgment is for the defendant.

On the second question, namely, whether the sale was wrongful, I think the learned judge was wrong. The defendant, who had only a lien on the horses, was not justified in selling them, and he has therefore been guilty of a conversion, and that enables the plaintiff to maintain this action for the proceeds of the sale. The very notion of a lien is, that if the person who is entitled to the lien, for his own benefit parts with the chattel over which he claims to exercise it, he is guilty of a tortious act. He must not dispose

of the chattel so as to give some one else a right of possession as against himself. The lien is the right of the creditor to retain the goods until the debt is paid. It is quite clear that the defendant could not use the horses, yet it is suggested that he can sell them and confer a title upon another person. Several cases were cited, but none of them are inconsistent with the present. Those mainly relied on were *Donald v. Suckling* ⁽¹⁾ and *Johnson v. Stear* ⁽²⁾. In the latter case it was no doubt held that the sale by the pledgee of an article pledged to him was tortious, and that the action could be maintained. But looking at the substance of the thing, and at the decision of *Halliday v. Holgate* ⁽³⁾, in all these cases the courts held that although the pledgee in repledging the article had exceeded what he had a right to do, yet inasmuch as there remained in the pledgee an interest, not put an end to by the unauthorized pledge, he could transfer the pledge to another person. In *Johnson v. Stear* ⁽²⁾ it certainly was held to be a tortious conversion. In the other two cases it was held not to be so. What in substance those cases decided was, that as the interest under the original pledge was not determined, the immediate right to the possession of the chattels was not re-vested in the pledgor so as to give him a right of action. Those cases, however, were cases between the pledgor and the pledgee, and have nothing *whatever to do with [490 the present case. The interests of the pledgee there could be assigned, but here the parting with the chattels subject to the lien destroyed it.

The third question argued was as to the amount of damages. The general rule is that where a person converts property to his own use by selling it and receives the price, he is liable for the value of the article, and he cannot set-off. Now what were the authorities cited to the contrary? *Chinery v. Viall* ⁽⁴⁾ is distinguishable on the ground that the case was decided on its special facts. The ground of the decision was that "as the vendor could not sue for goods bargained and sold, the result would be that he could not in any form of action recover the price; and it would be singular if the same act which saved the vendee the price of the sheep should vest in him a right of action for the full value without deducting the price." I cast no doubt on that case; the ground on which it is based is different. The next case was *Brierley v. Kendall* ⁽⁵⁾. That was an action

⁽¹⁾ Law Rep., 1 Q. B., 585.

⁽²⁾ Law Rep., 3 Ex., 299.

⁽³⁾ 15 C. B. (N.S.), 330; 33 L. J. (C.P.), 130.

⁽⁴⁾ 5 H. & N., 288; 29 L. J. (Ex.), 180.

⁽⁵⁾ 17 Q. B., 937; 21 L. J. (Q.B.), 161.

1878

Mulliner v. Florence.

of trespass, and the plaintiff had mortgaged the goods wrongfully seized by the defendants as a security for money advanced by them to him. Another case was *Johnson v. Stear* ⁽¹⁾. I only wish to add one word as to that case; the court there held that the action was maintainable, but I see that Blackburn, J., in his judgment in *Donald v. Suckling* ⁽²⁾, doubts whether that case was rightly decided, because he says, "This can be reconciled with the cases above cited, of which *Fenn v. Bittleston* ⁽³⁾ is one, by the distinction that the sale, though wrongful, was not so inconsistent with the object of the contract or pledge as to amount to a repudiation of it, though I own that I do not find this distinction in the judgment of *Johnson v. Stear*" ⁽⁴⁾. So that Blackburn, J., doubts whether the Court of Common Pleas were right in that case in giving the plaintiff even nominal damages. Whether that decision is right or not, the plaintiff clearly was not entitled to substantial damages. The reasoning in that case, however, is not applicable to the 491] present. But there is a remark of Williams, J., *in his judgment, at p. 134, which I think is applicable, it is this: "The true doctrine as it seems to me is that whenever the plaintiff could have resumed the property, if he could lay his hands on it, and could have rightfully held it when resumed as the full and absolute owner, he is entitled to recover the value of it as damages in the action of trover which stands in the place of such resumption." Now in this case if the plaintiff after the sale of the horses had thought fit to go to the vendee and say to him "Those horses are mine," and the vendee had refused to give them up, he could have maintained an action against the vendee for the full value of the horses; but instead of acting in this manner he has treated the sale by the defendant as a conversion. He is not to be worse off because he has brought his action against the defendant instead of against the vendee. It is said if the plaintiff succeeds that the defendant's lien would be useless to him, and that the plaintiff would be better off than he was before the sale of the horses by the defendant. I do not think there is anything unreasonable in holding the defendant liable if the defendant was not bound to feed the horses. In a case of a distress damage feasant before the recent statute (12 & 13 Vict. c. 92) the distrainer was not bound to feed the animals distrained.

It seems to me therefore that the learned judge was wrong.

⁽¹⁾ 15 C. B. (N.S.), 330; 33 L. J. (C.P.), 130.

⁽²⁾ Law Rep., 1 Q. B., at p. 617.

⁽³⁾ 7 Ex., 152; 21 L. J. (Ex.), 41.

I think that we ought to reverse the judgment, and give the plaintiff judgment for £73, but as the defendant has a lien on the carriage and harness for the whole bill, and that amount was not tendered, the defendant is entitled to retain his judgment as to the wagonette and harness. Under these circumstances the judgment will be entered for the plaintiff for £73, and as to the rest of the case the judgment will stand for the defendant.

BRETT, L.J. : This was an action against the defendant in respect of a wrongful sale of the plaintiff's horses and in respect of a wrongful withholding from him of a carriage and harness. The defence set up is that the defendant held the horses and the carriage and harness under a lien, and that the plaintiff therefore could not maintain the action in respect of any of them. The lien claimed by the defendant was that of innkeeper.

The first question is, what is the extent of an innkeeper's lien, *and to what goods did the lien attach? I am [492 of opinion the lien attached both on the horses and the carriage and harness for the full amount of the innkeeper's bill. Where the innkeeper in the course of his ordinary business receives not only travellers but also their horses and carriages, he has an innkeeper's lien for his whole claim. He has one obligation, he is bound to receive the traveller and any horses or carriages he may bring with him; and as there is but one business, one obligation, and one contract, according to the custom of England, it gives him one lien, and the lien cannot be split up and a separate lien claimed in respect of separate chattels. Therefore here the defendant has a lien for the whole bill incurred by Bennett, and that lien is on the carriage and horses and harness.

With regard to the horses, the defendant has sold the horses; it was an unjustifiable sale; he had no right to sell them, and as he had only a lien, the sale destroyed the lien. If he had parted with the possession in the horses, he would have lost the lien, and so in the case of a wrongful sale the lien is destroyed. With regard to the carriage and harness, the defendant has a lien on them for his whole account. The plaintiff was willing to pay some portion of the bill, but he never was willing to pay the whole amount. Then it was said, although the defendant improperly sold the horses, yet the plaintiff is not entitled to maintain the action, because the defendant had a lien on them, and the plaintiff has not tendered the amount of the lien. But this argument is not tenable, for by the sale the lien was destroyed, and there is no debt due from the plaintiff to the defendant. It

1878

Mulliner v. Florence.

does not seem to me to be necessary to decide whether the cases cited were rightly decided or not. *Donald v. Suckling* ⁽¹⁾, and *Halliday v. Holgate* ⁽²⁾, were cases not of lien, but where the property had been pledged with a power of sale: and the judgments in these cases were founded on the distinction which existed between the cases of pledge and lien, therefore those cases signify nothing, this not being a case of pledge. With regard to *Johnson v. Stear* ⁽³⁾, that also was the case of property pledged, and it is no authority in the present instance. At all events, I should say that [493] those *cases were only authorities if the action had been brought by Bennett, but none whatever as against the plaintiff who is seeking to recover his own property.

With regard to the damages, even if *Johnson v. Stear* ⁽³⁾ be an authority against an action by Bennett, it is no authority as against the plaintiff, who has an absolute right of property, and as there has been a wrongful sale he is entitled to recover full damages. However *Johnson v. Stear* ⁽³⁾ would require very great consideration before it was acted upon.

As to the plaintiff's claim to the carriage and harness, the defendant had a lien on the carriage and harness, and the plaintiff cannot recover as to them, but he is entitled to recover the sum of £73 in respect of the horses.

In the result, the plaintiff will have judgment for £73, which will carry the general costs of the cause, the defendant's costs to be deducted; and with respect to the appeal, as each party has substantially succeeded, no costs of the appeal will be allowed.

COTTON, L.J.: The question is what is the defendant's lien as innkeeper? Is it a lien as to the whole bill in respect of all the things brought by the guest to the inn, or is it a separate lien as regards the horses and also with respect to the harness and carriage? The innkeeper has a general lien for the whole amount of his bill. As to the horses, harness, and carriage, there would be a lien for any special expenditure, and there is no reason for exempting the horses, harness, and carriage from the general lien an innkeeper has in the guest's goods by the general law. The innkeeper is bound to receive the horses, harness, and carriage with the guest as much as he is bound to receive the guest himself—the liability of the innkeeper with respect to them is the same as his liability with respect to the other goods of the guest, and there is no reason for excluding the claim of

⁽¹⁾ Law Rep., 1 Q. B., 585.

⁽³⁾ 15 C. B. (N.S.), 330; 33 L. J. (C.P.),

⁽²⁾ Law Rep., 3 Ex., 299.

130.

the innkeeper although the horses, harness, and carriage are not received in the dwelling house, but in adjoining buildings. There is no authority for saying that the innkeeper's lien does not extend to the horses, harness, and carriage the guest brings with him as much as to the other things of the guest.

*With regard to the harness and carriage, although [494 the plaintiff tendered the amount due in respect of the horses, the defendant had a lien on the harness and carriage, and as to them the defendant is entitled to our judgment.

As to the horses, it was not contended that the sale was right, but the question was argued that as the plaintiff could not have taken them out of the hands of the defendant without satisfying his lien, he could not recover substantial damages. I do not accede to this argument. The defendant as an innkeeper has only a right to keep the horses until his bill is paid; he has parted with his possession, and has put an end to his right. The plaintiff therefore has an absolute title to the horses, and is entitled to such damages as amount to the real value. Although the defendant received the horses at the inn, and the innkeeper's lien attached, yet the lien is lost by the act of the defendant, and the innkeeper cannot claim anything as against the plaintiff as there is no debt owing from the one to the other. *Johnson v. Stear* (*) was decided on the principle that the person who sold the goods had some interest in them, and that case is different from the present where the person has only a right of detainer. Erle, C.J., says, "The deposit of the goods in question with the defendant to secure payment of a loan by him to the depositor on a given day, with a power to the defendant to sell in case of default on that day, created an interest and a right of property in the goods which was more than a mere lien." What, therefore, Erle, C.J., says is, assuming that the sale was wrongful, the defendant had an interest in the goods, and the owner can therefore only recover the real damage that he has actually sustained.

The judgment therefore will be entered for the plaintiff in £73, and for the defendant so far as relates to the harness and carriage.

Judgment accordingly (*).

Solicitors for plaintiff: *Sharpe & Ullithorne*.

Solicitors for defendant: *Patteson, Wigg & Co.*, agents for Oliver Minster, Coventry.

(*) 15 C. B. (N.S.), 330; 33 L. J. (C.P.), 130.

(*) See now, as to innkeepers' power of sale, 41 & 42 Vict. c. 38.

1878

Mulliner v. Florence.

See 2 Eng. R., 699 note ; 12 Eng. R., 268 note.

As to the lien of boarding house keepers in New York, see Laws 1860, chap. 446, p. 771, 4 Edm. St., 680, as amended, Laws 1876, ch. 319, p. 308, Laws 1879, ch. 530, vol. 1, p. 580.

As to the method of foreclosing such lien, see Code Civil Proc. N. Y., §§ 1787 *et seq.*

Chap. 738, Laws 1869 (vol 2, p. 1735), 7 Edm. Statutes, 469, are not repealed by the repealing act relating to the Code of Civil Procedure, 1 Laws 1877, chap. 417, p. 473, sub. 43 ; 1 Laws 1880, chap. 245, p. 372, sub. 45 ; *Id.*, p. 374, sub. 52.

See remedy provided by chap. 530 of the Laws 1879, vol. 1, p. 580.

As to the *liability* of boarding house keepers, see 3 Am. Law Reg., O.S., 257 *et seq.*

Plaintiff, who was a house keeper but not accustomed to take persons to board, upon defendant's application, received the latter and his family into his house for an indefinite time, with a general understanding that he (plaintiff) was to be compensated for board and accommodations. Held, that plaintiff was not a boarding house keeper within the meaning of Laws of 1860, chap. 446, p. 771, allowing a detention of the baggage and effects of boarders for board due. The legal meaning of the term boarding house keeper explained: *Cady v. McDowell*, 1 Lans., 484.

The intent of the statute of 1860 (Laws, p. 771), giving to the keeper of a boarding house a lien to the extent of the board due, is to give them the same lien which an innkeeper has upon the effects of a guest, without reference to the character of the guests, whether they are transient or permanent boarders : *Stewart v. McCready*, 24 How. Pr., 62.

See also *Walling v. Potter*, 35 Conn., 183 ; *Wintermute v. Clark*, 5 Sandf., 242.

In Wisconsin, under the statute of that State, it is held that, under chap. 89, Laws 1863, the keeper of a boarding house has a lien upon the baggage and effects of a boarder for the amount due for his board, of the same *character* and *extent* as that which an innkeeper has at the common law upon the goods

of his guests who are travellers and wayfaring persons: *Nichols v. Halliday*, 27 Wisc., 406.

Property of a guest of a hotel is not exempt from the lien of its keeper, by reason of the fact that it is property which would be exempt from general execution : *Swan v. Bournes*, 47 Iowa, 501.

In New York the statute of 1860 (L. 1860, p. 771), only gives the keeper of a boarding house a lien upon, and right to detain, the baggage and effects of a boarder for the amount which may be due by him, to the same extent and in the same manner as innkeepers have. Thus limiting the lien to that for board actually due, does not include damages for not boarding under an agreement to board in future. Nor can the act be extended to any other indebtedness or to any demand not due at the time of the detention : *Shafer v. Guest*, 35 How. Pr., 184, 6 Rob., 264.

In Massachusetts it has been held, that the lien given by the general statutes to boarding house keepers "on the baggage and effects brought to their houses belonging to their guests or boarders, except mariners, for all proper charges due for fare and board," attaches as and when the fare and board are furnished. If a guest of a boarding house keeper pays board by the week, and by his contract nothing is due until the end of the week, the lien given by the general statutes nevertheless in the meantime attaches : *Smith v. Colcord*, 115 Mass., 70.

Since the act of April 16, 1860, for the protection of boarding house keepers, the keeper of a boarding house has a lien for board upon goods brought upon the premises by a boarder to furnish his room, although they do not in fact belong to the boarder but to a stranger. It was the intention of the legislature by that act to give boarding house keepers the same lien in respect to the effects of their boarders, as the common law gave to innkeepers, as to the goods of their guests : *Jones v. Morrow*, 42 Barb., 623, affirmed by Court Appeals, Sept., 1866. This case is affected by Laws of 1876, ch. 319 (vol. 1, p. 308).

In Wisconsin, the lien extends to the property of a stranger : *Manning v. Hollenbeck*, 27 Wisc., 202.

The plaintiff, a married woman, resided with and was supported by her husband, and her separate property, such as wearing apparel, was sought to be detained by the defendant, a boarding house keeper, with whom she boarded with her husband, under a contract made by him with the defendant for the board of himself and wife:

Held, that chap. 448, Laws of 1860, for the protection of boarding house keepers, confers upon them no greater rights than innkeepers possessed at common law. That the common law did not, nor does this act, where the guest is received under a contract to furnish board for himself and wife, who accompanies him, give to an innkeeper a lien upon her effects brought on the premises by her, on the faith of such contract.

That her husband became liable for her board by special contract with the defendant: she incurred no liability, and, as nothing was due from her, the defendant had no right to detain her goods for the debt of her husband: *McIlvane v. Hilton*, 7 Hun, 594.

A mortgagor of horses cannot, without the knowledge, acquiescence or consent of the mortgagee, express or implied, "intrust the horses to be boarded so as to subject them to a lien for their keeping," under general statute (New

Hampshire), as against the mortgagee: *Sargent v. Usher*, 55 N. H., 287.

Where the innkeeper without any fraud being practised upon him accepts a draft drawn by the guest in payment of his bill, and voluntarily relinquishes possession of the goods, it seems that his lien is lost, and will not revive if the goods come again into his possession. But where he is induced to part with his possession by fraudulent representations of the guest (as that a draft given by the latter for the payment of his bill is good and will be paid, when he is not in fact authorized to draw such a draft), there is no waiver of the lien: *Manning v. Hollenbeck*, 27 Wisc., 202.

Under the statute (Gen. St., tit. 88, § 6), which gives a boarding house keeper a lien upon the personal property of a boarder, kept in the house for the amount due for his board, with a right to retain the property till the debt is paid, and, in case of non-payment for sixty days after due, to sell it and apply the proceeds, no special notice to the debtor of the time and place of sale is necessary. The limitation of the statute gives the debtor sufficient notice. The creditor must, of course, proceed reasonably and without concealment or unfairness: *Brooks v. Harrison*, 41 Conn., 184.

[3 Queen's Bench Division, 495.]

June 7, 1877.

[IN THE COURT OF APPEAL.]

**HOLME V. BRUNSKILL.*

[495]

Principal and Surety—Discharge of Surety by Alteration of the Guaranteed Contract—Materiality of Alteration in Contract between Principals—Landlord and Tenant—Surrender of part of Demised Premises—Notice to quit.

The plaintiff having agreed to let to G. B., as yearly tenant, a farm, including certain hill pastures and a flock of 700 sheep, the defendant gave the plaintiff a bond to secure the re-delivery to him at the end of the tenancy of the flock in good order and condition. In November the plaintiff gave G. B. a notice to quit, which was ineffectual to determine the tenancy at the expiration of the then current year. G. B. objected to the insufficiency of the notice, and on the 8th of April entered into an agreement with the plaintiff that G. B. should surrender a field to the plaintiff, that G. B.'s rent should be reduced £10, and the notice to quit should be considered as withdrawn. G. B. then continued tenant of the farm, less the field, at the reduced rent. In October, 1876, the plaintiff gave G. B. notice to quit on the 10th of April, 1877. On giving up the farm it was ascertained that the flock was reduced in num-

1877

Holme v. Brunskill.

ber and deteriorated in quality and value, and the plaintiff sued the defendant on his bond:

Held, by Brett, Cotton, and Thesiger, L.JJ., that neither the giving of the notice to quit and its withdrawal, nor the surrender of the field and the reduction of the rent, created a new tenancy.

Wayle v. Wildin (Law Rep., 3 Ex., 303) distinguished.

Held, also, by Cotton and Thesiger, L.JJ., Brett, L.J., dissenting, that the contract of the surety was that the flock should be delivered up in good condition together with the farm as originally demised to the tenant; that the surety ought to have been asked to decide whether he would assent to the variation in the terms of the letting, and not having been asked to assent he was discharged from liability.

At the trial the judge left it to the jury to say whether the new agreement with the tenant had made any substantial or material difference in the relation between the parties, as regarded the tenant's capacity to fulfil the condition of the bond:

Held, by Cotton and Thesiger, L.JJ., Brett, L.J., dissenting, that the question was one which ought not to have been submitted to a jury; that the surety was the sole judge whether it was reasonable that he should remain liable notwithstanding the new agreement.

ACTION on a bond against the defendant as surety. The bond was dated the 18th of March, 1873, and after reciting that the plaintiff had agreed to let to G. Brunskill, from year to year, a farm called Riggindale, and a stock of 700 heath going sheep, as regarded the arable land, from the 496] 2d of February, 1873; as *regarded the lands for pasturage and sheep, from the 10th of April, 1873; and as regarded the dwelling house and buildings from Whitsuntide then next; and after further reciting that the sheep were delivered to G. Brunskill on the 11th of April, 1873, and consisted of the number, species, and quality mentioned in the schedule to the bond, and it had been agreed that G. Brunskill and R. Brunskill, and C. H. Norman, should enter into the bond for the re-delivery of the said sheep or the offspring thereof in manner thereafter expressed, stated that the condition of the bond was "if the above bounden G. Brunskill should, at the determination of the tenancy, deliver up unto H. P. Holme, along with the said farm and premises, the like number, species, and quality of good and sound sheep as were delivered to the said G. Brunskill as aforesaid;" and "in case the said stock of sheep should, at the determination of the said tenancy, be reduced or deteriorated in number, quality, or value, should pay to H. P. Holme compensation for such reduction or deterioration, to be ascertained by certain arbitrators" in manner therein provided: and "should yearly and every year during the tenancy pay, or cause to be paid, to H. P. Holme by way of rent or interest for the sheep, the sum of £35 by two equal half yearly payments," then the bond should be void.

The statement of claim, after setting out the bond and averring the performance of all conditions precedent, alleged

that the tenancy was determined on the 29th of March, 1877; that G. Brunskill did not deliver up to the plaintiff, along with the farm, the like number, species, and quality of good and sound sheep as were delivered to him, nor did he pay compensation for the reduction and deterioration which had been ascertained in the manner provided by the bond, nor did he pay one half year's rent or interest for the sheep from the 10th of April, 1876.

At the trial at the Cumberland Summer Assizes, 1877, before Denman, J., the following facts were proved: The plaintiff was the owner of Riggindale Farm, consisting of 234 acres, and also of a right of pasturing sheep upon the commons and fells adjoining, all of which he had leased to G. Brunskill as tenant on the terms mentioned in the bond. On the 9th of November, 1875, the plaintiff gave to G. Brunskill a notice to quit the farm and lands * "on the 10th [497 of April, 1876, or at the expiration of the year of your tenancy, which shall expire next after the expiration of one half-year from the service of the notice." On the 8th of April, at an interview between the plaintiff and G. Brunskill, the latter declined to accept the notice to quit on the ground that it was bad, and on that day an agreement was entered into between the parties as follows: "I agree to give up the field called 'Bog,' now in my occupation, to my landlord, my yearly rent to be reduced by £10, also to give entry to the same on the 10th of April next, and to give up any claim I have to the use of the building known as the 'Stick-barn.'—G. Brunskill."

The notice to quit was then withdrawn, and G. Brunskill then continued tenant of the farm, less the Bog Field, at the reduced rent. On the 5th of October, 1876, the plaintiff gave G. Brunskill a notice to quit on the 10th of April, 1877, which was admitted to be a good notice; before that day G. Brunskill filed a petition for liquidation of his affairs by an arrangement with his creditors, and the trustees of his estate gave up possession of the farm to the plaintiff on the 29th of March, 1877. It was afterwards ascertained, in the manner mentioned in the bond, by arbitrators, that the flock of sheep was reduced in number and deteriorated in value and quality, and they assessed the damages at £132. It was also proved that the Bog Field was a field in which sheep did not usually pasture, but that it was occasionally used for pasturing sheep to the extent of twenty-five at a time being placed on it, and that it was also used during the lambing season; that the giving up the Bog Field would make an appreciable difference to the tenant in the spring,

1877

Holme v. Brunskill.

and that it might make a difference of perhaps fifteen in the number of the sheep that the farm would carry, and that it would compel the tenant to find hay either for the cattle or the sheep elsewhere.

The learned judge left it to the jury to say whether the new agreement with the tenant had made any substantial or material difference in the relation between the parties, as regarded the tenant's capacity to do the things mentioned in the condition of the bond, and for the breach of which the action was brought. The jury answered the question in the negative, and the learned judge reserved judgment.

498] *At the further consideration of the case, it was contended on behalf of the defendant; first, that the arrangement made on the 8th of April, 1876, amounted to a fresh tenancy as from the 10th of April, 1876, and to a surrender by operation of law of the original tenancy, and that the plaintiff could not sue in respect of a deficiency of sheep arising at the expiration of the new tenancy, as not being the tenancy contemplated in the condition of the bond. Secondly, that if the tenancy could be considered as the same there had been such an alteration in the terms of the bargain between G. Brunskill and the plaintiff, and such an alteration in the risk of the sureties, as to discharge them from their obligation. Thirdly, that the question of materiality was not for the jury, but that the judge was bound to hold that the alteration in the tenancy discharged the sureties, without reference to its materiality.

It was contended on behalf of the plaintiff that the tenancy continued until the 10th of April, 1877, varied only in its terms in one particular, but still remaining the same tenancy, and that the alteration in the agreement between G. Brunskill and the plaintiff was immaterial to the liability of the defendant in respect of the breach sued for, and did not increase the risk of the sureties.

Dec. 21, 1877. DENMAN, J., after stating the facts and pleadings, delivered the following judgment:

In order to decide whether there is an alteration in the risk such as to discharge the surety, I think it is impossible to lay down an absolute rule that in all cases it is for the judge to decide as matter of law, whether the alteration was such as to have that effect or not. There must, I think, be many cases in which the judge would have to take the opinion of the jury upon the question, whether the alteration was of such a character as to affect the surety in any way by substantially or materially altering the risk. By way

of example, I think it is impossible to say that if in the present case the evidence were that the landlord and tenant had merely agreed that the landlord should have the exclusive use of a small shed on the premises during the continuance of the tenancy, such an agreement would necessarily discharge the surety. I think it would in that case be a question for the jury at the most, *whether the [499] shed in question was of such importance, whether it played so material and substantial a part, if any at all, in assisting the tenant in keeping up his stock of sheep, as that the depriving himself of it, by allowing the use of it to the landlord, would render him less capable of performing the condition of the bond. In the present case I think that if the same tenancy had continued to exist, it would have been a question for the jury upon the evidence whether the alteration in its terms, so far as it relates to the giving up of the Bog Field, did make any material difference in the risk, in the sense above explained, and the jury having in effect found that it did not, I should not feel myself justified in holding the contrary as matter of law, and on that ground giving judgment for the defendants. The matter was one in its nature far more fit for the consideration of a special jury for the county of Cumberland than for a lawyer, and I cannot even say that I am dissatisfied with the view they took, though I might possibly, perhaps, through ignorance of sheep farming, come to a different conclusion upon the evidence if it had been for me to decide the question.

But as to the other contentions of the defendant, namely, that the contract between the plaintiff and the principal was a different contract, and that the tenancy was a new tenancy after the agreement of March, 1876, I am of opinion that on this ground the sureties are not liable; I think it is impossible to contend that the words "farm and lands called Riggindale" in the recital of the bond, meant anything except Riggindale Farm as it then existed, namely, a farm of 234 acres including the Bog Field, and though in one sense it would still be called Riggindale Farm after the new agreement, I do not think that that fact would justify me in holding that I could reject that part of the recital of the bond as immaterial; on the contrary, I think it was a material part of the bond, and any such alteration of the holding as the diminution of the farm by seven acres, and a reduction of the rent by £10, however unprejudicial it may in fact have been to the sureties, is on the face of it such an alteration in the agreement between the plaintiff and the principal as necessarily to make it a new and different agreement which, unless

1878

Holme v. Brunskill.

assented to by the surety, must discharge him from his obligation. *Whitcher v. Hall* (*), and *North * Western Ry. Co. v. Whinray* (*), are strong authorities to this effect, and I do not think that the case of *Sanderson v. Aston* (*) is in conflict with those decisions, for it only decides that where the surety undertook generally to be responsible for the conduct of a person as clerk and traveller, without any reference in the bond to the terms of the agreement as to the kind of notice which was to be given by either party, the mere substitution of an agreement for a one months' notice for an agreement for a three months' notice was not sufficient to discharge the surety. In the present case I think it impossible to say that the alteration was not such as to make a new agreement in a particular expressly referred to in the condition of the bond, and therefore within the authorities to constitute an altered contract for the performance of which the sureties had given no undertaking.

I also think that the defendant is entitled to succeed on the ground that the tenancy which was contemplated by the bond ceased by the operation of the notice to quit given in November, 1875, followed by the fresh agreement in April, 1876. The only distinction which was pointed out between the present case and that of *Tayleur v. Wildin* (*), which was cited for the defendant (but for which distinction it would be precisely in point), is that in that case the notice which had been given was a good notice to quit on the proper day, given in proper time, whereas in the present case the notice was given too late to be a good notice for the day for which it gave notice to quit. But it would have been available as a notice to quit in the following year, and was not therefore wholly void or necessarily inoperative; and therefore it appears to me, when the landlord and tenant agreed together that as from the day mentioned in that notice, as the day for quitting, the rent should be reduced and a field given up by the tenant, the tenancy became a new tenancy as much or even more clearly than was the case in *Tayleur v. Wildin* (*). I am therefore of opinion that the defendant is not responsible for the deficiency of sheep which existed at the expiration of this new tenancy, or for the non-payment of the amount assessed by the arbitrators in respect of that deficiency. I therefore give judgment for the defendant.

501] *The plaintiff appealed.

May 7. *C. Russell*, Q.C., and *Dickinson*, for the plaintiff: First, no new tenancy was created between the land-

(1) 5 B. & C., 269.

(2) 10 Ex., 77.

(3) Law Rep., 8 Ex., 73; 4 Eng. R., 452.

(4) Law Rep., 3 Ex., 303.

lord and tenant, for an alteration in the terms of the holding does not create a new tenancy. In Com. Dig., tit. Surrender (I. 2), it is laid down that if a lessee surrender or accept a new lease of part of the estate, that will operate as a surrender for that part only. So in Bacon's Abrid., tit. Leases (S.) 3, "If tenant for years of land accepts a new lease by indenture of part of the same lands, this is a surrender for that part only, and not for the whole, because there is no inconsistency between the two leases for any more than that part only which is so doubly leased; and though a contract for years cannot be so divided or severed as to be avoided for part of the years, and to subsist for the residue, either by act of the party, or by act in law, yet the land itself may be divided or severed, and he may surrender one or two acres, either expressly or by act in law, and yet the lease for the residue remains entire, whereas in the other case the contract for the whole would be divided, which the law will not allow." An alteration in the rent does not create a new tenancy: *Clarke v. Moor* ⁽¹⁾. The case of *Tayleur v. Wildin* ⁽²⁾ is distinguishable on the ground that in the present case the notice to quit was inoperative. Secondly, there was not such an alteration in the terms of the contract between the plaintiff and the principal debtor as would discharge the surety. For all practical purposes the contract has no relation to the farm, as to its extent or mode of management. The farm still remained Riggendale Farm, though the rent had been reduced and the Bog Field given up to the landlord; there is a distinction between the farm and its appurtenances; the agreement related only to part of the farm, and the guarantee was only for the re-delivery of the sheep to be pastured on the adjacent commons and fells, and in respect of the rent to be paid for their use. [On this point they cited *Whitcher v. Hall* ⁽³⁾; *Petty v. Cooke* ⁽⁴⁾; *North Western Ry. Co. v. Whinray* ⁽⁵⁾; *Skillett v. Fletcher* ⁽⁶⁾; *Hollier v. Eyre* ⁽⁷⁾.] *Thirdly, that the question of [502 materiality had been properly left to the jury: *Sanderson v. Aston* ⁽⁸⁾.

Aspinall, Q.C., and C. Crompton, for the defendant: First, there was a new letting and a surrender of the premises. There was a surrender of part, and a reduction of rent of the remainder; a creation of a new rent issuing out of a different thing. The concurrence of the two created a new

⁽¹⁾ 1 J. & Lat., 728.

⁽²⁾ Law Rep., 3 Ex., 303.

⁽³⁾ 5 B. & C., judgment of Littledale, J., at p. 277.

⁽⁴⁾ Law Rep., 6 Q. B., 790, 795.

⁽⁵⁾ 10 Ex., 77.

⁽⁶⁾ Law Rep., 2 C. P., 469.

⁽⁷⁾ 9 H. L. C., 57.

⁽⁸⁾ Law Rep., 8 Ex., 73; 4 Eng. Rep., 452.

tenancy. *Tayleur v. Wildin* (¹) is in point. Secondly, when the subject-matter of the contract is specified as the letting of Riggindale Farm, any alteration as to the farm will invalidate the suretyship, because the surety might or might not have continued the suretyship if he had known of the altered circumstances. The Bog Field having been given up to the landlord, the contract in respect of which the suretyship attached was altered, and the surety released, for the tenant did not get what the surety bargained he should get, that is, Riggindale Farm, including the Bog Field: *Whitcher v. Hall* (²). Thirdly, whether the giving up of the Bog Field was a reasonable or material alteration, was a question of which the surety was the sole judge: *Polak v. Everett* (³). And the judge was wrong in leaving that question to the jury.

C. Russell was heard in reply.

Cur. adv. vult.

June 7. The following judgments were delivered :

COTTON, L.J.: This is an appeal of the plaintiff against a judgment of Denman, J., in favor of the defendant, Robert Brunskill. The action was on a bond for £1,000, dated the 18th of March, 1873, executed by George Brunskill, Robert Brunskill, and others, in favor of the plaintiff. The plaintiff was at the date of the bond, and still is, the owner of a farm called Riggindale, and before the execution of the bond he had agreed with George Brunskill to let to him as yearly tenant Riggindale Farm, including certain hill pasture held therewith, and also a flock of 700 sheep, and the bond in which Robert Brunskill joined as surety for George Brunskill, was given to the plaintiff to secure the delivery to him [503] at the end of the tenancy of the flock of *sheep in good order and condition. The material part of the condition of the bond is as follows. [The Lord Justice read the condition.]

On the 9th of November, 1875, the plaintiff gave to George Brunskill a notice to quit the farm, which was in terms, a notice to quit "on the 10th of April, 1876, or at the expiration of the year of your tenancy, which shall expire next after the expiration of one half year from the service of the notice." The notice being served less than six months before the 10th of April, 1876, was ineffectual to determine the tenancy on that day, but was effectual to determine it on the 10th of April, 1877. Before the 10th of April, 1876, George Brunskill and the plaintiff met, and George Brunskill, objected to the insufficiency of the notice to quit.

(¹) Law Rep., 3 Ex., 308.

(²) 5 B. & C., 269.

(³) 1 Q. B. D., 669; 18 Eng. Rep., 104.

Whereupon the plaintiff stated that he did not wish to take the farm from him, but that he wanted part of the farm called the Bog Field, and it was thereupon agreed that George Brunskill should surrender this on the 10th of April then next, and that his rent should from that time be reduced by £10 a year, and that the notice to quit should be considered as withdrawn. This agreement was carried into effect, and George Brunskill continued to hold the remainder of the farm; but early in October following, the plaintiff gave him due notice to quit on the 10th of April, 1877. Before this time arrived George Brunskill got into difficulties and had become insolvent. His trustee, some time in March, 1877, gave up the farm, and it was then ascertained that the flock referred to in the bond was reduced in number and deteriorated in quality and value; and the action has been brought to recover from the defendant, under his bond, compensation for the diminished value of the flock.

Mr. Justice Denman, before whom the action was tried, gave judgment for the defendant, and against this judgment the plaintiff has appealed.

One ground on which the defendant relied in supporting the judgment was, that his obligation under the suretyship bond had expired before the deficiency arose, that is to say, that by the notice to quit and agreement made as to the surrender of the Bog Field, and the withdrawal of the notice, a new tenancy was created, to which the bond did not apply; and for this he relied on the case *of *Tayleur v. Wildin* (') as an authority that, under the circumstances, a new tenancy was created; and it was on the authority of *Tayleur v. Wildin* ('), that Mr. Justice Denman, as we understand, principally relied, but we are unable to agree with this view. In *Tayleur v. Wildin* ('), the tenant continued in the occupation of the farm after the day for which the notice to quit, which was withdrawn, had been effectually given, and the rent for which the surety was sued accrued in respect of the occupation after that day, and the court considered the continuance of the tenant's possession after that time as a new tenancy, and that the guarantee which applied only to the old tenancy was therefore gone. But in the present case, the tenancy of George Brunskill was, in fact, determined on or before the day when, if the notice to quit had not been withdrawn it would have ended. The deficiency and deterioration of the flock therefore occurred at the determination of the very tenancy to which the bond referred. It was, however, argued that the effect of giving

(') Law Rep., 8 Ex., 308.

up the Bog Field, must be a surrender of the old tenancy. But we are of opinion that this cannot be maintained, and that notwithstanding the surrender to a landlord of part of the land demised, the former tenancy of the remainder of the farm still continues.

It was contended by the defendant, that even if there was a continuance of the old tenancy the effect of the surrender of the Bog Field was to discharge him as surety from all liability. The Bog Field contained about seven acres, and the jury, in answer to a question left to them, at the trial, found that the new agreement with the tenant had not made any substantial or material difference in the relation between the parties, as regards the tenant's capacity to do the things mentioned in the condition of the bond, and for the breaches of which the action was brought. The plaintiff's contention was that this must be treated as a finding that the alteration was immaterial, and that, except in the case of an agreement to give time to the principal debtor, a surety was not discharged by an agreement between the principals made without his assent, unless it materially varied his liability or altered what was in express terms a condition of the contract.

In my opinion this contention on behalf of the plaintiff 505] cannot *be sustained. No doubt there is a distinction between the cases, which have turned on the creditor agreeing to give time to the principal debtor, and the other cases. Where a creditor does bind himself to give time to the principal debtor he, with an exception hereafter referred to, does deprive the surety of a right which he has, that is to say, of the right at once to pay off the debt which he has guaranteed, and to sue the principal debtor, and without inquiry whether the surety has, by being deprived of this right, in fact suffered any loss, the courts have held that he is discharged. The exception to which I have referred is, where the creditor on making the agreement with the principal debtor expressly reserves his right against the surety, but this reservation is held to preserve to the surety the right above referred to, of which he would be otherwise deprived. The cases as to discharge of a surety by an agreement made by the creditor, to give time to the principal debtor, are only an exemplification of the rule stated by Lord Loughborough in the case of *Rees v. Berrington* ('): "It is the clearest and most evident equity not to carry on any transaction without the knowledge of him [the surety], who must necessarily, have a concern in every transaction

(') 2 Ves. J., 540.

with the principal debtor. You cannot keep him bound and transact his affairs (for they are as much his as your own) without consulting him.”

The true rule in my opinion is, that if there is any agreement between the principals with reference to the contract guaranteed, the surety ought to be consulted, and that if he has not consented to the alteration, although in cases where it is without inquiry evident that the alteration is unsubstantial, or that it cannot be otherwise than beneficial to the surety, the surety may not be discharged; yet, that if it is not self-evident that the alteration is unsubstantial, or one which cannot be prejudicial to the surety, the court will not, in an action against the surety, go into an inquiry as to the effect of the alteration, or allow the question, whether the surety is discharged or not, to be determined by the finding of a jury as to the materiality of the alteration or on the question whether it is to the prejudice of the surety, but will hold that in such a case the surety himself must be the sole judge whether or not he will consent to remain liable notwithstanding *the alteration, and that if he has [506 not so consented he will be discharged. This is in accordance with what is stated to be the law by Amphlett, L.J., in the *Croydon Gas Company v. Dickenson* (*).

The plaintiff, in support of his contention, that having regard to the finding of the jury, the surety was not discharged, relied on various dicta to the effect that any material change in the contract between the principals will discharge the surety. Even if by these expressions the judges intended to state that to have the effect of releasing the surety the alteration must be material, it does not follow that they intended to lay down that no alteration would discharge the surety unless the jury, in an action to enforce his liability, held it to be material, or to express any opinion at variance with the rule laid down by me. The case of *Sanderson v. Aston* (†) was specially relied on by the plaintiff. But Martin, B., though he did not formally dissent from the decision of the majority of the court, was not satisfied with the judgment; and if the decision is to be considered as based on the reason given by Pollock, B., that the court was entitled to consider whether the alteration was material, it cannot, in our opinion, be sustained.

In the present case, although the Bog Field contained seven acres only, yet it cannot be said to be evident that the surrender of it could not prejudicially affect the surety. Some of the witnesses for the plaintiff admitted that it was

(*) 2 C. P. D., at p. 51; 19 Eng. R., 296. (†) Law Rep., 8 Ex., 73; 4 Eng. R., 452.

occasionally used for pasturing, that its loss would be appreciable in the spring, and that it might make a difference of fifteen in the number of the sheep which the farm would carry.

The case may also be considered in another point of view. The bond given by the defendant, the surety, was to guarantee the delivery up of the flock of sheep therein referred to at the determination of the tenancy of the Riggindale Farm, which in our opinion must mean Riggindale Farm as then demised to George Brunskill, and the bond certainly implied that he should continue to hold the farm as then demised till the flock was given up. The contention of the plaintiff, if it could be supported, would make a variation in this contract, as to the materiality of which there is at least a doubt, and would make the defendant liable for a deterioration of 507] the flock during the time when the tenant *held a smaller farm than that contemplated by the contract of the surety.

The plaintiff's counsel relied on some observations made by Lord Cottenham in the case of *Hollier v. Eyre* ⁽¹⁾. But, in fact, those observations are in favor of the defendant and not of the plaintiff. What Lord Cottenham says is, "the surety will be left to judge for himself between his original undertaking and another substituted for it, but that is not the case where the contract remains the same, though part of the subject-matter is withdrawn from its operation." In this case, as already pointed out, the original contract of the surety was that the flock should be delivered up in good condition, together with the farm, as then demised to the tenant.

No part of that which was guaranteed was ever withdrawn from the operation of the bond. But the plaintiff attempts to substitute for the contract that the flock should be given up in good condition, with the farm, as then demised, a contract that it should be delivered up in like condition with a farm of different extent. In my opinion the surety ought to have been asked to decide whether he would assent to the variation. He never did so assent, and in my opinion was discharged from liability, notwithstanding the finding of the jury, inasmuch as in my opinion the question was not one which ought to have been submitted to them.

Lord Justice Thesiger concurs in this judgment.

BRETT, L.J.: I speak with great deference when I say I cannot bring my mind altogether to agree with this judgment, and I feel bound to observe that I arrive at another view than that which has been expressed. As to the first part of

⁽¹⁾ 9 II. L. C., 57.

the judgment I entirely agree. I do not think there was any new tenancy, and I ground that view on the fact of the finding of the jury, amongst other things, that the alteration was immaterial. It is the latter part of this view with which I cannot agree. In the first place, this case comes before us fettered by certain rules. We are bound to observe that it is a direct appeal from the decision of my Brother Denman, after a trial by jury; we are, therefore, not at liberty to ask whether the question he left was left in proper form. [508 There cannot be a motion here for misdirection, and we are not at liberty to say that the finding of the jury was contrary to the evidence. It is a general rule that we have no right to look at the verdict, but accept it according to its ordinary construction. I find the question left to the jury was, whether the new agreement with the tenant, which we are told did not alter the tenancy, made a substantial or material difference in the relation between the parties as to the tenant's capacity to do the things mentioned in the bond, and for breach of which the action was brought. They not only found that, but my Brother Denman says that the matter is far more fit for the consideration of a jury of the county of Cumberland than for a lawyer, and he cannot say that he is dissatisfied with their view. Therefore there is the finding of the jury with the assent of the judge. If it were necessary to give an opinion, considering I have not an intimate knowledge of these things, but from what I know of Cumberland farmers, so far from dissenting from the opinion of the jury, I think it is a substantial finding. When one remembers how many views are taken as to farms in Cumberland, I should be inclined to agree with the jury and say it did not make any material difference. We are bound by that finding, and can act in conformity with it. Where there is a suretyship bond, and there are some alterations in the contract or relation of the parties under the bond as to guaranteeing its performance, the question is whether the alteration is not material or substantial, and whether the surety is released. I cannot bring my mind to think he is, for the law takes no notice of alterations that are neither material nor specific. The proposition of law as to suretyship to which I assent is this, if there is a material alteration of the relation in a contract, the observance of which is necessary, and if a man makes himself surety by an instrument reciting the principal relation or contract, in such specific terms as to make the observance of specific terms the condition of his liability, then any alteration which happens is material; but where the surety makes himself responsible in general terms

for the observance of certain relations between parties in a certain contract between two parties, he is not released by an immaterial alteration in that relation or contract. My 509] opinion is in accordance with the finding of the *jury, and it will be most dangerous in this particular case to put ourselves in the place of a jury and because we think seven acres may make a difference, or £10 a year may make a difference, to set aside the finding of the jury, which is that neither one is material or substantial. I think the surety is not released. The doctrine of the release of suretyship is carried far enough, and to the verge of sense, and I shall not be one to carry it any further. *Judgment affirmed.*

Solicitors for plaintiff: *Johnston & Harrison*, for Harrison & Little, Penrith.

Solicitor for defendant: *Arnison*, Penrith.

See Brandt on Suretyship, §§ 339, 345-7; 25 Eng. Rep., 441 note.

Where plaintiff agreed that he would keep twenty cows during the season for the dairying business, and sell the butter made from said dairy of cows to defendant to be delivered at a time and place specified, at a price per pound named, and defendant agreed to pay for the butter to be delivered, and plaintiff at the commencement of the dairy season put twenty cows on his farm from which butter was made until the end of the season, which was about the middle of November, except that three of the cows about the 1st of September, and two of them about the middle of October, ceasing to yield more than about a quart of milk each per day and to be of much value for dairy purposes, were respectively sold at those dates: Held, that plaintiff could not sustain an action on the contract. By the contract plaintiff was required to keep during the season twenty milch cows, and when any of those provided ceased to yield milk, it was his duty to procure others within a reasonable time: *Oakley v. Morton*, 11 N. Y., 25; *King Philip, etc., v. State*, 12 R. I., 82; *Jenkins v. Wheeler*, 2 Abb. App. Cas., 442, 444; S. C. more fully, 3 Keyes, 645, 654, 4 Trans. App., 450, 459, affirming 4 Rob., 573; *Baldwin v. New York, etc.*, 3 Bosw., 530, 545.

In a similar case a surety for performance of such a contract was held

not to be liable: *Whitcher v. Hall*, 5 Barn. & Cress., 269, 11 Eng. C. L.

Unless the conditions of a guaranty are strictly complied with by the party to whom the guaranty is given, the guarantor will not be bound.

See 17 Eng. Rep., 185 note.

New York: *Leeds v. Dunn*, 10 N. Y., 469; *Grant v. Smith*, 46 id., 93; *Dobbin v. Bradley*, 17 Wend., 422; *Birckhead v. Brown*, 5 Hill, 640; *Barnes v. Barrow*, 61 N. Y., 39.

Where a guaranty is given to pay for different kinds of goods to be sold on a credit of six months, and the goods are sold, one kind on a credit of six and the other on a credit of four months, the guarantor is not holden for any part of such sale, even though the seller wait six months before demanding payment.

How far a bill of the goods is conclusive on the vendor, considered: *Leeds v. Dunn*, 10 N. Y., 469; *Henderson v. Marvin*, 81 Barb., 297, 11 Abb. Pr., 142.

So, though the purchases are *averaged*: *Stewart v. Ranney*, 26 How. Pr., 279, reversing 23 How. Pr., 205.

Defendant guarantied that B. & S. should receive and pay for a steam engine and two boilers of a given capacity and power, particularly described, at an agreed price. By an agreement of the principals, without the assent of the surety, an engine with three boilers and of a greater capacity and power, at an additional

price, was substituted. Held, that the change in the contract was a material one, imposing entirely new obligations upon the contracting parties and discharged the surety from any liability: *Grant v. Smith*, 46 N. Y., 93.

So where defendant guaranteed payment of the purchase price of a cargo of nuts, and the vendor and vendee, without his consent, changed the contract so as not to require the vendee to take the deck load. Held, defendant was discharged: *Eneas v. Hoops*, 42 N. Y. Super. Ct. R., 517.

The sureties upon a bond, wherein the principals have obligated themselves to the United States to open a ship canal three hundred feet in width and twenty feet in depth, and keep it open the same width and depth for four and a half years from the time of the acceptance of the work by the Secretary of War, are discharged from all liability on the same, if the principals do not perform their agreement for opening the channel according to its terms, and the government accepts the work with a channel only eighteen feet in depth instead of twenty, as required by the contract: *United States v. Corwine*, 1 Bond, 339.

Where the bond by a surety purported to guarantee the payment of flour to be supplied by the obligee (of a specified quality) in order to enable the principal debtor to execute a contract, and the obligee designedly supplied inferior flour so that the contract was annulled, the obligor is entitled to have the bond cancelled: *Blest v. Brown*, 3 Giff., 450.

A party who has engaged to guarantee the payment of the paper of another, made payable at a particular bank, is not liable upon a note drawn by such party, although it be deposited for collection in the bank specified in the guaranty previous to its maturity, and notice thereof given to the guarantor: *Dobbin v. Bradley*, 17 Wend., 422.

Surety by promissory note for a floating balance due to bankers from a customer, is not liable if the bankers credit the customer with the full amount of the note without advancing the money at the time: *Archer v. Hudson*, 7 Beav., 551.

Where a party agrees to be bound for \$1,500 expected to be advanced to

the principal for business purposes and the chief portion of the residue was adjusted by discharging an old debt to the party making the advance, and but \$1,000 was actually so advanced, and no notice of this was given to the surety, he is not liable: *McWilliams v. Mason*, 6 Duer, 270; *Blest v. Brown*, 3 Giff., 450 (see 25 Eng. R., 443 note); *Shine v. Central*, etc., 70 Mo., 524; *Watriss v. Pierce*, 32 N. H., 560; *Ham v. Greve*, 34 Ind., 19.

Yet where the agreement of the lender to make such an advance upon the guaranty is first made, and the guaranty having been afterward obtained, the lender faithfully performs his agreement, the surety or guarantor is not absolved from liability because the principal debtor, unknown to the lender, induced him to become bound by a concealment or misrepresentation as to the nature of the agreement (25 Eng. Rep., 442 note): *McWilliams v. Mason*, 1 Rob., 576, 2 Abb. Pr. (N.S.), 211, affirmed 31 N. Y., distinguishing *S. C.*, 6 Duer, 276.

See also *Western*, etc., v. *Clinton*, 66 N. Y., 326; *Magee v. Manhattan*, etc., 92 U. S. R., 93; *Cunningham v. Buchanan*, 10 Grant's (U.C.) Chy., 523.

The question of benefit or prejudice to the surety is not the test of his responsibility. If the terms on which he engages are not fully observed; if any practice or deceit has taken place which makes the contract between the debtor and creditor different from that assented to; or if, without deceit, a material change has been made, and this is not communicated to and assented to by the surety, he is discharged.

See 17 Eng. Rep., 184 note.

Canada, Upper: *Titus v. Durkee*, 12 U. C. Com. Pl., 367; *O'Neil v. Carter*, 9 U. C. Q. B., 470; *Grieve v. Smith*, 23 id., 23.

English: *Bowmaker v. Moore*, 7 Price, 223.

Maine: *Andrews v. Marrett*, 58 Maine, 539; *Thomas v. Stetson*, 59 id., 229.

Massachusetts: *Brigham v. Wentworth*, 11 Cush., 123.

Missouri: *Farrar v. Kramer*, 5 Mo. App. R., 167.

New York: *Grant v. Smith*, 46 N. Y., 93; *Coleman v. Wade*, 6 id., 44; *Fellows v. Prentiss*, 3 Den., 512; *Cole-*

1878

Holme v. Brunskill.

mard v. Lamb, 15 Wend., 381; Henderson v. Marvin, 31 Barb., 297; Eneas v. Hoops, 42 N. Y. Super. Ct. R., 517; McWilliams v. Mason, 6 Duer, 276; Wilson v. Roberts, 5 Bosw., 100; Saily v. Elmore, 2 Paige, 497.

United States, Circuit and District: U. S. v. Corwine, 1 Bond, 339.

Virginia: Shannon v. McMullin, 25 Gratt., 211.

A valid agreement reducing the interest on a bond and mortgage from seven per cent. to six per cent., will discharge the sureties on the bond because it alters the contract. A mere acceptance of six per cent. instead of seven per cent. is not such a change of the contract as will release the sureties, although the holder of the mortgage expressly says that the rate will thereafter be only six per cent.: The Bank for Savings v. Webster, 1 N. Y. Monthly Law Bull., 70.

If the Croton water pipes, which are arranged for an entire building rented in tenements, and which supply water to the part occupied by the tenant, get out of repair, the landlord of the whole building is the one to repair them, and not a tenant who merely occupies a particular part of the building, for a tenant is not bound to make permanent repairs that relate to the whole structure when he merely occupies part of it. The act of the landlord, who occupied the lower part of a building, in shutting off the water from the upper part, because the Croton water pipes were out of order, and the tenant who occupied such upper part refused to repair them, held to amount, under the circumstances, to an eviction sufficient to justify the tenant in abandoning the premises, and in that way relieving himself and surety from the payment of rent: West Side Sav. Bank v. Newton, 57 How., 152, 76 N. Y., 616, reversing 8 Daly, 332.

Premises were leased in writing, possession to be given on a day named. It was stipulated at the expiration of the term the lessee should deliver up the premises in as good condition as when received, wear and tear and accidents excepted. Contemporaneously with the lease it was agreed between the lessor and lessee that the building should be changed and remodeled by the lessor at an expense of \$1,500, possession to be given upon the completion of the improvements: Held that, in the

absence of proof of knowledge of this contemporaneous agreement, the guarantor in the lease was released: Farrar v. Kramer, 5 Mo. App. R., 167.

Where, on divorce, the husband was adjudged to pay the wife, for the support of their children, a certain annual sum in quarterly instalments, on specified days, and he gave a bond with surety for such payment. Afterwards, on the wife's petition, and without the consent of the husband or his surety, the judgment was modified so as to require payment of a larger sum, in quarterly instalments, on different days from those previously named. Held, that the surety was discharged, notwithstanding the surety entered into the bond with knowledge that the court had power to alter the judgment for alimony.

It seems, that if the last judgment had been merely that the husband pay a sum additional to that first allowed, leaving the original sum undisturbed, the surety would have remained liable: Sage v. Strong, 40 Wisc., 576.

Defendant, as surety, entered into a bond that his principal should insure and keep insured certain buildings on lands mortgaged by him to plaintiff. Afterwards the position of the buildings was altered by the mortgagee in possession, the outbuildings being brought nearer to the house, and the risk thus increased: Held, that defendant was thereby discharged: Grieve v. Smith, 23 U. C. Q. B., 23.

Where defendant became surety to the plaintiff for the rent of a certain piano hired to one H., and for its return on request, and plaintiff afterwards sold the piano to H., taking in security a bill of exchange on England, with the understanding that if the bill should be dishonored the sale should be void: Held, that by such agreement defendant was discharged from his guarantee: O'Neil v. Carter, 9 U. C. Q. B., 470.

Where a surety agreed a purchaser should make certain payments on the purchase price of certain mills, the grantee being required to keep the mills insured in the sum of \$4,000 and assign the policy to the grantor, and the grantor agreed to and did waive the insurance: Held, the surety was discharged: Titus v. Durkee, 12 U. C. Com. Pl., 367.

C. applied to the plaintiff to be supplied with gas light and meter on the premises occupied as the Gramercy Park House, and agreed to pay for the same on the usual terms; E. signing the application as surety. Subsequently C. ceased to be the occupant of the premises and W. became his successor. Held that E. by signing the application undertook to pay for gas and meter supplied to C. at the Gramercy Park House if C. did not pay; but that he was not liable for gas furnished to W. after he became the landlord.

Held, also, that E. could not be made liable to pay for gas furnished to W. on account of C.'s neglect to give notice to the plaintiff of the change of proprietorship of the hotel: *Manhattan Gas Light Co. v. Ely*, 39 Barb., 174, 25 How. Pr., 237.

So a guarantee for payment of sales to partners, if one retire and a sale be made to those remaining: *Chancellor, etc., v. Baldwin*, 5 M. & W., 580; *Cramer v. Higginson*, 1 Mason, 323, 337; *Penoyer v. Watson*, 16 Johns., 100; *Connecticut, etc., v. Bowler*, 1 Holmes (U.S.), 263.

See *Power v. Alger*, 13 Abb. Pr., 284, 475; *Greer v. Bush*, 57 Miss., 575, 585 and cases cited.

So in case of a guaranty to an individual, the guarantor is not liable to a firm, of which such individual is a member, which supplies the goods: *Barnes v. Barrow*, 61 N. Y., 39.

A person became surety for another for the due discharge of his duty as agent in the purchase of wheat for a mercantile firm. Afterwards the agent and his principals entered into an agreement for partnership, and during the continuance thereof he became indebted to his copartners in the sum of \$750, and the surety having been called upon, executed a confession of judgment for the amount of his principals' indebtedness, in ignorance, as he alleged, of the fact that the agency had ceased and a partnership been formed.

Upon a bill filed to enforce the judgment against the surety, the court, under the circumstances, directed a reference to ascertain what, if any, portion of the debt for which the assignment was given, arose in respect of dealings during the agency, reserving further directions and costs; or if the plaintiffs

should decline this reference, then that the bill should be dismissed with costs: *Gooderham v. Bank, etc.*, 9 Grant's Chy., 39.

To an action upon a bond given by the defendant to the plaintiffs as security that F., whom the plaintiffs had appointed their agent to sell sewing machines, should account for and pay over to them the proceeds of all sales, it is no defence that F. had partners and others interested with him in selling the machines.

The fact that F. had partners will not affect his personal liability (or that of the surety) for machines personally ordered by him; where it appears that the plaintiffs, although they knew that F. had partners, never recognized the latter as their agents, or delivered machines to any one but F., or upon his order; and his written power of attorney was never revoked or discharged: *Palmer v. Bagg*, 64 Barb., 641.

Though where one was surety for two trustees as guardians, and one died, it was held that the trust survived, and that the surety was responsible for the acts of the surviving guardian: *People v. Byron*, 8 Johns. Cas., 53.

Though where one of two guardians has been discharged by the orphan's court, and the other afterwards becomes insolvent, and the surety for both pays the money due by the latter to his ward, the surety cannot demand the amount paid from the discharged guardian: *Hocker v. Baskins*, 1 Pearson (Penn.), 187.

Where sureties guaranteed the payment of advances on drafts at sixty days, they are not liable upon drafts at ninety days: *Birckhead v. Brown*, 5 Hill, 640, 2 Den., 375.

Where a party had purchased real estate and executed a bond to make certain improvements thereon, and afterwards his grantor, the obligee in the bond, advised him not to make the improvements because he never could pay for the property; held, that the grantor was estopped to maintain an action against the sureties on the bond: *Davis v. Williams*, 49 Iowa, 83.

Where the contract guaranteed by the sureties provides for alterations by the principal parties to the contract, the surety is not discharged by alterations

1878

Holme v. Brunskill

made pursuant to the terms of the contract : Board, etc., v. Burr, 2 Sweeny, 25.

An order of the directors of a company, not warranted by the act of incorporation or the by-laws, will not relieve the surety of an officer of the company from his liability on a bond given to the company conditioned, among other things, that the officer should keep and obey the by-laws; neither would an order or direction of the directors with respect to the funds of the company, unless within the legitimate authority of the board, be any justification to the treasurer for committing a breach of his bond with reference to the disposition of the funds, by acting in direct violation of the by-laws, or relieve his surety from liability : Spring Hill, etc., v. Sharp, 3 Pugsley (N.B.), 603.

Where defendant indorsed the notes sued on, on the understanding and agreement with the plaintiffs, by whom they were to be discounted, that the proceeds should be applied in the purchase of pork, on which plaintiffs were to take and hold security for the payment of the notes; plaintiffs had such security on pork, which was of greater value than the amount of the notes; plaintiffs through their negligence lost such security, the makers either having been allowed to sell the pork and receive the proceeds, or such proceeds having been received by the plaintiffs and applied to other liabilities of the makers. Held, that defendant was discharged. As between the parties it was held unnecessary to discuss the right of the makers to give valid warehouse receipts for such pork to plaintiffs, there being enough shown to create a valid pledge of the pork for the special purpose of the agreement, and to provide a fund to which defendant looked for protection.

The alleged impracticability of the bank attending to the sale and disposition of such property in their ordinary course of business was held immaterial, there being an express agreement as above stated: Molson's Bank v. Girdlestone, 44 U. C. Q. B., 54.

Where the creditor included in his security premiums for three years insurance on certain property mortgaged, but did not keep up the insurance, he was held liable, in case of loss, to the

debtor for such insurance : Soule v. Union Bank, 30 How. Pr., 105.

Where the surety had secured himself by a chattel mortgage, and the debtor and creditor agreed, with the assent of the surety, that the debtor should market the property mortgaged, pay over the proceeds to the creditor, and the debtor sold property mortgaged for sufficient to pay the debt, it was held that by the transaction the debtor became the creditor's agent, and the surety was released : Chanter v. Rear-don, 32 Mich., 162.

So where the creditor sold property belonging to the debtor, under an agreement that the proceeds should be applied on the debt; held, on receipt by the creditor of sufficient proceeds to pay the debt the creditor could not otherwise apply them, and the surety was released : Mellendy v. Austin, 69 Ills., 15.

Where one surety received from the principal debtor an indemnifying chattel mortgage, a co-surety has no right of action against such mortgagee for failing to cause the mortgage to be recorded, if it were taken upon an agreement that it should not be placed upon record : White v. Carleton, 52 Ind., 371.

A promissory note made by Huber and Austin to the order of, and indorsed and transferred by, one Rutherford to defendant, was sold by the latter to the plaintiff for a valuable consideration, the defendant at the time guarantying the *payment* thereof. The note was not protested for non-payment, nor was any notice thereof given to the indorser. The makers of the note were insolvent, but the indorser was good. Held, that the fact that the indorser was discharged by the failure of the plaintiff to notify him did not relieve defendant from his liability on the guaranty. The principle that the surrender by a creditor to the principal debtor of collateral security, held by the former, releases a surety for the same debt, has no application to such a case : Deckes v. Works, 18 Hun, 266.

A sale by a creditor of collateral securities placed in his hands by the principal debtor, in violation of a stipulation for a particular notice of sale contained in the contract under which they were pledged, does not *per se* dis-

Ex parte Bradlaugh.

1878

charge a surety, *in toto*, who is liable for the debt, but by such sale the creditor makes the securities his own, to the extent of discharging the surety of an amount equal to their value: *Vose v. Florida, etc.*, 50 N. Y., 369.

The non-performance by a landlord, within the time specified, of an independent agreement indorsed upon the lease to make certain improvements in the demised premises, does not discharge the whole contract, so as to relieve the tenant from liability for rent, and release the surety.

In such cases, it seems that the tenant may sue for damages, or make the improvements and deduct the expense from the accruing rent.

An agreement on the part of a creditor to accept, from the principal debtor, a sum less than the stipulated amount, without any other change in the agreement between them, will not discharge a surety for the debt: *Ellis v. McCormick*, 1 Hilt. R., 313.

A surety is not discharged by a contract between his principal and their common obligee, which does not place him in a different position from that which he occupied before the contract was made: *Roach v. Summers*, 20 Wallace, 165.

The lease contained a clause that the lessees would not assign it, or let or underlet the premises without the consent of the lessor. The latter, subse-

quent to the execution of the lease and taking possession thereunder by the lessor, agreed with the lessee to rent the premises for them at their risk, crediting to them any receipts for rent, with a condition that the agreement should not impair or alter the relations of the parties, the covenants of the lease, or the security for the rent:

Held, that the agreement did not operate to discharge the sureties, although they had no knowledge or notice of it; that the agreement, without the condition, was no more in effect than a consent that the lessees might underlet; and that under the condition, the rights of the sureties, and consequently their liability, were in no wise affected.

A new agreement between a creditor and his principal debtor will not discharge their sureties when, by the new agreement, the remedies of the creditor against the sureties are expressly and clearly reserved: *Morgan v. Smith*, 70 N. Y., 537.

An attachment bond given under the statutes of Rhode Island (Chap. 196, § 20), is vacated by the death of the defendant before final judgment against him in the action in which the bond is given, though the suit be continued against his personal representative, and judgment recovered against the latter: *Upham v. Dodge*, 11 R. I., 621.

[3 Queen's Bench Division, 509.]

June 6, 1878.

Ex parte BRADLAUGH.

Obscene Book, Order for Destruction of—20 & 21 Vict. c. 83, s. 1—*Absence of Jurisdiction*—*Certiorari taken away*—2 & 3 Vict. c. 71, s. 49—*Metropolitan Police Courts*.

A section in an act of Parliament taking away the *certiorari* held not to apply in the case of a total absence of jurisdiction.

An order by a magistrate for the destruction of obscene books under 20 & 21 Vict. c. 83, s. 1, is bad if it merely states that the magistrate was satisfied that the books were obscene, but not that he was satisfied that the publication of them would be a misdemeanor, and proper to be prosecuted as such.

IN this case the applicant in person had obtained a rule *nisi* for a *certiorari* to bring up an order of a metropolitan magistrate, under 20 & 21 Vict. c. 83, for the destruction of

1878

Ex parte Bradlaugh.

certain books of which the applicant claimed to be the owner, as obscene publications, on the ground that the order did not show any jurisdiction on the face of it, because it did not state that the magistrate was satisfied that the publication of the books would be a misdemeanor, and proper to be prosecuted as such.

The order was in substance as follows: It recited that complaint had been made by John Green to Mr. Flowers, one of the metropolitan police magistrates, sitting at Bow Street, within the metropolitan police district, that he had reason to believe that certain obscene books were kept by Edward Truelove, at his shop, No. 256 Holborn, in the 510] county of Middlesex, within the metropolitan *police district, for the purpose of sale or of being otherwise published for the purposes of gain; that the magistrate being satisfied that the belief of the said John Green was well founded, and that the publication of the books was a misdemeanor, proper to be prosecuted as such, thereon issued his warrant pursuant to 20 & 21 Vict. c. 83, for the seizure of the books under that statute: that certain books being copies of a work called the Fruits of Philosophy, kept for the purpose of sale, or of being otherwise published for the purpose of gain, had been seized and brought before Sir J. T. Ingham, one of the metropolitan police magistrates, sitting at Bow Street; that he had issued a summons to the said Edward Truelove, as occupier of the said shop, to appear and show cause why the books should not be destroyed, and that the applicant appeared before Mr. Vaughan at the hearing, and claimed to be the owner of the books. The order then proceeded to state that the magistrate having examined the said books and duly considered the premises, and being satisfied that the said books so seized were obscene, did order their destruction (¹).

(¹) 2 & 3 Vict. c. 71 (an Act for Regulating the Police Courts in the Metropolis), s. 49, enacts that no information, conviction, or other proceeding before or by any of the said magistrates, shall be quashed or set aside, or adjudged void or insufficient for want of form, or be removed by *certiorari* into Her Majesty's Court of Queen's Bench.

20 & 21 Vict. c. 83, s. 1, provides that "it shall be lawful for any metropolitan police magistrate, or other stipendiary magistrate, or for any two justices of the peace, upon complaint made before him or them, on oath, that the complainant has reason to believe,

and does believe, that any obscene books, &c., are kept in any house, shop, &c., within the limits of the jurisdiction of any such magistrate or justices for the purpose of sale or distribution, &c., or being otherwise published for the purposes of gain, &c., &c., and upon such magistrate or justices being also satisfied that any of such articles so kept for any of the purposes aforesaid are of such a character and description that the publication of them would be misdemeanor, and proper to be prosecuted as such," to issue a warrant to search such house, shop, &c., and seize all such books, &c., as aforesaid, found

**Besley* and *Tickell* showed cause: The *certiorari* [51] is taken away by the act regulating the police courts in the metropolis, 2 & 3 Vict. c. 71, s. 49.

By 12 & 13 Vict. c. 45, s. 7, the order may be amended by the court on the return to the *certiorari*, if sufficient grounds were in evidence before the magistrate upon which it might have been correctly drawn up in the first instance. The defect in the order is pure matter of form. The magistrate finds that the books were obscene, and obviously it was meant by implication that they were the species of obscene books that were the proper subject of a prosecution for misdemeanor. Every reasonable intendment is to be made in favor of an order of justices: *Rex v. Clayton* (').

It is not unreasonable to construe this order as stating inferentially that the magistrate was satisfied of the existence of the requisites of jurisdiction. It states that the magistrate who issued the warrant of search was satisfied that the books were obscene, and the fit subject of a prosecution for misdemeanor, and upon such books being produced before the magistrate who makes the order, he finds that they are obscene, and orders their destruction. By reasonable intendment that must mean that he acts upon a similar opinion to that of the first magistrate. His finding must be coupled with the previous recital.

The applicant, who appeared in person, was not called upon to support the rule.

COCKBURN, C.J.: The act of Parliament makes the magistrate's jurisdiction dependent upon two conditions, first, that the publication must be obscene, and secondly, that it must in the magistrate's judgment be such as is a misdemeanor and proper to be prosecuted as such. It is not enough that it should be obscene. If the Legislature

in any such house, shop, &c., and to carry all the articles so seized before the magistrate or justices issuing the warrant, or some other magistrate or justices exercising the same jurisdiction. The section goes on to provide that such magistrate or justices shall thereupon issue a summons calling upon the occupier of the house, shop, &c., to appear within seven days to show cause why the articles seized should not be destroyed; "and if such occupier, or some other person claiming to be the owner of the said articles, shall not appear within the time aforesaid, or shall appear, and the magis-

trate or justices shall be satisfied that such articles, or any of them, are of the character stated in the warrant, and that such or any of them have been kept for any of the purposes aforesaid, it shall be lawful for the said magistrate or justices, and he or they are hereby required to order the articles so seized, except such of them as he or they may consider necessary to be preserved as evidence in some further proceeding, to be destroyed at the expiration of the time hereinafter allowed for lodging an appeal, unless notice of appeal as hereinafter mentioned be given."

(') 8 East, 57.

had intended that it should be subject to destruction merely 512] *on the ground of its being obscene, there would have been no meaning in inserting the additional provision as to its being a proper subject for prosecution as a misdemeanor. The insertion of the provision shows that the intention was that the enactment should not take effect when the additional element of fitness for prosecution was wanting. The order now before us is defective in that it omits an essential element of jurisdiction, viz., the statement that the magistrate was of opinion that these books were the proper subject of a prosecution for misdemeanor. The procedure prescribed by the section is as follows. If a complaint is made stating that the complainant believes that an obscene publication is kept for the purposes of sale, and the magistrate is satisfied that such publication amounts to a misdemeanor proper to be prosecuted, then, and then only, he is to issue a warrant for the seizure of such publication.

When the seizure has taken place a summons is to be issued to the party who occupies the premises where the publication has been seized, in order that he may show cause against its destruction. When the matter comes before the magistrate upon the summons he must also be satisfied, on the production before him of the publication, that it is of the character described in the warrant; that is to say, not only that it is obscene, but also that it amounts to a misdemeanor proper to be prosecuted. It is, therefore, essential to his jurisdiction that he should be so satisfied. Here the magistrate who issued the warrant is stated to have been satisfied that the books were not only obscene, but that they also formed the proper subject of a prosecution for misdemeanor, and therefore the warrant is correct in point of form; but when we come to the order for their destruction, that omits to state that they were the proper subject of a prosecution for misdemeanor, but finds merely that they were obscene. The order, therefore, does not state the existence of matter that is essential to the jurisdiction. It was contended that the *certiorari* is taken away by 2 & 3 Vict. c. 71, s. 49. I entertain very serious doubts whether that provision does not apply only to matters in respect of which jurisdiction is given by that statute, and not to matters in which jurisdiction is given by subsequent statutes; but it is not necessary to deal with that point. This is an objection founded upon an absence of jurisdiction 513] *appearing on the face of the order; and I am clearly of opinion that the section does not apply when the application for the *certiorari* is on the ground that the in-

ferior tribunal has exceeded the limits of its jurisdiction. It may possibly be that when this order is brought before us on *certiorari*, the 7th section of 12 & 13 Vict. c. 45, may enable us, if satisfied that the necessary ingredients of jurisdiction existed, to cure the defect; but it is unnecessary to pronounce any opinion upon that now. At present the only question is whether the writ is to issue. I am of opinion, for the reasons I have stated, that the rule should be absolute for a *certiorari*.

MELLOR, J.: I am of the same opinion. It is well established that the provision taking away the *certiorari* does not apply where there was an absence of jurisdiction. The consequence of holding otherwise would be that a metropolitan magistrate could make any order he pleased without question. The act provides that if a magistrate is satisfied that the book is obscene and the fit subject of a prosecution for misdemeanor he may issue a warrant for its seizure, but that is only preliminary to the order for its destruction; and in order that it may be legally destroyed the magistrate before whom it is produced, before ordering its destruction, must, upon its production before him, form an entirely distinct and independent judgment that it is not only obscene, but the proper subject of a prosecution for misdemeanor. He is not to take it for granted that such is the case on the strength of the judgment of the magistrate who issued the warrant. The order omits to state that the magistrate who made it was satisfied that the books ordered to be destroyed were the proper subject of a prosecution, and therefore the order on the face of it shows an absence of jurisdiction.

Rule absolute.

Solicitors for complainant: *Collette & Collette.*

As to an officer taking and detaining gambling instruments, and other articles to be used as evidence, see *Willis v. Warren*, 17 How. Pr., 100, 1 Hilton, 590; *Spaulding v. Preston*, 21 Verm., 9, 1 Law Reporter (N.S.), 453; *Bolles v. State*, 3 W. Va., 685, 687; *Houghton v. Bachman*, 47 Barb., 388; *Com. v. Gaming Implements*, 119 Mass., 332; *Closson v. Morrison*, 47 N. H., 482; *Ridgeway v. West*, 60 Ind., 371; *Weller v. Ely*, 45 Conn., 547; *Whart. Crim. Pl. and Pr.* (8th ed.), § 25.

As to destruction of liquors: *Bishop's Stat. Crimes*, §§ 988-996, 1056.

As to destroying gambling instruments: *Laws N. Y.*, 1851, chap. 504,

p. 943; as amended 1855, p. 823, 4 Edm. Stat., 40.

Where the magistrate is authorized to destroy gambling instruments without any notice to and hearing of the owner, the act is unconstitutional: *Lowry v. Rainwater*, 70 Mo., 152, 21 Alb. L. J., 72; *Fisher v. McGier*, 1 Gray, 1; *Hibbard v. People*, 4 Mich., 125; *Lincoln v. Smith*, 27 Verm., 355; *Wynehamer v. People*, 13 N. Y., 378.

An officer and his posse, under a search warrant, issued under the Revised Statutes of Massachusetts, ch. 50, § 19, seized a number of game cocks, and afterwards, by command of the justice before whom they were brought,

1878

Horne v. Ronquette.

destroyed the same: Held, 1. That the game cocks were not implements of gaming within the meaning of the statute; consequently the search warrant did not justify their seizure: 2. Nor were they apparatus or implements, used or to be used, in gaming under the Revised Statutes, ch. 142, § 5, and the order of the magistrate did not justify their destruction: 3. The search warrant was evidence that the officer and his posse were lawfully present at the time of the seizure, and only those of the party were liable for the seizure who were proved to have been actually engaged: 4. The criterion of the value of the fowls was not what they would bring as poultry

in a provision market, but what they were actually worth to the plaintiff: 5. Where the motives of the defendants were commendable, only the actual damages were to be given: Coolidge v. Choate, 7 Law Reporter, 412, Common Pleas, affirmed 11 Metc., 79, 9 Law Reporter, 205.

The measure of damages, in an action of trespass for taking and carrying away and destroying game cocks, is their actual value to the plaintiff as articles of merchandise or sale, whether the market for them is in this state or elsewhere: Coolidge v. Choate, 9 Law Reporter, 205, 11 Metc., 79, affirming 7 Law Reporter, 412.

[3 Queen's Bench Division, 514.]

July 2, 1878.

[IN THE COURT OF APPEAL.]

514]

*HORNE V. ROUQUETTE.

Bill of Exchange—Indorser and Indorsee—Indorsement Abroad—Notice of Dishonor by Non-acceptance.

A bill of exchange drawn in England and payable in Spain, was indorsed in England by the defendant to the plaintiff, who indorsed it to M., residing in Spain. Acceptance having been refused, a delay of twelve days occurred before M. wrote to inform the plaintiff of the dishonor. On receipt from M. of the notice of dishonor, the plaintiff gave immediate notice to the defendant. No notice of dishonor by non-acceptance is required by the law of Spain:

Held, that the plaintiff was entitled to recover the amount of the bill.

APPEAL of the defendant from the judgment in favor of the plaintiff by Lord Coleridge, C.J., at the trial without a jury.

The facts are sufficiently stated in the judgments of Brett and Cotton, L.JJ.

Feb. 1, 2. *Benjamin, Q.C., Murphy, Q.C. (Edwyn Jones with them)*, for the defendant: The right to sue in this case depends upon the law of England and not of Spain; and therefore the action is not maintainable against the defendant who had no sufficient notice of dishonor by non-acceptance. An indorser is liable according to the law of the country where he contracts: *Mellish v. Simeon* (1); *Allen v. Kemble* (2); *Gibbs v. Fremont* (3). The plaintiff's counsel

(1) 2 H. Bla., 378.

(2) 6 Moo. P. C., 314.

(3) 9 Ex., 25.

may rely upon *Rothschild v. Currie* ('); but the decision in that case has been doubted, *Hirschfeld v. Smith* ('), and it does not appear to be approved of in Story on Bills, s. 366, and *Aymar v. Sheldon* ('), which bears a strong resemblance in its facts to the present case, is a strong authority to show that as between indorser and indorsee *lex loci contractus* must prevail. *Bradlaugh v. De Rin* (') is another illustration of the same principle.

J. Brown, Q.C. (H. Cowie with him), for the plaintiff: The indorsement to Monforte must be considered as having been made *in Spain, *Buckley v. Hann* ('); *Chapman v. Cottrell* ('); *Dunlop v. Higgins* ('); *Harris's Case* ('); and therefore no notice of dishonor by non-acceptance was needed. It is the law of the country where the bill is to be paid which determines the rights of the parties to it: Story's Conflict of Laws, ch. 8, ss. 307 a. b. c.; *In re State Fire Insurance Co.* ('); *Suse v. Pompe* ('); *Pecks v. Mayo* ('). Although the decision in *Rothschild v. Currie* (') may have been questioned, yet it was recognized as good law in *Rouquette v. Overmann* ('), which may be considered as overruling *Mellish v. Simeon* ('). The defendants have relied upon *Bradlaugh v. De Rin* ('); but that case is not in point.

Murphy, Q.C., replied.

Cur. adv. vult.

July 2. The following judgments were delivered:

BRETT, L.J.: In this case the plaintiff, as the indorsee, sued the defendant, as indorser. The facts which it becomes material to consider are, that the bill was drawn on the 19th of March, 1874, at Newcastle, by Bryant, Foster & Co., on Chasserot, in Spain, in favor of the defendant, trading in Spain as Rouquette & Co., the bill being made payable in Spain three months after date. This bill was said to be purchased by the plaintiff in London from the defendant who indorsed it in London to the plaintiff. The plaintiff having written his name on the back of the bill, forwarded it to Monforte, in Spain, who there placed it to account under circumstances which, without referring further to

(1) 1 Q. B., 43.

(2) Law Rep., 1 C. P., 340.

(3) 12 Wend. R., 439.

(4) Law Rep., 5 C. P., 478.

(5) 5 Ex., 43.

(6) 34 L. J. (Ex.), 186.

(7) 1 H. L. C., 381.

(8) Law Rep., 7 Ch., 587; 3 Eng. R.,

(9) 32 L. J. (Ch.), 300.

(10) 8 C. B. (N.S.), 538; 30 L. J. (C.P.), 75.

(11) 14 Vermont (Rep.), 33.

(12) Law Rep., 10 Q. B., 525, at p. 542; 14 Eng. R., 330.

(13) 2 H. Bla., 378.

1878

Horne v. Rouquette.

them, I hold made the transaction between the plaintiff and Monforte, an indorsement of the bill by the plaintiff to Monforte, in Spain. Monforte indorsed the bill in Spain to Clavero, who indorsed it also in Spain to O'Connor & Sons. The bill was presented by the holders for acceptance in Spain on the 1st of May, 1874, and was dishonored. It was protested in Spain for such dishonor on the 2d of May. 516] Notice of the dishonor by *non-acceptance was sent by Monforte to the plaintiff in a letter written by him in Spain on the 13th of May, and received by them on the 26th of May, in London. No clear explanation was given in evidence of the delay in Spain from the 2d to the 13th of May. The plaintiff gave notice to the defendant on the 26th of May, so that there was no delay by the plaintiff. The defence was rested on the allegation of a want of notice in due time to the defendant of the dishonor by non-acceptance. It was found as a fact that by the law of Spain no notice of dishonor by non-acceptance need be given.

Upon these facts, if all the transactions on this bill had occurred in England the plaintiff could not have recovered, because of the delay of Monforte in forwarding notice to the plaintiff: but if all had occurred in Spain the plaintiff could have recovered, inasmuch as no notice of dishonor is required in Spain. The question is, what is the law here, where some of the transactions on a bill have occurred in England and some abroad. The bill in this case was what is called a foreign bill, because it was a bill drawn in England to be accepted and paid abroad. But this fact seems to be in this case immaterial; for the same question would have arisen in respect of the other facts if the bill had been an inland bill. The facts which raise the difficulty in this case, are the indorsement to Monforte in Spain, the law of Spain, and the delay of Monforte in giving notice of the dishonor, whilst the first indorsement, that of the defendant to the plaintiff, the indorsement sued on, was made in London, was therefore an English indorsement, and raised an entirely English relation of indorser and indorsee between the defendant and the plaintiff. In order to explain the grounds of my judgment it seems to me useful to consider what the law is, if every transaction on a bill occurs in England, and the reasons on which the law is founded; then we must apply those reasons to the present mixed case. If all the transactions on a bill occur in England, there may be one or more indorsements. If there be only one, and the indorsee presents the bill for acceptance, and it be refused, he gives notice to the drawer of dishonor by non-acceptance. He

must give such notice at once; that is to say, if he lives in the same town he must give it so that it is to be delivered on the same day, *or otherwise he must forward it [517 by a post of the following day, or the next practicable day. But there may be several indorsements and the bill be presented for acceptance by the last indorsee. In such case, if the acceptance be refused, the last indorsee, the holder, must give notice of dishonor, but he may give it either only to his immediate indorser, or only to the drawer, or to these and to all the intermediate indorsers. Whatever notice he gives he must give it at once, i.e., within the terms above described. And each indorser, as he receives notice, must, if he would preserve his remedy over, give notice to his indorser, or to all before him, within a similar period after he has himself received notice. If all give due notice, each can recover against his immediate indorser or against any indorser whose name is before his on the bill. But if any one fails to give due notice, no one whose name is before his on the bill is liable to pay him, and none of them are liable to pay each other. If those below him who have failed to give due notice have only given notice to him, or to each other in succession up to him, they cannot recover from any one above him: otherwise if they have given a direct notice to those above him. Now the reasons of this law are these: the primary contract on a bill is that between the drawer and acceptor if the drawee accept; the secondary contracts are those between the drawer and his indorsee and between the different indorsers and their indorsees. Each of those is a direct contract between the parties, and each such contract is governed by the common law. But by the law-merchant all those contracts can be transferred, that is to say, the acceptor's with the drawer, the drawer's with his indorsee, and so on, so that any subsequent indorsee may, under certain conditions, sue not only his own indorser but any prior indorser, or the drawer or the acceptor. What the contract is between a subsequent indorsee and any prior indorser other than his own immediate one, or between him and the drawer or the acceptor, whether it is the contract of such prior indorser, the drawer, or the acceptor transferred, or whether it is a new authorized contract between such indorsee and such prior indorser, or the drawer or acceptor, need not be determined in this case. Such a question may be material where the indorsement to a subsequent indorsee is made *abroad, and he sues a prior indorser, or the [518 drawer or acceptor, whose immediate contract was made in England. But in the present case the contract sued on is

one between an indorsee and his immediate indorser. It is necessary to examine what that contract is, and what are the consequences following from it. "The effect of indorsing [a bill] is a conditional contract on the part of the indorser to pay the immediate or any succeeding indorsee in case of the acceptor's or maker's default" (Byles on Bills, 11th ed., p. 3). "An indorser contracts that if the drawee shall not at maturity pay the bill, he, the indorser, will, on receiving due notice of the dishonor, pay the holder the sum which the drawee ought to have paid, together with such damages as the law prescribes or allows as an indemnity. He also contracts in the case of a bill payable at a future date, that if the drawee refuse to accept on presentment, he will in like manner pay" (p. 151). "Suppose the bill to have been accepted and indorsed for value. The acceptor is the principal debtor, and all the others parties are sureties for him, liable only on his default. But though all the other parties are in respect of the acceptor sureties only, they are not as between themselves merely co-sureties, but each prior party is a principal in respect of each subsequent party. For example, suppose a bill to have been accepted by the drawee and afterwards indorsed by the drawer and by two subsequent indorsers to the holder. As between the holder and the acceptor the acceptor is the principal debtor, and the drawer and indorsers are his sureties. But as between the holder and the drawer, the drawer is a principal debtor, and the subsequent indorsers are his sureties. As between the holder and the second indorser, the second indorser is the principal, and the subsequent, or third, indorser is his surety" (p. 243).

All the contracts raised upon the bill, it is seen, except those with the acceptor, are contracts of suretyship, that is to say, are contracts of indemnity. Probably from this, though perhaps from other more strictly mercantile circumstances, as for the purpose of making other preparations or modifications in business, notice of dishonor is by the law-merchant made a condition of the liability of the surety. The contracts of indorsement then between the immediate parties [519] to them are conditional, and are *by way of indemnity. It follows from this last that there can be no valid claim in respect of the indorsement where there is no liability in respect of it. And the two together are the reason why a failure by any indorsee to give due notice of dishonor not only disables him from recovering against his immediate indorser, but disables a prior indorser to him from recovering against his indorser, or a prior indorser to him. The in-

dorsee who has failed to give notice cannot recover, because he has not fulfilled the condition of his contract. The others cannot recover, because, as they cannot be made liable they do not require to be indemnified. For example, the indorser to him who has failed to give due notice is not liable to him, and therefore cannot claim against his own indorser; and therefore, again, such last indorser cannot claim against his indorser, and so on. The description of the contract of the indorser cited from Sir John Byles' treatise, may, therefore, be somewhat more strictly defined. It may be thus stated, "An indorser contracts that if the drawee shall not on presentment accept, or at maturity pay the bill, he, the indorser, will on receiving due notice of the dishonor pay to the person who has a right to claim as holder as against him, if such person though he has given value for has received no value on the bill, or if such person though he did receive value on the bill is liable to pay on the bill, the sum which the drawee ought to have paid together with such damages as the law prescribes or allows as an indemnity."

Within that definition the ultimate indorsee will, if he has given due notice or notices, recover, because though he has given value for the bill, he has received no value on it. Any intermediate indorser will recover, if the notices are in order, because though he received value on the bill when he indorsed it he is made liable on the bill by having to indemnify his indorsee, or a subsequent indorsee. But such intermediate indorser will not be liable if the notices are not in order, because he received value on the bill when he indorsed it and is relieved from liability by defect of notices, and therefore is entitled to no indemnity.

The law and its principles and its application, where all the transactions on the bill are in England, being thus worked out, it *is necessary to apply them where [520 some indorsement has been made abroad. Every party to a bill knows that by the law-merchant it may be indorsed abroad. He cannot object to its being indorsed abroad. He, by the law-merchant, undertakes some liability in respect of such indorsement abroad. The question is, how will he be affected by such indorsement abroad? Such an indorsement raises a contract between the immediate indorser and indorsee. Such an indorsement then raises a foreign contract, and that must be construed according to the law of the country in which it was made. The liability of each of those contracting parties to the other is to be determined by the law of the country in which the contract was made. In this case the liability of the plaintiff to Monforte is there-

1878

Horne v. Rouquette.

fore to be measured by the law of Spain. The plaintiff then was liable to Monforte, though he gave no notice of the dishonor by non-acceptance. By an indorsement, of which the defendant has no right to complain, which by the law-merchant he in effect authorized the plaintiff to make at pleasure, the plaintiff, by reason of the default of the drawee, though he did once receive value on the bill, is liable to pay on the bill. He brings his case within the definition of the defendant's liability to him. It follows that, by the law of England applied to the English contract made between the plaintiff and the defendant, the defendant is liable to the plaintiff.

The rules and their application thus deduced were applied in the case of *Rothschild v. Currie* ⁽¹⁾ and in *Hirschfeld v. Smith* ⁽²⁾. In both these cases, as in this, the contract sued on was an English contract of indorsement, made immediately between the plaintiffs, indorseees and the defendants, indorsers. In both cases there had been subsequent foreign indorsements. In both cases the plaintiffs were, according to the construction of the foreign contracts of indorsement by foreign law, liable to the foreign subsequent indorsers, though they would not have been liable if such indorsers had been English indorsers. In both cases the plaintiffs were held, and I think rightly held, to be entitled to recover. The case of *Gibbs v. Fremont* ⁽³⁾ does not raise 521] the *same point. The only question was, whether as against the drawer his contract was a Californian or a Washington contract, and it was held that it was Californian. The case of *Aymar v. Sheldon* ⁽⁴⁾ seems to be in accordance with *Rothschild v. Currie* ⁽¹⁾.

I am of opinion that the judgment of Lord Coleridge was right, and that the appeal must be dismissed.

BRAMWELL, L.J.: I agree with my Brother Brett that this judgment should be affirmed. The indorser of a bill of exchange is on its dishonor bound to pay it to the holder, if he has received due notice from him, and if the holder was bound to pay it to some subsequent indorsee by the law-merchant. I agree in thinking that it is immaterial that this was a foreign bill. But it was; and when the defendant indorsed it to the plaintiff he must have known that it would be sent to Spain, and probably transferred by a Spanish indorsement to an indorsee in Spain, with the rights and duties created by the law of Spain. I agree in thinking that the indorsement to Monforte was such an indorsement; but there was a subsequent indorsement by Monforte in Spain,

⁽¹⁾ 1 Q. B., 43.

⁽²⁾ Law Rep., 1 C. P., 340.

⁽³⁾ 9 Ex., 25.

⁽⁴⁾ 12 Wendell, 439.

as to which there can be no doubt. On the dishonor being known to the plaintiff he at once, and according to English law, gave notice to the defendant; then was the plaintiff bound to pay the bill to Monforte? He certainly was; because, according to the Spanish law, no notice of dishonor is necessary to enable the holder to have recourse to an indorser. It may be that, before an action could be maintained in our courts against an indorser carrying on business and resident in England, some notice must be given; but as by Spanish law none is necessary, it follows that such notice, if necessary here, may be given at any time. As the plaintiff was then liable to Monforte, he is entitled to have recourse to the defendant. *Hirschfeld v. Smith* (1) was decided on this principle. There is nothing in *Story on Bills* to the contrary, nor in the case of *Aymar v. Sheldon* (2). *Rothschild v. Currie* (3) is a decision the same way, though certainly the reasoning there is not satisfactory.

*COTTON, L.J.: This is an appeal from a decision [522 of Lord Coleridge, giving judgment for the plaintiff in an action brought by him as indorsee of a bill of exchange against the defendant, who had indorsed it to him. The bill was drawn by Bryant, Foster & Co., merchants carrying on business in England, on M. Chasserot, residing in Spain, where the bill was made payable. It was payable to the order of Messrs. Rouquette & Co., under which name the defendant traded, and he in England indorsed it for value to the plaintiff, who is also a merchant carrying on business in England. The plaintiff indorsed the bill and sent it to a correspondent of his, M. Monforte, who resided at Valencia, in Spain. There was no antecedent agreement between the latter and the plaintiff, which bound Monforte to take the bill. But in fact he did so, and credited the amount to the plaintiff, or otherwise gave him the value of the remittance. The bill was indorsed in Spain by Monforte and subsequently by his indorsee, and it was on the 1st of May presented for acceptance to Chasserot, who refused acceptance. Notice of non-acceptance was given to the plaintiff by Monforte by a letter dated the 13th of May, which was received in London on the 26th of that month, and the plaintiff immediately gave notice to the defendant. The bill was on the 19th of June presented for payment. Payment was refused, and the bill was protested for non-payment on the 20th of that month, and the plaintiff on the 30th of July received notice of non-payment, which was given by a letter of Monforte dated the 17th of that month, and the plaintiff on the same

(1) Law Rep., 1 C. P., 840.

(2) 12 Wendell, 439.

(3) 1 Q. B., 43.

1878

Horne v. Rouquette.

30th of July gave notice of non-payment to the defendant. The plaintiff afterwards paid the amount of the bill and expenses to Monforte, and the action was to recover from the defendant the amount so paid. The defense was, that due notice of the non-acceptance and non-payment was not given.

There was evidence that by the law of Spain no notice of dishonor was necessary; and Lord Coleridge found as a fact that, having regard to the law of Spain, the notice of dishonor was given within a reasonable time; and the principal question argued was by what law the contract made by the indorsement of a bill of exchange is to be regulated. In my opinion this in no way depends on the place where the bill 523] is made payable. That must *regulate the contract made by the drawee if he accepts the bill, but an indorser does not contract to pay in the place where the bill is made payable, or where the drawee resides; and his liability on the contract which he enters into by his indorsement must, in my opinion, in accordance with the general rule, depend on the law of the place where that contract is made. This is not consistent with the reasoning of Lord Denman when giving judgment in the case of *Rothschild v. Currie* (¹), that the contract made by an indorser must be governed by the law of the country where the drawee resides and the bill is to be paid. The decision in that case has been doubted (see Byles, J., in *Hirschfeld v. Smith* (²) and *Allan v. Kemble* (³); and although the decision may be supported on other grounds, namely, that due notice is such as may be reasonably required under the circumstances of the case, and that the notice was under the circumstances given in a reasonable time (see Erle, C.J., in *Hirschfeld v. Smith* (⁴)), I am unable to agree with the reasons given by Lord Denman in deciding the case.

In this case the indorsement of the defendant was made in England to a person residing in England, and therefore, in my opinion, must be regulated by the law of England. What, then, is the contract made by the indorser of a bill with the indorsee? It is that if the bill is not accepted, or after having been accepted is dishonored, he will pay him the amount of the bill if it has not been indorsed by his indorsee, or if it has been so indorsed will indemnify him against any liability to a subsequent indorsee in respect of the bill, and according to English law this contract is subject to a condition that due notice of the non-acceptance or non-payment be given to the indorser. There was no delay or default

(¹) 1 Q. B., 49.

(²) Law Rep., 1 C. P., 343.

(³) 6 Moo. P. C., 314.

(⁴) Law Rep., 1 C. P., 351, 352.

on the part of the plaintiff in giving notice to the defendant, and the question really is, whether under the circumstances the plaintiff was under any legal liability on the bill, or paid the amount in fact paid by him in respect thereof voluntarily and without legal liability.

As there was no antecedent agreement on the part of Monforte to take and give credit for the bill remitted to him by the plaintiff, *the contract with Monforte by the [524 indorsement of the bill was not complete till the delivery of the bill to him in Spain: see *Sichel v. Borch* ('). Under these circumstances, where we have to ascertain what condition as to notice of dishonor is to be imported into the contract of indorsement, even if the contract of the plaintiff by his indorsement to Monforte is not to be treated as made in Spain (in which case it would be governed by the law of Spain), in my opinion the law of Spain cannot be disregarded. If the plaintiff was entitled to notice of dishonor, which is a condition implied by English law, as in my opinion he was, I think that in ascertaining what was due notice regard must be had to the law of Spain. Lord Coleridge has found as a fact, and the evidence supports his finding, that having regard to the law of Spain, the notice of dishonor to the plaintiff was given within a reasonable time. The consequence, in my opinion, is that the plaintiff was liable to Monforte on his contract of indorsement, and was liable to make the payments in fact made by him, and is therefore entitled to recover, on the ground that he the plaintiff has performed the condition to which by the law of England the defendant's contract of indorsement is subject, and was liable to make the payment in respect of which he claims to be indemnified.

This in no way decides that one, who has in England indorsed a bill to a person resident in this country, would be liable to the holder of it, who took it by subsequent indorsement in another country, if the English indorser received from this holder such notice only as is required by the law of the foreign country, and not such as is required by the law of England. That question does not arise in the present case.

Judgment affirmed.

Solicitors for plaintiff: *Kearsey, Son & Hawes.*

Solicitors for defendant: *Lowless & Co.*

(') 2 H. & C., 654.

[3 Queen's Bench Division, 525.]

July 2, 1878.

[IN THE COURT OF APPEAL.]

525]

*BAXENDALE V. BENNETT.

Bill of Exchange—Inchoate Instrument—Liability of Acceptor of a Lost Blank Acceptance—Negligence, Evidence of.

The defendant gave H. his blank acceptance on a stamped paper, and authorized H. to fill in his name as drawer. H. returned the blank acceptance to the defendant in the same state in which he received it. The defendant put it into a drawer of his writing table at his chambers, which was unlocked, and it was lost or stolen. C. afterwards filled in his own name without the defendant's authority, and an action was brought on it by the plaintiff as indorsee for value:

Held, that the defendant was not liable on the bill.

Per Bramwell, L.J., on the ground that there was no estoppel between the parties, which prevented the defendant from setting up the true facts, and if the defendant had been guilty of negligence it was not the proximate or effective cause of the fraud.

Per Brett, L.J., on the ground that after the return of the blank acceptance by H. the defendant had never authorized any one to fill in a drawer's name, and that he had never issued the acceptance intending it to be used.

ACTION commenced on the 10th July, 1876, on a bill of exchange, dated the 11th of March, 1872, for £50 drawn by W. Cartwright and accepted by the defendant, and of which the plaintiff was the holder, and for interest.

At the trial before Lopes, J., without a jury, at the Hilary Sittings in Middlesex, the following facts were proved: The bill, dated the 11th of March, 1872, on which the action was brought, purported to be drawn by one W. Cartwright on the defendant, payable to order at three months' date. It was indorsed in blank by Cartwright, and also by one H. T. Cameron. The plaintiff received the bill from Cameron on the 3d of June, 1872, and was the *bona fide* holder of it, without notice of fraud, and for a valuable consideration.

One J. F. Holmes had asked the defendant for his acceptance to an accommodation bill, and the defendant had written his name across a paper which had an impressed bill stamp on it, and had given it to Holmes to fill in his name, and then to use it for the purpose of raising money on it. Afterwards Holmes, not requiring accommodation, returned the paper to the defendant in the same state in which he 526] had received it from him. The defendant then *put it into a drawer, which was not locked, of his writing table at his chambers, to which his clerk, laundress, and other persons coming there had access. He had never authorized

Cartwright or any person to fill up the paper with a drawer's name, and he believed that it must have been stolen from his chambers.

On these facts the learned judge found that the bill was stolen from the defendant's chambers, and the name of the drawer afterwards added without the defendant's authority; but that the defendant had so negligently dealt with the acceptance as to have facilitated the theft; he therefore ruled upon the authority of *Young v. Grote* (*), and *Ingham v. Primrose* (*), that the defendant was liable, and directed judgment to be entered for the plaintiff for £50 and costs.

May 4. *Bittleston* (Rolland with him), for the defendant: The question is whether a blank acceptance, lost by the alleged acceptor, before its delivery to any one, and subsequently filled up by a stranger and put into circulation, can be sued on by a *bona fide* holder for value. No action can be brought on such an instrument, for it is merely an inchoate bill; and there can be no implied authority to any one to make the bill complete, for it was never intended that it should be issued. In *Byles on Bills*, 11th ed., p. 87, it is said, "without the drawer's signature, a bill payable 'to my order' though accepted is of no force either as a bill of exchange or as a promissory note." *Stoessiger v. South Eastern Ry. Co.* (*), and *M'Call v. Taylor* (*), are authorities for this proposition. *Young v. Grote* (*), and *Ingham v. Primrose* (*), will be relied on by the plaintiff, but in those cases the documents were complete. *Awde v. Dixon* (*) is in point for the defendant. There is no evidence of negligence on the part of the defendant to make him liable to the plaintiff. On this point *Bank of Ireland v. Trustees of Evans' Charities* (*) applies. In that case the trustees having a common seal permitted their secretary to have it in his custody; he fraudulently affixed the seal to a power of attorney, which being presented at the Bank of Ireland certain stock were transferred from the names of the trustees. *It was sought to make the bank responsible [527 for having acted on a power of attorney to which the seal of the trustees had been fraudulently attached. The judge who tried the cause told the jury that, if under the circumstances the trustees had so negligently conducted themselves as to contribute to the loss, the verdict must be for the bank. But Parke, B., in delivering the opinion of the

(*) 4 Bing., 253.

(*) 7 C. B. (N.S.), 82; 28 L. J. (C.P.), 294.

(*) 3 E. & B., 553; 23 L. J. (Q.B.), 293.

(*) 34 L. J. (C.P.), 365.

(*) 6 Ex., 869.

(*) 5 H. L. C., 389.

1878

Baxendale v. Bennett.

judges in the House of Lords, said, "that the supposed negligent custody of their corporate seal by the trustees in leaving it in the hands of their secretary, whereby he was enabled to commit the forgeries, is not sufficient evidence of that species of negligence which alone would warrant a jury in finding that the plaintiffs were disentitled to insist on the transfer being void—that the negligence which would deprive the plaintiffs of their right to insist that the transfer was invalid, must be negligence in or immediately connected with the transfer itself." So here leaving the blank acceptance in an unlocked drawer in his chambers is not that species of negligence which disentitles the defendant from insisting that the bill is invalid. In *Swan v. North British Australasian Co.* (*), Blackburn, J., explains that negligence must be the neglect of some duty cast upon the person guilty of it, and then he adds, "A person who does not lock up his goods, which are consequently stolen, may be said to be negligent as regards himself, but inasmuch as he neglects no duty which the law casts on him, he is not in consequence estopped from denying the title of those who may have, however innocently, purchased those goods from the thief, except in market overt." That passage from the judgment of Blackburn, J., is cited with approbation by Cockburn, C.J., in *Johnson v. Credit Lyonnais Co.* (*). On these authorities it is clear that the judge was wrong in ruling that the defendant was guilty of negligence and liable on the bill.

Jeune, for the plaintiff: The defendant having been guilty of negligence, the plaintiff, being a holder for value, is entitled to recover. It is clear law that it is immaterial whether the name of the drawer be added before or after acceptance, *Molloy v. Delves* (*); and it is equally clear that it is not necessary that the bill should be drawn by the person to whom it is handed by the *acceptor: *Schultz v. Astley* (*). There is, however, no direct authority on the question whether the holder of a bill that has been lost before it has been issued can recover upon it; but there are dicta of learned judges on the point. In *Awde v. Dixon* (*) Parke, B., laid it down as a general proposition that a person who puts his name to blank paper impliedly authorizes the filling up to the amount the stamp will cover. In *Swan v. North British Australasian Co.* (*) Byles, J., is reported to

(*) 2 H. & C., at p. 181; 32 L. J. (Ex.), at p. 278.

(*) 3 C. P. D., at p. 42.

(*) 7 Bing., 428.

(*) 2 Bing. N. C., 544.

(*) 6 Ex., 869.

(*) 32 L. J. (Ex.), at p. 278.

have said "that where a man loses or parts with his name written on a piece of stamped paper he is responsible to any *bona fide* holder when it is filled up as a promissory note or bill." In *Montague v. Perkins* ⁽¹⁾ Cresswell, J., puts the very question: "Suppose the defendant had lost his blank acceptance, would he have been liable upon it if the finder, without his authority, had filled it up?" It seems to have been conceded in the argument that he would; in that case the blank acceptance had been filled up after a lapse of twelve years, and the jury found it had been filled up after the lapse of a reasonable time, nevertheless the acceptor was held liable. *Awde v. Dixon* ⁽²⁾ is no authority for the defendant, for it was apparent, on the face of the instrument, that the bill was incomplete. In Byles on Bills, 11th ed., at p. 187, the author seems to be of opinion that the writer of a blank acceptance not delivered, but lost or stolen without any negligence on his part, would not be liable; but in the present case the defendant has been guilty of such negligence as, according to *Ingham v. Primrose* ⁽³⁾, would make him liable. In that case the defendant gave the bill to M. to get it discounted, and M., failing to do so, returned it. The defendant then tore it in half and threw it into the street. M. picked it up, joined the pieces together and negotiated it. The jury found that the defendant intended to cancel the bill; he was, however, held liable on the authority of *Young v. Grote* ⁽⁴⁾, on the ground that he had led to the plaintiff becoming the holder of it for value. Williams, J., in delivering the judgment of the court, says: "It is settled law that if the defendant had drawn a check and before he had *issued it he had lost it, or it had [529] been stolen from him, and it had found its way into the hands of a holder for value without notice, who had sued the defendant upon it, he would have had no answer to the action. So if he had indorsed in blank a bill payable to his order, and it had been lost or stolen before he delivered it to any one as indorsee—see the judgment in *Marston v. Allen*" ⁽⁵⁾. The defendant has been negligent in the custody of the bill, and the plaintiff is entitled to recover.

Bittleston, in reply.

Cur. adv. vult.

July 2. The following judgments were delivered:

BRAMWELL, L.J.: I am of opinion that this judgment cannot be supported. The defendant is sued on a bill

⁽¹⁾ 22 L. J. (C.P.), at p. 189.

⁽⁴⁾ 4 Bing., 253.

⁽²⁾ 6 Ex., 869.

⁽⁵⁾ 8 M. & W., 494.

⁽³⁾ 7 C.B. (N.S.), 82; 28 L. J. (C.P.), 294.

alleged to have been drawn by W. Cartwright on and accepted by him. In very truth he never accepted such a bill; and if he is to be held liable, it can only be on the ground that he is estopped to deny that he did so accept such a bill. Estoppels are odious, and the doctrine should never be applied without a necessity for it. It never can be applied except in cases where the person against whom it is used has so conducted himself, either in what he has said or done, or failed to say or do, that he would, unless estopped, be saying something contrary to his former conduct in what he had said or done, or failed to say or do. Is that the case here? Let us examine the facts. The defendant drew a bill (or what would be a bill had it had a drawer's name) without a drawer's name, addressed to himself, and then wrote what was in terms an acceptance across it. In this condition it, not being a bill, was stolen from him, filled up with a drawer's name, and transferred to the plaintiff, a *bona fide* holder for value. It may be that no crime was committed in the filling in of the drawer's name, for the thief may have taken it to a person telling him it was given by the defendant to the thief with authority to get it filled in with a drawer's name by any person he, the thief, pleased. This may have been believed and the drawer's name *bona fide* put by such person. I do not say such person could have recovered on the bill; I am of opinion he could not; but what I wish to point out is that the bill might be made 530] *a complete instrument without the commission of any crime in the completion. But a crime was committed in this case by the stealing of the document, and without that crime the bill could not have been complete, and no one could have been defrauded. Why is not the defendant at liberty to show this? Why is he stopped? What has he said or done contrary to the truth, or which should cause any one to believe the truth to be other than it is? Is it not a rule that every one has a right to suppose that a crime will not be committed, and to act on that belief? Where is the limit if the defendant is estopped here? Suppose he had signed a blank check, with no payee, or date, or amount, and it was stolen, would he be liable or accountable, not merely to his banker the drawee, but to a holder? If so, suppose there was no stamp law, and a man simply wrote his name, and the paper was stolen from him, and somebody put a form of a check or bill to the signature, would the signor be liable? I cannot think so. But what about the authorities? It must be admitted that the cases of *Young v.*

Grote (') and *Ingham v. Primrose* (2) go a long way to justify this judgment; but in all those cases, and in all the others where the alleged maker or acceptor has been held liable, he has voluntarily parted with the instrument; it has not been got from him by the commission of a crime. This, undoubtedly, is a distinction, and a real distinction. The defendant here has not voluntarily put into any one's hands the means, or part of the means, for committing a crime.

But it is said that he has done so through negligence. I confess I think he has been negligent; that is to say, I think if he had had this paper from a third person, as a bailee bound to keep it with ordinary care, he would not have done so. But then this negligence is not the proximate or effective cause of the fraud. A crime was necessary for its completion. Then the *Bank of Ireland v. Evans' Trustees* (3) shows under such circumstances there is no estoppel. It is true that was not the case of a negotiable instrument; but those who complained of the negligence were the parties immediately affected by the forged instrument.

*BRETT, L.J.: In this case I agree with the con- [531] clusion at which my Brother Bramwell has arrived, but not with his reasons. The defendant signed a blank acceptance and gave it to a person who wanted money that he might get it discounted; that person sent the blank acceptance back to the defendant, who put it into a drawer in his room; the room was not a place of general resort, and the drawer into which the acceptance was put was left unlocked; somebody, not a servant of the defendant, stole it, and it was filled up by a different person from him to whom the acceptance was originally given and who had returned it. On these facts, Lopes, J., held that the defendant had been guilty of negligence, and was therefore liable on the bill to the plaintiff.

Bramwell, L.J., says that the defendant is not liable, because if he be guilty of negligence, the negligence is not the proximate or effective cause of the fraud. It seems to me that the defendant never authorized the bill to be filled in with a drawer's name, and he cannot be sued on it. I do not think it right to say that the defendant was negligent. The law as to the liability of a person who accepts a bill in blank, is that he gives an apparent authority to the person to whom he issues it to fill it up to the amount that the stamp will cover; he does not strictly authorize him, but enables him to fill it up to a greater amount than was intended. Where a man has signed a blank acceptance, and

(1) 4 Bing., 253.

(2) 7 C. B. (N.S.), 82; 28 L. J. (C.P.), 294.

(3) 5 H. L. C., 389.

1878

Baxendale v. Bennett.

has issued it, and has authorized the holder to fill it up, he is liable on the bill, whatever the amount may be, though he has given secret instructions to the holder as to the amount for which he shall fill it up; he has enabled his agent to deceive an innocent party, and he is liable. Sometimes it is said that the acceptor of such a bill is liable because bills of exchange are negotiable instruments, current in like manner as if they were gold or bank notes; but whether the acceptor of a blank bill is liable on it depends upon his having issued the acceptance intending it should be used. No case has been decided where the acceptor has been held liable if the instrument has not been delivered by the acceptor to another person.

In this case it is true that the defendant after writing his name across the stamped paper sent it to another person to be used. When he sent it to that person, if he had filled it in to any amount that the stamp would cover the defendant 532] would be liable, because *he sent it with the intention that it should be acted upon; but it was sent back to the defendant, and he was then in the same condition as if he had never issued the acceptance. The case is this: the defendant accepts a bill and puts it into his drawer, it is as if he had never issued it with the intention that it should be filled up; it is as if after having accepted the bill he had left it in his room for a moment and a thief came in and stole it. He has never intended that the bill should be filled up by anybody and no person was his agent to fill it up.

Then it has been said that the defendant is liable because he has been negligent; but was the defendant negligent? As observed by Blackburn, J., in *Swan v. North British Australasian Co.* (1), there must be the neglect of some duty owing to some person—here how can the defendant be negligent who owes no duty to anybody—against whom was the defendant negligent, and to whom did he owe a duty? He put the bill into a drawer in his own room; to say that was a want of due care is impossible; it was not negligence for two reasons, first, he did not owe any duty to any one, and, secondly, he did not act otherwise than in a way which an ordinary careful man would act.

As to the authorities that have been cited; in *Schultz v. Astley* (2) the blank acceptance had been filled up by a stranger and a fraud had been committed; nevertheless, the acceptor was held to be liable. There, however, the acceptance had been issued and it was intended that it should be filled up by some one; but Crompton, J., in *Stoessiger v.*

(1) 2 H. & C., 175; 32 L. J. (Ex.), 278.

(2) 4 Bing. N. C., 544.

South Eastern Ry. Co. (¹), said that case had gone to the utmost extent of the law. I do not think that the doctrine there laid down ought to be extended. In *Ingham v. Primrose* (²) the acceptor of a bill of exchange, with the intention of cancelling it, tore it into two pieces and threw them into the street, they were picked up by the indorser, joined together, and the bill was put into circulation. The acceptor was held liable because, said the court, although he did intend to cancel it, yet he did not cancel it. It seems to me to be difficult to support that case, and the correct mode of dealing *with it is to say we do not agree with it. In [533 *Young v. Grote* (³) Young left a blank check with his wife and in filling up the check for fifty pounds the word fifty was written in the middle of the line, ample space being left for the insertion of other words. By a forgery, before the word fifty, the words "three hundred and" were inserted. Notwithstanding the forgery the court held Young liable. It is said that the case may be upheld on the ground that Young owed a duty to his own bankers, and that he was guilty of negligence in not drawing his checks on them with ordinary care, but that case does not govern the present, it only applies to cases between bankers and mere customers. In *Bank of Ireland v. Evans' Charity Trustees* (⁴), Parke, B., in delivering the opinion of the judges in the House of Lords remarks, with reference to *Young v. Grote* (⁵), "In that case it was held to have been the fault of the drawer of the check that he misled the banker on whom it was drawn by want of proper caution in the mode of drawing the check, which admitted of easy interpolation, and consequently that the drawer, having thus caused the banker to pay the forged check by his own neglect in the mode of drawing the check itself, could not complain of that payment." He then gives instances in which a person would not be liable and which govern the present case. "If a man should lose his check book or neglect to lock his desk in which it is kept and a servant or stranger should take it, it is impossible, in our opinion, to contend that a banker paying his forged check would be enabled to charge his customer with that payment. Would it be contended that, if he kept his goods so negligently that a servant took them and sold them, he must be considered as having concurred in the sale and so be disentitled to sue for their conversion on a demand and refusal?" Lord Cranworth, speaking of *Young v. Grote* (⁶), says that

(¹) 3 E. & B., at p. 556.(²) 7 C. B. (N.S.), 82; 28 L. J. (C.P.), 294.

28 ENG REP.

(³) 4 Bing., 253.(⁴) 5 H. L. C., 389.

case went upon the ground, whether correctly arrived at in point of fact is immaterial, that in order to make negligence a good answer there must be something that amounts to an estoppel or ratification—"that the plaintiff was estopped from saying that he did not sign the check," and then he says the doctrine of ratification is well illustrated by *Coles v. Bank of England* ('). I think the observations made by 534] the *Lords in the case of *Bank of Ireland v. Evans' Charity Trustees* (') have shaken *Young v. Grote* (') and *Coles v. Bank of England* (') as authorities. In the present case I think there was no estoppel, no ratification, and no negligence, and that the defendant is entitled to our judgment.

BAGGALLAY, L.J., concurred that the judgment ought to be entered for the defendant.

Judgment for the defendant.

Solicitors for plaintiff: *George Kirby & Millett.*

Solicitor for defendant: *G. Reader.*

(') 10 A. & E., 437.

(^o) 5 H. L. C., 389.

(^o) 4 Bing., 253.

See 1 Daniels on Neg. Inst., § 142 *et seq.*, 2 id., § 1344 *et seq.*; Edwards Prom. Notes (2d ed.), 93 marg. p.

If blanks in an instrument be filled without any authority or pretence of authority, it is a criminal act, and makes the party offending liable to a prosecution for forgery: *Wilson v. South, etc.*, 70 Ills., 46.

A. wrote his name upon a piece of blank paper at the request of B., who afterwards, without the knowledge or consent of A., wrote a promissory note over the signature. In an action on the note by an innocent holder, held, that the instrument was a forgery, and that A. was not liable thereon: *Caulkins v. Whisler*, 29 Iowa, 495, 4 Am. Rep., 236.

Defendant was convicted, at the quarter sessions, on an indictment charging that he feloniously did offer, dispose of and put off a certain promissory note, purporting to be made by one F. for the sum of £4 10s., with intent to defraud, he, the said defendant, at the time he so uttered and published the said note as aforesaid, then and there well knowing the same to be forged.

It appeared that some boys had been amusing themselves with writing promissory notes and imitating persons' signatures, and among them was

one with F.'s name. The papers were put into the fire, but this note was picked up by the defendant. A person who was with him at the time said that he thought it was not genuine, and advised him to destroy it; but defendant kept it, and afterwards passed it off, telling the person who took it that it was good:

Held, that upon these facts the defendant was guilty of a felonious uttering; but the conviction was quashed, for the indictment was defective in not stating expressly that the note was forged, or that defendant uttered it as true: *Regina v. Dunlop*, 15 U. C. Q. B., 118.

A person delivering to another a paper bearing his signature with blanks unfilled therein, which he must necessarily expect will be filled to make it a completed instrument, gives implied authority to the person receiving it to fill the blanks; and if they are filled fraudulently, the maker will be liable thereon to a *bona fide* purchaser for value without notice. Thus, a person who negligently delivers to another a blank note, having the name of the payee and the words "or order" therein, intending that it shall be used for a specified purpose, will be liable thereon if the blanks are wrongfully

Porteus v. Watney.

1878

filled and the note then transferred to a *bona fide* holder for value, without notice of the fraud: *Abbott v. Rose*, 62 Maine, 194.

As to a criminal prosecution for hav-

ing unfinished counterfeit bank bills in one's possession, with intent to complete them: *People v. Sam*, 41 Cal., 645.

[3 Queen's Bench Division, 584.]

July 2, 1878.

[IN THE COURT OF APPEAL.]

PORTEUS and Others v. WATNEY and Others.

Ship and Shipping—Charterparty—Bill of Lading—Demurrage—Liability to Ship-owner of Consignee prevented from discharging his Goods by the delay of other Consignees.

A charterparty entered into between the plaintiffs and B. & Co. for the conveyance of grain from C. to L., stipulated that fourteen working days were to be allowed for loading and unloading at the port of discharge, and ten days on demurrage at £35 a day. The vessel having been loaded, one of the bills of lading was indorsed to the defendants. The defendants' grain was stowed at the bottom of the main hold, and that of the other shippers on the top of it. The bill of lading, indorsed to the defendants, contained the words "paying freight for the same goods and all other conditions as per charterparty." Owing to the consignees, whose grain was placed on the top of the defendants', having failed to take away their goods within the lay days, the defendants were unable to obtain delivery of their grain, and three days' demurrage was incurred:

Held, affirming the judgment of Lush, J., that the defendants were liable for the demurrage, although they were prevented from getting their goods by the delay of other consignees.

ACTION to recover £105 for three days' demurrage of the steamer Stamford at the port of discharge.

At the trial before Lush, J., at the Hilary Sittings in London, the following facts were proved: A charterparty was entered into between the plaintiffs, the owners of the Stamford, and Brand & *Co., for the conveyance of [535 a cargo of grain from Cronstadt to London, and by which it was stipulated that fourteen working days were to be allowed for loading and unloading at the port of discharge, and ten days on demurrage over and above the said loading and delivery days at £35 day by day. The captain to sign bills of lading as presented without prejudice to the charterparty, but at not less than chartered rate, and to have an absolute lien on the cargo for all freight, dead freight, and demurrage. The cargo to be brought and taken from alongside the ship at merchant's risk and expense.

The vessel took on board a full cargo of grain from several shippers, and a portion of it was consigned to the defendants. The defendants' grain was stowed at the bottom of the main hold, and that of other shippers on the top of it.

Bills of lading for portions of the cargo were given to the several shippers, and one of which, for a part of the cargo, was indorsed to the defendants, and contained the words, to be delivered to order or to assigns "on paying freight for the said goods and all other conditions as per charterparty." Seven days had been consumed at the port of loading, so that seven working days remained for unloading at the port of discharge. Owing to the consignees of the portions of cargo placed on the top of the grain of the defendants having failed to take away their goods in proper time, the defendants were unable to obtain delivery of their grain, and in consequence demurrage amounting to three days was incurred. The learned judge directed the judgment to be entered for the plaintiffs for £105 and costs⁽¹⁾.

May 4. *Butt*, Q.C., and *Matheo*, for the defendants, contended that the words in the bill of lading "paying freight for the same goods and all other conditions as per charterparty" must receive some limited construction; that it would be too extensive a construction to hold that they put the consignee in the place of the charterer, for it never could have been intended to make him liable to every dispute between the charterer and the shipowner. The words therefore ought to be limited to conditions having reference to the particular goods.

536] *May 16, 17. *A. L. Smith* and *R. T. Reid*, for the plaintiffs, contended that the charterparty was incorporated in the bill of lading, and that the consignee was bound before he received delivery of his goods to fulfil the conditions referred to besides the payment of freight.

The cases cited in the arguments are mentioned in the judgments.

Cur. adv. vult.

July 2. The following judgments were delivered.

THESIGER, L.J.: I am of opinion that this appeal should be dismissed.

By the terms of the bill of lading, the consignee is only to receive his goods on the payment of freight for them and on the fulfilment of all other conditions as per charterparty. Among those conditions is that by which the shipowner stipulates for payment of demurrage at a fixed rate, in the event of the vessel carrying the goods being detained beyond the working days allowed by the charterparty. The language used, if construed according to its natural meaning, imports a liability on the part of the consignee for de-

⁽¹⁾ *Anle*, p. 227.

demurrage, coextensive with the liability of the charterer, and the court ought not to depart from what is the natural meaning of words selected by the parties to the contract, unless compelled by strong reasons or distinct authority. In *Wegener v. Smith* ⁽¹⁾ the words of the bill of lading were substantially the same as here, namely, "against payment of the agreed freight and other conditions as per charterparty," and the construction put upon them was that to which I have referred. It is true, as was pointed out by the later case of *Smith v. Sieveking* ⁽²⁾, that there the demurrage sued for had arisen from the default of the defendant, but this fact was not even alluded to in the judgments of the learned judges who decided the case, and clearly was not the ground of the decision. In *Gray v. Carr* ⁽³⁾, the words were "he or they paying freight and all other conditions or demurrage (if any should be incurred), for the said goods *as per the aforesaid charterparty," and al- [537 though the Court of Exchequer Chamber decided against the shipowner, on the ground that the claim set up by him for damages for short loading was not provided for under the term "dead freight" used in the charterparty, so that the case is not a direct authority upon the point under consideration, yet, inasmuch as the majority of the court consisting of four out of six judges, were of opinion that under the words "all the conditions as per the aforesaid charterparty," the holder of the bill of lading would have been liable for dead freight if any had been payable, the case at least, indirectly confirms the authority of *Wegener v. Smith* ⁽⁴⁾. The cases of *Chappel v. Comfort* ⁽⁵⁾, *Fry v. Chartered Mercantile Bank of India* ⁽⁶⁾; and *Smith v. Sieveking* ⁽⁷⁾, which have been cited on behalf of the defendant in the present case, so far from weakening the authority of *Wegener v. Smith* ⁽⁸⁾ appear to me to tend still further to strengthen it. In each of them the reference to the charterparty contained in the bill of lading was either expressly, by use of the words "freight as per charterparty," as in the two first cases, or impliedly by the use of the words "paying for the said goods as per charterparty," as in the last case, limited to the condition in the charterparty relating to freight, and was held to be made simply for the purpose of ascertaining the rate of freight, and not for the purpose of imposing an obligation upon the holder of the bill of lading

⁽¹⁾ 15 C. B., 285; 24 L. J. (C.P.), 25.

⁽⁵⁾ Law Rep., 1 C. P., 689.

⁽²⁾ 4 E. & B., 945; 24 L. J. (Q.B.), 257.

⁽⁶⁾ 4 E. & B., 945; 24 L. J. (Q.B.), 257;

⁽³⁾ Law Rep., 6 Q. B., 552.

5 E. & B., 589.

⁽⁴⁾ 10 C. B. (N.S.), 802.

to perform the conditions of the charterparty generally. In none of these cases was any doubt thrown upon the correctness of the decision in *Wegener v. Smith* ⁽¹⁾. While in *Smith v. Sieveking* ⁽²⁾ it is expressly approved of, and the court in referring to the language of the bill of lading, says: "This plainly indicated to the consignee that before he was entitled to the delivery of the goods he was bound to make a payment beyond the freight; and there was a reference to the charterparty for some condition to be performed beyond the payment of freight." That condition was payment of demurrage, and the bill of lading was construed as if it had expressly made the payment of demurrage a condition on the performance of which the goods were deliverable. The 538] consignee *accepting the goods under such a bill of lading could not escape the payment of demurrage by denying his liability to pay it. The true result of the authorities therefore is, that a bill of lading in which the words "and all other conditions as per charterparty," follow the expression "on paying freight," or "paying for the said goods," or similar expressions, imports a liability on the part of the consignee of goods under the bill of lading to pay the demurrage stipulated for by the terms of the charterparty to which it refers.

It is said, however, on the part of the defendants that the present case is distinguishable from those of *Wegener v. Smith* ⁽¹⁾, and *Gray v. Carr* ⁽³⁾, by the fact that in them the bill of lading comprised the whole cargo, while here it comprises only a portion of the cargo; but with the exception of an observation of Maule, J., made in the course of the argument in the former case, I can find nothing which would justify me in supposing that such a distinction exercised any material effect upon the decisions in those cases, and the absence of any reference in the judgments to it is an argument against its existence. For myself I feel a difficulty in seeing how the construction of a bill of lading, which on its face may not, and in many cases will not, prove the fact, whether the goods to which it refers do or do not constitute the whole cargo of a chartered ship, can upon a point like that under consideration alter, according to whether the parol evidence establishes that fact in the affirmative or negative. One view by which it was suggested that this difficulty is met, is that the construction is not altered, but the conditions of the charterparty are to be read into the bill of lading, not absolutely, but with reference to the goods

⁽¹⁾ 15 C. B. 285; 24 L. J. (C.P.), 25.

⁽²⁾ 4 E. & B. 945; 24 L. J. (Q.B.), 257; 5 E. & B. 589. ⁽³⁾ Law Rep., 6 Q. B., 522.

which are the subject of it, and that just as the freight, if regulated by the charterparty freight, is proportionate to the goods carried under the bill of lading, so the demurrage is to be divided among the consignees in proportion to the value of their goods. But this view by attempting to remove one difficulty raises another, for it would if adopted be impossible of being worked out, as a matter of commercial practice. It is impossible to suppose that a shipowner whose ship has been detained beyond the lay days could in practice assert liens, or bring actions against all the bill of lading holders, for proportionate amounts of demurrage ascertained by a sort of *average statement; and the [539 result would therefore be that a clause in the bill of lading, which would appear to have been inserted for the very purpose of securing the liens to which the shipowner is entitled by the charterparty, would become practically inoperative. Another view presented is that the working days under the charterparty must be allotted among the consignees of the cargo, in proportion to the amount of the cargo to be respectively received by them, so that if in the present case there had been seven consignees of the cargo in equal portions, then there being seven working days left for unloading at the port of discharge, each consignee would be entitled to one day for unloading, and would only be liable for demurrage if he exceeded, and to the extent that he exceeded that one day. But this view is as unpractical as the other to which I have just referred, and would if adopted lead to the same consequence. There is in reality no practicable middle course between the right of the shipowner to treat each consignee as liable *in solido* for the demurrage secured by the charterparty, and the right of the bill of lading holder to have his goods entirely freed from the condition as to demurrage contained in the charterparty. And even if a middle course were practicable, the parties to the bill of lading contract could only be held to have adopted it by giving a strained interpretation to the words used by them. But then it has been urged upon us that the inconvenience and hardship, which would arise if the consignee of a small parcel of goods were held liable for the whole demurrage under the charterparty, afford a strong practical argument against the construction of the bill of lading contended for by the plaintiffs. This might be so if it were possible to construe the bill of lading so as to exclude altogether the condition as to demurrage, but if that condition must be included, as for the reasons I have already given I think it must, and the words by which it is included in their natural meaning import, as I also think

1878

Porteus v. Watney.

they do, that condition is to be read as if it was introduced into the bill of lading, while any other construction of the bill of lading would lead to an utterly impracticable result, the argument founded upon the alleged inconvenience and hardship to the consignee becomes of little force. It is no doubt a startling consequence if by the construction which this court puts upon the bill of lading—as it has been suggested, *and as I understand Brett, L.J., holds—the shipowner can recover the demurrage against all as well as against any one or more of the consignees, so that he may be paid over and over again. If the words of the charterparty are to be read into the bill of lading in such a manner as that reference to the charterparty and to what is done under the charterparty, except for the purpose of reading the words in, cannot be made, such a consequence would follow; but in that case, *Leer v. Yates* (') becomes an authority that notwithstanding that consequence the consignee is liable for the entire demurrage, and *Leer v. Yates* ('), notwithstanding the dissent from the doctrine laid down in it expressed by Lord Tenterden in the cases of *Rogers v. Hunter* ('), and *Dobson v. Droop* ('), still stands as an authority.

But, on the other hand, without taking upon myself to express an opinion upon a point which is not directly before us, especially in the face of the opinion of Brett, L.J., I must at least say that I do not think it altogether clear that when a bill of lading stipulates that a consignee under it is to have his goods on payment of freight and on the performance of all other conditions of the charterparty; and, in point of fact, all demurrage due under the charterparty has been paid to the shipowner by some other consignee under a similar bill of lading, so that the condition in the charterparty as to demurrage has been performed, although not by the particular consignee; that fact would not constitute in equity, if not at law, a defence to an action for demurrage brought against the first consignee. Be this how it may, I feel bound by the language of the contract between the parties in this case to hold that the plaintiffs were entitled to recover against the defendants the demurrage claimed, and that consequently the decision in their favor by the learned judge in the court below was right and should be affirmed.

COTTON, L.J.: I agree in the decision, and also in the reasons which have been given by Thesiger, L.J., for the conclusion at which he has arrived. The question is, what is the contract the parties have entered into by the bill of lading? 541] The words of *the bill of lading are "paying freight

(1) 3 Taunt., 387.

(2) Moo. & M., 63.

(3) Moo. & M., 441.

for the same goods and all other conditions as per charterparty." There is an express provision in the charterparty that the shipowner shall have an absolute lien on the cargo for all freight, dead freight, and demurrage. It is impossible not to import that into the contract entered into by the bill of lading. We are not at liberty to reject the words "all other conditions," unless there is something manifestly inconsistent in introducing them. The lien is on the cargo and on every part of it; and although the bill of lading refers to one part of the cargo, yet my opinion, as a matter of construction of the contract between the parties, is, that this condition shall be introduced, and being introduced, there is a lien on every part of the cargo for demurrage; and therefore, on the construction of the contract, the plaintiff is right. If parties choose to make these contracts they must take the consequences, and not come to the court to enforce an unnatural construction of words simply for the purpose of avoiding an inconvenience, which possibly they may not have conceived, but which is the result of a fair construction of the contract into which they have entered. As regards the question whether the plaintiffs could recover from each holder of a bill of lading the full amount of the demurrage, the question does not arise before us, therefore I think it better not to express any opinion upon it. I think that the plaintiff has, under his contract with the defendant, a right to recover the sums sued for.

BRETT, L.J.: I do not differ from the decision at which the Lord Justices have arrived, for to decide otherwise would be to break many settled rules of law. The bill of lading is, "on paying freight for the same goods, and all other conditions, as per charterparty." I endeavored in *Gray v. Carr* (') to give what I thought was a reasonable interpretation to those words, "and all other conditions as per charterparty;" but my interpretation was not accepted by the majority of the court. I take the decision in *Gray v. Carr* (') to have been that those words in a bill of lading are to be treated as words of reference to the charterparty, and that they therefore introduce into the bill *of lading every condition [542 that is in the charterparty by way of reference; so that they bring into the bill of lading every condition of the charterparty in its terms, and make every one of those conditions part of the bill of lading, as if they had been originally written into it. But then there is another rule which applies, which is, that if taking all the conditions to be in the bill of lading, some of them are entirely and absolutely insensible

(') Law Rep., 6 Q. B., at p. 533.

(') Law Rep., 6 Q. B., 522.

and inapplicable, they must be struck out as insensible; not because they are not introduced, but because being introduced they are impossible of application. The bill of lading must therefore be considered as if all the conditions of the charterparty had been absolutely written into it originally and then we have a bill of lading in this form: fourteen working days for loading and unloading, and ten days on demurrage. It is impossible to say that condition is not applicable to a bill of lading, although the bill of lading represents only part of the cargo. It is applicable, although it seems to me strange that a person should enter into such a contract. Then there is another rule. The bill of lading claims to be a contract between the shipowner and the person taking the bill of lading. There is no relation whatever between the holders or takers of other bills of lading and any one holder of a bill of lading. They are not co-sureties. When, therefore, it is said we can look at all the bills of lading and then divide the days of demurrage or the lay days between them, we are looking at other bills of lading which cannot be given in evidence. They cannot be received in evidence in an action between the shipowner and the holder of a bill of lading, and therefore when it is said that the bill of lading represents a part of the cargo, and that the other bills of lading are in the same form, we break the rule which does not allow us to look at them, for we do not know whether the other bills of lading are in the same form. Then what is the contract represented by the bill of lading with the conditions in it? It seems to me that the cases of *Randall v. Lynch* (*) and *Leer v. Yates* (*), and particularly the case of *Thiis v. Byers* (*), show what the contract is, when that contract is in this form. It is not that the holder of the bill of lading will discharge his cargo *within a reasonable time after he is able to do so; it is that if the ship is not able to discharge the whole of her cargo within the given number of days after she is at the usual place of discharge, the holder of that bill of lading will pay a certain sum for each day beyond those days, however the delay may be caused, unless it is by default of the shipowner. That is stated to be so in *Thiis v. Byers* (*). Therefore the holder of a particular bill of lading is bound to pay according to that contract for every day beyond the stipulated days, during which the ship remains with the cargo in her, unless the delay is caused by the fault of the shipowner.

Now in this case there is no fault on the part of the shipowner; the delay might be caused by accidents over which

(*) 2 Camp., 352.

(*) 3 Taunt., 387.

(*) 1 Q. B. D., 244; 16 Eng. R., 308.

none of the holders of the bills of lading had any control, or it may have been caused by delay of the holders of cargo above that of the defendant. But even supposing it is by their neglect, in the contract between the shipowner and the defendant there is no stipulation about the negligence of other people. The defendant is to pay, unless it is the fault of the shipowner. The negligence of the owners of the cargo above is not the fault of the shipowner. Therefore the negligence of owners of cargo above would be one of those negligences the consequence of which the defendant has undertaken to pay for. Therefore whether they were negligent or not, it seems to me on his contract he must pay. If I could arrive at an opposite conclusion I would, for I do not share the doubt of Thesiger, L.J. I think that if the consignee of a portion of the cargo had a bill of lading in the same words, and had been called upon to pay, and had paid the whole demurrage to the shipowner, the holder of another bill of lading, if sued, could not set that up as a defence. That defence would arise in respect of a wholly independent contract between the shipowner and the holder of the other bill of lading. He could not set it up as a defence, because he would have no right to prove that other and wholly independent contract. I accept the proposition that it would be no defence for the owner of the bill of lading, to say that the shipowner had been paid the same sum by all other holders of bills of lading for cargo in the ship. Therefore I think that we are bound to follow the decision of *Leer v. Yates* ⁽¹⁾. I cannot do so without *considerable hesitation, after the expressions of opinion of eminent judges, of the authority of Lord Tenterden and Sir James Mansfield. We have to decide on a conflict of cases, and I prefer the decision of *Leer v. Yates* ⁽¹⁾ to the rulings laid down in *Rogers v. Hunter* ⁽²⁾ and *Dobson v. Droop* ⁽³⁾.

There is another solution of the problem, which has been ingeniously suggested by Mr. Maclachlan in the last edition of his book, at p. 496, where he suggests that there are two elements which enter into this question, namely, time and amount, and he proposes a solution somewhat between the opinion of Sir James Mansfield and Lord Tenterden, but his solution would break the settled rules of law, and cannot be admitted.

It has suggested itself to me that, if the holder of the bill of lading of cargo above were to delay the ship unreasonably, it is possible that the holder of the bill of lading of cargo under him might have an action against him for dam-

⁽¹⁾ 3 Taunt., 387.

⁽²⁾ Mood. & M., 63.

⁽³⁾ Mood. & M., 441.

1878

Re Brown.

ages. It may be they owe the duty to each other, that no one of them shall negligently delay; but there may be difficulties in bringing an action. He may not have notice of the contract, or there may be other difficulties, still I think it is possible he may have that remedy—it is reasonable—but he certainly can have no other; he cannot maintain an action against the others for contribution; and it does not seem to me that there is any equity between them. So that I accept the whole consequence that was seen by Sir James Mansfield in *Leer v. Yates* (¹); but at the same time I think the rules of law oblige me to say that the holder of each bill of lading is liable if the ship is delayed beyond the number of days allowed in his bill of lading. The judgment of Lush, J., is correct, and must be affirmed.

Judgment affirmed.

Solicitors for plaintiffs: *Hollams, Son & Coward.*

Solicitors for defendants: *Plews, Irvine & Hodges.*

(¹) 8 Taunt., 387.

[3 Queen's Bench Division, 545.]

June 6, 1878.

545]

**Re* BROWN.

Licensing Act, 1872 (35 & 36 Vict. c. 94), ss. 3, 51—Pecuniary Penalty—Alternative Penalty of Imprisonment—Imprisonment in Default of Payment—Order for Distress, condition of Jurisdiction under 35 & 36 Vict. c. 94, s. 51, subs. 2.

The justices cannot order imprisonment in default of payment of a penalty under 35 & 36 Vict. c. 94, s. 51, subs. 2, unless there has first been an order for a distress. There is no jurisdiction to order imprisonment under that sub-section in the first instance without a distress warrant, when it appears that the defendant has no goods whereon to levy.

Per Cockburn, C.J.: The 2d sub-section of the 51st section of 35 & 36 Vict. c. 94, applies to cases where a pecuniary penalty only is attached by the act to an offence, not to cases where a period of imprisonment other than that given by the 51st section is given as an alternative punishment.

[3 Queen's Bench Division, 549.]

June 4, 1878.

***HARRINGTON V. THE VICTORIA GRAVING [549]
DOCK COMPANY.**

Contract—Corrupt Consideration—Money promised to Agent or Employe to bias him contrary to his Principal's Interests.

The defendants contracted to pay the plaintiff a commission for superintending repairs to be executed by them on certain ships belonging to the Great Eastern Railway Company. The plaintiff at the time of such contract being made was in a position of trust in relation to the railway company, having been employed by them as an engineer to advise them as to the repairs, and the contract between defendants and plaintiff was made in part in consideration of a promise that the plaintiff would use his influence with the railway company to induce them to accept the defendants' tender for the repair of the ships. The jury found that the contract, though calculated to bias the mind of the plaintiff, had not, in fact, done so, and that he had not in consequence thereof given less beneficial advice to the company as to the defendants' tender than he would otherwise have done:

Held that the plaintiff could not maintain an action for commission under the contract, on the ground that, even although the plaintiff had not been induced to act corruptly, the consideration for the contract was corrupt.

THE action was brought for the balance of moneys alleged to be payable by the defendants to the plaintiff under an agreement, by which the defendants undertook to pay the plaintiff a commission of 5 per cent. for superintending repairs to two ships executed by the defendants for the Great Eastern Railway Company. The defence was in substance as follows:

The plaintiff had been employed by the Great Eastern Railway Company as an engineer to advise them with relation to the repairs that were necessary to the ships, and to make estimates as to the cost of such repairs. It was alleged by the defendants that the commission so agreed to be paid by the defendants to the plaintiff was agreed to be paid, upon an understanding that the plaintiff should use his influence with the Great Eastern Railway Company to obtain the acceptance by the company of the defendants' tender for the repairs, and that the agreement was therefore void as being made on a corrupt consideration ('). [550]

The jury found, in answer to questions put to them by Field, J., before whom the trial took place, that the agreement to pay the 5 per cent. was in consideration in part of the plaintiff's undertaking to superintend, on behalf of the defendants, the execution of the works contracted for; that the agreement to pay the 5 per cent. was in consideration in

(') The agreement to pay the commission to the plaintiff was made by an official of the defendants' company without the knowledge of the directors of the company, and the directors, when they knew of the agreement, repudiated it.

1878

Harrington v. Victoria Graving Dock Co.

part of a promise by the plaintiff to use his influence with the Great Eastern Railway Company to obtain an acceptance of the defendants' tender; that the plaintiff, at the time the arrangement was made, was in a position of trust and confidence in relation to the Great Eastern Railway Company in reference to the tender for the repairs of the ships, and that the agreement was calculated to bias the mind of the plaintiff so that he should not give his full, free, and unfettered advice to the Great Eastern Railway Company. But they found that the agreement did not so bias the mind of the plaintiff, and that he did not give advice to the company less beneficial than he otherwise would in reference to the said tender. They also found that the arrangement was not disclosed to the company.

The learned judge did not enter judgment on these findings at the trial for either party.

A. L. Smith, for the plaintiff, moved for judgment: It must be admitted that when the consideration is partly good and partly corrupt no action will lie. But it is contended that the effect of all the findings taken together is that here no part of the consideration was corrupt. The defendants undertake to pay the plaintiff this sum for labor actually to be done for them. No doubt their object in employing him was to bias his mind, and induce him to favor them in advising his employers as to the tenders. But then it is found that this latter object failed, and the employers were not damaged, for he gave them the benefit of his full, free, and unfettered judgment. It does not under these circumstances [551] stances *lie in the defendants' mouths to say that part of the consideration was corrupt. The Great Eastern Company could not maintain any action against the plaintiff for breach of duty in his employment by them.

Parry, Serjt., and *Jeune*, for the defendants, were not called on to show cause.

[In the course of the arguments the case of *Smith v. Sorby* which is reported in a note at the end of this case, was referred to.]

COCKBURN, C.J.: Our judgment must, in my opinion, be for the defendants. I will assume, for the purposes of argument, that the agreement did not influence the mind of the plaintiff so as to induce him to do anything dishonest towards his employers, the Great Eastern Railway Company. I entertain no doubt, however, that when a bribe is given, or a promise of a bribe is made, to a person in the employ of another by some one who has contracted, or is about to contract, with the employer, with a view to inducing the

person employed to act otherwise than with loyalty and fidelity to his employer, the agreement is a corrupt one, and is not enforceable at law, whatever the actual effect produced on the mind of the person bribed may be. The tendency of such an agreement as this must be to bias the mind of the agent or other person employed, and to lead him to act disloyally to his principal. It is intended by the party who promises the bribe to have that effect, and the other party knows such is his intention. Such a bargain is obviously corrupt. It would plainly be in contravention of the maxim, *e turpi causâ non oritur actio*, and most mischievous to hold that a man could come into a court of law to enforce such a bargain on the ground that he was not in fact corrupted. It is quite immaterial that the employer was not in fact damaged. It is sufficient that the consideration upon which the promise was made was intended to be a corrupt one.

MELLOR, J.: I am of the same opinion. It is not because the agreement failed to have the effect which it was intended to have in corrupting the plaintiff's mind that therefore it can afford the basis of a good cause of action. It would be most fatal if it were open to a person, who had entered into an agreement that he knew *was designed to induce [552 him to act unfaithfully to his employers, to allege that it had not in fact had that effect, and to recover upon it on the ground that the employer had not been damaged.

FIELD, J.: I am of the same opinion. I am very glad that we have an opportunity of distinctly declaring the law upon this point, which was left undecided in the case of *Smith v. Sorby*. The present case affords an instance how sadly loose commercial practice has become in respect to transactions of this nature. If the point we are now deciding has never been exactly decided before, it is most clearly within the principles laid down by the authorities on the subject. It really needs no authority to show that, even although the employers are not actually injured, and the bribe fails to have the intended effect, a contract such as this is a corrupt one, and cannot be enforced.

Judgment for the defendants (').

Solicitors for plaintiff: *Cattarns, Jehu & Hughes*.

Solicitors for defendants: *Gedge, Kirby & Millett*.

(') Jan. 30, 1875. SMITH v. SORBY. [8 Queen's Bench Division, 552.]

Contract—Fraud—Principal and Agent—Secret Gratuity to Agent—Avoidance of Contract.

Where a secret gratuity is given to an agent with the intention of influencing his mind in favor of the giver of the gratuity, and the agent, on subsequently enter-

ing into a contract with such giver on behalf of his principal, is actually influenced by the gratuity in assenting to stipulations prejudicial to the interests of his principal, although the gratuity was not given directly with relation to such particular contract, the transaction is fraudulent as against the principal, and the contract is voidable at his option.

THIS was an action for breach of an agreement by the defendant to supply the plaintiff with coals, in answer to which the defendant pleaded that the agreement was voidable by reason of fraud and collusion between the plaintiff and the defendant's agent, who entered into it under the following circumstances: In October, 1869, the agent who managed the defendant's colliery, with the defendant's knowledge, entered into an agreement with the plaintiff that the plaintiff should supply fifty wagons for use in connection with the defendant's colliery for the period of five years, and that the hire of the wagons should be paid either in money or in coals at the then market rate, which was 6s. a ton, at the defendant's option. The plaintiff, immediately after the making of this agreement, promised the agent to pay him £1 for every 553] wagon by way of commission, and *£10 as a bonus. This he did, according to his own account, in hopes of further business.

In December, before the time for the performance of the contract had arrived, the agent agreed with the plaintiff for an alteration of the terms, and an arrangement was made, as the defendant stated without her knowledge or authority, by which the contract for the supply of wagons was to be transferred to a company with whom the defendant was to enter into a contract for that purpose, and the agent on the defendant's behalf was to enter into a distinct and independent contract to supply the plaintiff yearly on demand during five years, with coal amounting in the aggregate to 12,000 tons, at the rate of 6s. 6d. a ton.

The defendant signed the contract as to the wagons, supposing, as she stated, that it was the only contract, and that it simply gave effect to the first mentioned agreement, to which she had already assented, and the agent signed the second contract for the supply of coals. The agent admitted that the defendant did not know of the promise of payment to himself, but asserted that she knew of the second contract. The defendant, however, swore that she never knew of the second contract till long afterwards, and it appeared that no demand for the coal or deliveries had taken place in 1870, 1871, and 1872. In 1873 the price of coals had risen to £1 a ton, and the plaintiff demanded delivery of the coals under the alleged contract at 6s. 6d. a ton.

The defendant's case was, that the secret agreement for payment of a commission to the agent was intended to influence his mind in favor of the plaintiff to the prejudice of his employer, and that it did, in fact, influence his mind in entering into the agreement of December.

Pollock, B., before whom the trial took place, directed the jury that the giving of a commission to an agent, though improper, was not necessarily fraudulent, and that, in order to vitiate the contract on the ground of fraud, there must have been an intention on the part of the party offering the commission to induce the agent in entering into the contract to betray his principal's interests, and the mind of the agent must, in fact, have been corruptly affected by such inducement. The jury found for the plaintiff, stating that though the practice of giving commissions to servants or agents was objectionable in their opinion, yet there had been nothing amounting to fraud in the case before them.

A rule nisi had been obtained for a new trial on the ground of misdirection, and on the ground that the verdict was against evidence.

Fidd, Q.C., Wills, Q.C., and Chandos Leigh, showed cause.

Digby Seymour, Q.C., and Gould, supported the rule.

COCKBURN, C.J.: We are of opinion that the rule must be made absolute for a new trial. It is unnecessary to decide whether the secret payment of a gratuity to an agent by the party with whom he is authorized to negotiate on behalf of his employer, supposing that it had no effect at all on the mind of the agent

so as to induce him to make an agreement less beneficial to his employer than he might otherwise have the opportunity of making, will vitiate the contract made by an agent under such circumstances. It is enough for the decision of the present case to say that, in my opinion, if a party with whom an agent is negotiating on the part of another agrees to give, or does give the agent a secret *gratuity, and that gratuity does influence the mind of the agent, [554] directly or indirectly, in assenting to anything prejudicial to his employer in making the contract, the contract is vitiated. Now, on looking at the facts of this case, I cannot help thinking that, quite unintentionally on the part of the learned judge, the jury have not been led to take the view of the question which they ought to have taken. The first agreement in October was a beneficial one for the defendant. It gave an option to pay for the wagons in money or in coals which, as it turned out, would have been of advantage to her. In December the agent who had previously received the gratuity agreed to an alteration of the terms. And under the fresh arrangement the defendant was to have no option to deliver coals or pay money, but became bound to deliver the coals at a fixed price. The result was very disadvantageous to the defendant. If in assenting to this fresh arrangement the agent was influenced by the gratuity that he received, then I think that the principle I have laid down would apply, and the contract would be vitiated. We all agree that the giving of such gratuities is highly improper and morally objectionable, because they are necessarily calculated to sap the fidelity of the agent towards his employer. Such being the case, if we can see our way to the conclusion that the gratuity in this case did actually affect the mind of the agent, then, in my opinion, a sufficient case of fraud has been made out to vitiate the contract.

Now it seems to us, on the whole, that the jury may not have had their minds sufficiently directed to the true issue in this case. The direction of the learned judge may have left it open to them to think that because the gratuity was actually given in reference to the first contract, and had no direct connection with the second, they ought not to consider the substitution of the second contract as having possibly been influenced by the gratuity. But if the operation of the gratuity was to influence the mind of the agent in a manner favorable to the party offering it, it obviously might operate on his mind adversely to his principal in relation to the second contract.

We find that the stipulations of the second contract were much more unfavorable to the defendant.

When the agent came to make a second contract, would not his mind be likely to be influenced in assenting to such stipulations by the fact that he had received a very large gratuity in connection with the first contract? It seems to me that a very fair and reasonable presumption arises that it would be so. And this, as it seems to me, ought to have been distinctly put to the jury. They should have been told that if the gratuity was given to the agent in order that he might have a favorable disposition towards the party giving it, and it had that effect, and he was thereby induced to enter into the second contract, that was quite enough to vitiate the second contract. The learned judge may have intended to leave the case to the jury in that way, but his language is somewhat ambiguous, and the finding of the jury leads one to think that at any rate they could not have sufficiently taken into account the considerations I have just mentioned. On the whole, I think there should be a new trial. The verdict is not, to my mind, satisfactory, and I think a second jury should have an opportunity of considering the case.

BLACKBURN, J.: I am of the same opinion. There can be no doubt that the giving of a secret gift or gratuity to an agent is very improper. The learned *judge appears to have told the jury that it was fraudulent if it was [555] done with the intention of influencing the mind of the agent to betray his principal, which he otherwise would not do, and if it in fact produced that effect, but that otherwise it was not fraudulent. I am not prepared to say that there is an absolute presumption, *presumptio juris et de jure*, that the giving of such a gratuity amounts to fraud. I think it is a question for the jury, and if they think that the gratuity was given without the knowledge of the principal,

1878

Harrington v. Victoria Graving Dock Co.

and with the intention of influencing or biasing the mind of the agent in favor of the person giving it, and that it did produce the effect of biasing the mind of the agent in favor of such person, and so acted as an inducement to him in entering into a contract or carrying one out, then I think the jury ought to find that there is what amounts to fraud. I cannot help thinking that no jury could have come to any other conclusion than that this money was given to the agent to bias his mind in favor of the plaintiff, and that his mind was so biased, if the considerations I have adverted to had been fully before them. I am not satisfied that in this case they were put before the jury by the learned judge with sufficient distinctness. Looking at all the circumstances, I think the case should go down again for a new trial.

MELLOR, J., concurred.

Rule absolute.

See 27 Eng. R., 460 note.

A court is, in the due administration of justice, bound to refuse its aid to enforce a contract either in violation of law or against public policy, although its invalidity be not specially pleaded: *Oscanyan v. Arms Co.*, 103 U. S. R., 261.

A consul general of a foreign government residing in this country entered into a contract, whereby, in consideration of a stipulated *percentage*, he agreed to use his influence in favor of a manufacturing company here, with an agent of that government sent to examine and report in regard to the purchase of arms for it. By exerting his influence, sales of arms were made by the company to that government, and he brought suit to recover the *percentage*. Held, that there could be no recovery on the contract: *Oscanyan v. Arms Co.*, 103 U. S. R., 261.

A provision in a contract between a telegraph company and a railroad company, to the effect that the telegraph company will transmit the family, private and social messages of the executive officers of the railroad company free, is against public policy, and immoral, and taints the entire contract so that a court of equity will not enforce it, or grant any relief to a party claiming under it: *Western, etc., v. Union, etc.*, 1 McCrary, 418.

A mortgage given, at the request of the mortgagor, for the purpose of preventing an assessment and of evading the payment of taxes upon the money at interest and secured thereby is void, though the mortgage be given in another state: *Drexel v. Tyrrell*, 15 Nev., 114, 131-140.

A party to a contract, the making of which, although prohibited by law, is not *malum in se*, may, while it remains

executory, rescind it and recover money by him advanced thereon to the other party who had performed no part thereof: *Spring Co. v. Knowlton*, 103 U. S. R., 49, contrary to S. C., 57 N. Y., 518.

The statute prohibiting savings banks from loaning money on the security of names alone, is directory to the trustees, and designed for the protection of the depositors, and will not prevent a bank from enforcing payment of a promissory note, whether the purchase was or was not in conformity with its provisions: *Farmington, etc., v. Fall*, 71 Maine, 49.

So a defendant sued by a national bank for money loaned to him by it cannot set up, as a bar, that they exceeded in amount one-tenth part of its capital stock: *Gold, etc., v. National, etc.*, 90 U. S. R., 640.

See *Allen, etc., v. First, etc.*, 23 Ohio St. R., 97; *National, etc., v. Porter*, 125 Mass., 333; *Attleborough, etc., v. Rogers, Id.*, 339.

So a mortgage to a national bank, given for a present, and not a past, loan: *National, etc., v. Matthews*, 98 U. S. R., 621; *National, etc., v. Whitney*, 103 id., 99, reversing 71 N. Y., 169; *Pratt v. Eaton*, 79 id., 449; *Mapes v. Scott*, 94 Ills., 379.

See *Pratt v. Short*, 79 N. Y., 437; *First, etc., v. Haire*, 36 Iowa, 443; *Western, etc., v. Taylor*, 9 Grant's (U.C.) Chy., 471; *Richards v. Koutze*, 4 Neb., 200; *First, etc., v. Nat., etc.*, 92 U. S. R., 122, 51 How. Pr., 320, affirming 39 Md., 600; *American, etc., v. Wellman*, 69 Ind., 413; *Worcester, etc., v. Chee-ney*, 87 Ills., 602.

See *contra*: *Matthews v. Skinker*, 62 Mo., 329, 3 Cent. L. J., 606; *Farmers, etc., v. Baldwin*, 4 Cent. L. J., 119; *Fridley v. Bowen*, 87 Ills., 151.

A national bank may legally and properly engage in the business of dealing in, and exchanging, government securities: *Van Leuven v. First*, etc., 54 N. Y., 671, 19 Am. R., 724.

See *Farmers, etc., v. Baldwin*, 23 Minn., 198; *Atlantic v. Saney*, 82 N. Y., 291; *Tracy v. Tallmadge*, 18 Barb., 456, 14 N. Y., 162; *Erdman v. Barrett*, 80 Penn. St. R., 324; *First, etc., v. Ocean, etc.*, 60 N. Y., 278, 19 Am. R., 181, 192 note.

The doctrine that where the debtor himself, or a near relative, out of compassion for him, pays money exacted by a creditor as a condition of his signing a composition, he may be regarded as having paid under duress, and is not equally criminal with the creditor, and so that he may recover it back, if sound (as to which, *quere*), cannot be invoked in favor of one remotely related by marriage to the debtor; it can only be asserted in favor of the debtor himself, and the wife, husband or near relative of the blood of the debtor.

Plaintiff, who was a brother-in-law of N. of the firm of N. & Co., to induce the defendants, who were creditors of that firm, to unite with the other creditors in a composition of its debts, secretly agreed to and did give them his promissory note for a portion of their debt, beyond the amount to be paid by

the composition agreement. Defendants transferred the note before due to a *bona fide* holder, and plaintiff was compelled to pay: Held, that the agreement was a fraud upon the other creditors; that it was not divested of its fraudulent character by the fact that it was made not by the debtor, but by a third person; and that an action was not maintainable to recover back the amount so paid: *Solinger v. Earle*, 82 N. Y., 393, distinguishing and questioning *Smith v. Bromley*, 2 Doug., 96; *Smith v. Coff*, 6 M. & S., 160; *Atkinson v. Denby*, 7 H. & N., 934.

There was a dispute between the parties as to the amount due appellee. Being pressed by a creditor for a debt owing him, appellee settled with appellant for a sum named, and drew an order therefor in favor of his creditor upon appellant, who accepted the same, and afterwards paid it. Appellee signed said order with these words added, "I sign under the compulsory note to pay my just bills due Mr. John F. Weare." Held, a full discharge and satisfaction of the account between appellant and appellee. There was no compulsion or duress sufficient to warrant appellee disregarding the settlement thus made: *Kitchie v. Cherest*, 8 Bradwell (Ills.), 534.

[3 Queen's Bench Division, 569.]

May 18, 1878.

[IN THE COURT OF APPEAL.]

*BRICE V. BANNISTER.

[569

Assignment of Debt—Payment to Original Creditor after Notice—Supreme Court of Judicature Act, 1873, s. 25, subs. 6.

G. agreed to build a vessel for the defendant, the price of which was to be paid by instalments. Before the vessel was finished, G., being in debt to the plaintiff, by an instrument in writing directed the defendant to pay to the plaintiff £100 out of moneys due or to become due from the defendant to G. At the time of giving this direction all the instalments which were due had been paid by the defendant to G. Notice in writing of the above mentioned instrument was given to the defendant, but he refused to be bound by it, and afterwards paid to G. the balance of the price of the vessel, amounting to more than £100:

Held (by Bramwell and Cotten, L.JJ., Brett, L.J., dissenting), that the instrument in writing constituted a valid assignment of £100, part of the moneys due or to become due from the defendant to G., and that the plaintiff was entitled to recover that amount from the defendant, notwithstanding the subsequent payments by him to G.

1878

Brice v. Bannister.

CLAIM stated that John Gough, by an order in writing under his hand, directed to the defendant, bearing date on or about the 27th of October, 1876, absolutely assigned to the plaintiff the sum of £100, money due or to become due of John Gough in the hands of the defendant, of which order due notice was given to the defendant, and the defendant thereupon accepted the same. At the time of the making of 570] the order in writing and at the time *of notice thereof to the defendant he was indebted to John Gough in divers sums of money more than sufficient to pay the sum of £100 assigned by John Gough to the plaintiff. The plaintiff had on more than one occasion demanded from the defendant payment of the sum of £100, but the defendant had not paid it or any part of it.

The nature of the defence appears from the facts hereinafter stated.

At the trial at the Somersetshire Summer Assizes, 1877, before Lord Coleridge, C.J., without a jury, the following facts were proved. The plaintiff is a solicitor at Bridgwater, and the defendant is a shipowner residing at Barrow-in-Furness. The defendant had entered into a contract with John Gough, dated the 17th of May, 1876, by which Gough agreed to build for the defendant a vessel on certain terms.

The material part of the contract is as follows: "The vessel to be completed by the 30th of December, 1876, for the sum of £1,375. Payments to be made as follows:—

When keel and stern post up and floors across . . . £250

When in frame 250

When planked 400

and the remainder when completed and handed over with Lloyd's, Board of Trade, and builder's certificates."

The contract was in the course of being performed by John Gough between the date of the contract, 17th of May, 1876, and the completion of the vessel, 11th of February, 1877.

The first instalment under the contract became due on the 22d of June, 1876, the second instalment became due on the 11th of October, 1876, and the third instalment became due on the 23d of November, 1876, and the remainder was due on the completion of the vessel, 11th of February, 1877. Gough was unable to finish the vessel without assistance from the defendant, and therefore during the progress of the building the latter advanced to him sums of money, which were necessary to enable him to pay the wages of his workmen employed in building the vessel and to pay for the materials used in constructing her. The total amount of these advances upon the 27th of October, 1876, was £1,015. That

sum was in excess of the amount then due pursuant to the contract.

*On the 27th of October, 1876, Gough, being in- [571
debted to the plaintiff to an amount exceeding £2,000, gave the plaintiff an order addressed to the defendant in the following terms:—

“I do hereby order, authorize, and request you to pay to Mr. William Brice, solicitor, Bridgwater, the sum of £100 out of moneys due or to become due from you to me, and his receipt for same shall be a good discharge.”

On the same day, the 27th of October, 1876, the plaintiff gave the defendant written notice of the order in the following terms:—

“I hereby give you notice that by a memorandum in writing dated the 27th of October, 1876, John Gough, of this place, authorized and requested you to pay me the sum of £100 out of money due or to become due from you to him, and my receipt for the same shall be a good discharge.”

The defendant acknowledged the receipt of the notice, but declined to be bound by it as an authority to pay £100 to the plaintiff.

Subsequently to the receipt of the notice, the defendant paid to Gough on account of the building of the vessel, pursuant to the contract, sums far exceeding £100; and unless the defendant had made such payments to Gough, he would not have been able to complete the vessel.

On these facts it was contended by the defendant's counsel that the judgment ought to be entered for the defendant, on the following grounds:—

1. That at the time of giving the order there was nothing due to Gough, and therefore there was nothing which could be assigned by him to the plaintiff by virtue of the Judicature Act, 1873, s. 25, subs. 6 (1).

(1) By the Supreme Court of Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 25, subs. 6, “Any absolute assignment by writing under the hand of the assignor (not purporting to be by way of charge only) of any debt, or other legal chose in action, of which express notice in writing shall have been given to the debtor, trustee, or other person from whom the assignor would have been entitled to receive or claim such debt or chose in action, shall be and be deemed to have been effectual in law (subject to all equities which would have been entitled to priority over the right of the as-

signee if this act had not passed) to pass and transfer the legal right to such debt or chose in action from the date of such notice, and all legal and other remedies for the same, and the power to give a good discharge for the same without the concurrence of the assignor: Provided always, that if the debtor, trustee, or other person liable in respect of such debt or chose in action shall have had notice that such assignment is disputed by the assignor or any one claiming under him, or of any other opposing or conflicting claims to such debt or chose in action, he shall be

572] *2. That there was no binding acceptance of the order by the defendant.

3. That had not the defendant made advances to Gough or to his creditors, other than the plaintiff, Gough would never have been in a position to become a creditor of the defendant.

Lord Coleridge, C.J., after consulting Lindley, J., delivered the following judgment:

LORD COLERIDGE, C.J.: In this case I am of opinion that the plaintiff is entitled to succeed.

This is an action brought to recover the sum of £100 due on an order given by a person named Gough on the 27th of October, 1876, authorizing and requesting the defendant to pay to the plaintiff Brice £100 out of money due, or to become due, from the defendant to Gough, and the plaintiff's receipt was to be a good discharge.

The circumstances under which this order was made are these. [The learned judge stated the facts.] Now it appears by the statement which Mr. Cole has made on behalf of the defendant, and which is not disputed on the part of the plaintiff, that certain payments were made, not at the dates fixed by the contract, but at periods to a considerable extent in advance of the payments under the contract. Mr. Cole has furnished a list of them, but the only circumstance that is material for me to consider is, that at the date of the 27th of October, 1876, as much as £1,015—it is better to include the payment made on the 27th of October—had been paid under the contract. That was, no doubt, considerably in excess of the sum which at that time was due. That left the difference between £1,015 and £1,375 to be paid under the contract.

573] *It is admitted on the part of the plaintiff, that those payments had been made before the date of the order: it is admitted on the part of the defendant, that payments subsequently to the date of the order were made to a much greater extent—it is immaterial to what extent—but to a much greater extent than £100.

The further facts that are material are, that the notice was given of this order at the date of the order: that the defendant acknowledged the receipt of the order, but did not accept the order in the sense of any attornment to it, or agreeing to be bound by it. He therefore acknowledged he knew of the order, but at the same time declined in terms to be

entitled, if he think fit, to call upon the several persons making claim thereto to interplead concerning the same, or he may, if he think fit, pay the same into the

High Court of Justice, under and in conformity with the provisions of the acts for the relief of trustees."

bound by its authority. These are the only material facts necessary for my decision.

It is said on behalf of the plaintiff that he has proved his case. He has shown there was a contract, there were various sums to become due, after the date of the order, under the contract; that those sums did become due and were not paid to him, although an order was given for the payment of the amount of £100, the portion of the debt which had been assigned to the plaintiff. On behalf of the defendant it was objected, first, at the date of the order there was no money due, and it seems to be admitted that Gough was overpaid, and nothing was at the time under the terms of the contract owing to him. The words of the order are "out of money due or to become due." It is argued that, in order to satisfy the terms of the statute to which he has referred, the debt must be an existing debt, and an assignment of a debt to become due will not be within the terms of the section. Now that a debt to become due is a chose in action, is clear; and that an assignment of a debt to become due would have been enforced in equity, upon the authorities is clear. I am happy to find that two great authorities cited to me have so decided; but I should have thought it fell within the very nature and definition of the term "chose in action." Lord Hardwicke⁽¹⁾ and Sir L. Shadwell⁽¹⁾ have so decided; that is sufficient for the present purpose. It seems to me that this is distinctly a chose in action, and the fact that the *actual sum which [574 was assigned under the order had not become due, is not material in reference to the power of the plaintiff to enforce it.

Next, it is said that there was no acceptance of the order. In one sense that is true. There was no acceptance. That, again, does not appear to me to be material, because if the debt was a chose in action, and if there was an assignment of it, the Judicature Act, 1873, s. 25, subs. 6, is directly in point, and there need be no acceptance and no agreement on the part of the debtor, express notice having been given. Therefore it seems to me that the first objection has no foundation, and the second falls with it.

Then the third objection is, that in order to give occasion for the payment of the sums, a portion of which was assigned, advances had been made by the debtor in the interval, and the assignor never would have been in a position to become a creditor but for those advances, and it is argued

⁽¹⁾ It is presumed that Lord Coleridge, Sen., 331; 2 W. & T. (L. C. in Eq.), 726, C.J., referred to *Row v. Dawson*, 1 Ves. 5th ed., and *Lett v. Morris*, 4 Sim., 607.

1878

Brice v. Bannister.

that shows an equity in favor of the defendant, because he is the meritorious cause of the payment. It appears to me that that argument does not bear investigation, and this becomes apparent upon referring to the date of the order and the date of the receipt of the notice. It is admitted that the £1,015 only had been paid, and subsequently to the receipt of the notice the defendant chose to advance to Gough sums of money without regard to the order. He did that in his own wrong, for he knew that to the extent of the order the contract, on which by hypothesis the advance was made, was gone from Gough, and that the contract to that extent was no longer a security in favor of the latter; therefore to the extent of £100 the defendant was lending money on no security, and it appears to me that no question of priority arises. This last point has no substance in it, and I must decide it against the defendant.

A material point remains to be considered, which was probably intended to be raised before me, but was not put very prominently forward, but which it is fit I should notice. [The learned judge read the Supreme Court of Judicature Act, 1873, s. 25, subs. 6.] The Legislature uses the words "any absolute assignment," and it may be said that an absolute assignment does not include what in strictness is rather an agreement to assign a debt when it arises, than the present assignment of a debt that has arisen. When, however, the general object of this section is looked at, and when one remembers that the reason of it was to give a right to an action at law in cases which would have been the subject-matter of a bill in equity, and when it is recollected that an agreement in equity to assign a future debt would have been enforced, it appears to me that it is no straining of the words of this section to construe the request to pay as an absolute assignment of a debt or chose in action, the words of the enactment being not merely "a debt," but also "chose in action," and I think that it was intended to include a case of this kind. I do not think I am straining the words of this section in holding that this order is within their meaning.

It is necessary to have recourse to the enactment, because at law no action could have been maintained without the assent of the assignor, and in equity, I apprehend, though I speak here with great diffidence, that without joining the assignor no bill could have been enforced for want of parties. Therefore I could not decide this case without the aid of the enactment. The general jurisdiction of the High Court and the abolition of the general lines of demarcation between

law and equity and the authority of a Vice-Chancellor would not have enabled me to decide this case in favor of the plaintiff. But for the section I must have looked on this action as a bill in equity, to which the only parties were the present plaintiff and the present defendant, and which therefore could not have been maintained for want of proper parties. I therefore rely on the terms on this subsection, and not on the general authority of the High Court.

For these reasons I direct that the judgment be entered for the plaintiff for £100.

The defendant appealed.

Jan. 28, 29. *Cole*, Q.C., and *Bullen*, for the defendant: The document signed by Gough was not an absolute assignment of a "debt or other legal chose in action" within the meaning of the Supreme Court of Judicature Act, 1873, s. 25, subs. 6. It resembled a check, which is a mere order to pay, and confers in *equity no title upon an assignee [576 as against the drawee: *Schroeder v. Central Bank of London* (1), following *Hopkinson v. Foster* (2). An express promise made to a creditor by a third party that he will pay to the former money thereafter to be received for the debtor, is not an assignment in equity: *Rodick v. Gandell* (3). The last clause giving the debtor power to interplead or pay money into court under the Trustee Relief Acts, shows that the Legislature intended to confine the operation of subs. 6 to debts already due.

A. Charles, Q.C., and *Herbert Reed*, for the plaintiff: The document by its very terms was a good assignment in equity of £100, to be paid out of any money due either at its date or thereafter from the defendant to Gough. The doctrine that a debt was assignable in equity upon notice, was established by many decisions before the Judicature Acts, of which one of the latest is *M'Gowan v. Smith* (4). The defendant's counsel have referred to *Rodick v. Gandell* (5), but that case is very distinguishable in its facts. The promise relied upon was not made by a person who owed money to the debtor.

[COTTON, L.J.: *Rodick v. Gandell* (6) was a very different case from the present.

BRAMWELL, L.J.: It is not an authority against the contention for the plaintiff.]

The plaintiff relies upon *Yeates v. Groves* (7) and *Lett v. Morris* (8), in which orders to pay were supported in equity.

(1) 34 L. T. (N.S.), 735; 24 W. R., 710.

(2) 26 L. J. (Ch.), 8.

(3) Law Rep., 19 Eq., 74.

(4) 1 Ves., 280.

(5) 1 De G. M. & G., 763.

(6) 4 Sim., 607.

1878

Brice v. Bannister.

This case does not raise any question as to the property in the ship built by Gough, and therefore *Clarke v. Spence* (*) does not assist the view presented upon behalf of the defendant.

Bullen, replied.

Cur. adv. vult.

May 18. The following judgments were delivered :

COTTON, L.J.: The letter of the 27th of October is a good equitable assignment by Gough to the plaintiff of money to 577] the *extent of £100, which might become due under his contract with the defendant. To this extent he thereby anticipated the moneys payable from the defendant to him, and Gough became incompetent to deal with these moneys to plaintiff Brice's prejudice, and the defendant, after notice of the letter, could not come to any agreement with Gough dealing with or anticipating these moneys to the prejudice of the plaintiff. At the time when notice of the letter of the 27th of October was given to the defendant, the balance of the contract price which remained unpaid exceeded £100, and the ship has been completed under the contract. The question is, whether in substance what has been done by Bannister and Gough was not a dealing with the moneys payable under the contract; I think it was. The contention of the defendant was that though, after notice of the assignment to the plaintiff he had paid moneys exceeding £100 to Gough, he did so not in payment of the price or under the contract, but that the advances were necessary in order to secure the completion of the ship. But this is not a case where the builder having failed in his contract the person for whom he was building put an end to the contract and completed the work. In such a case, the builder, if he in fact completed the work, would be employed as agent or servant doing the work for the owner of the vessel. Here the builder completed the work as contractor building under a contract with the defendant, and this is the distinction between this case and *Tooth v. Hallett* (*) where the work was completed after the bankruptcy of the builder by his trustee out of his own moneys, and the person for whom the work was done had power to take possession and employ any one to complete the building, and in effect he did so, and the court allowed the expenditure against the equitable assignee. It is probable that Gough would not, unless he had obtained the advances made by the defendant either from him or from some other person, have been able to complete the vessel; but a charge for the money lent after the 27th of Octo-

(*) 4 A. & E., 448.

(*) Law Rep., 4 Ch. App., 242.

ber by any other person for the purpose of paying wages or buying material necessary for the completion of the ship, and in that sense necessary to enable the money to become due to Gough, could not be preferred to the plaintiff's claim. Moneys paid for the same purpose to Gough by *the [578 defendant cannot, in my opinion, stand in a better position. It was urged that the assignee of a chose in action takes subject to all equities. But these must be equities existing or arising out of circumstances existing before notice is given of the assignment; the advances made by the defendant were in no way sanctioned by the contract, and in no sense an equity between Gough and the defendant existing or arising from circumstances existing at the date of the notice to the defendant of the assignment to the plaintiff. The plaintiff was assignee for value of the moneys payable under the contract, without any deduction for cost of materials or other costs of construction. The defendant, for his own purposes, determined not to complete the ship himself, but to let Gough do so under the contract. To enable him to do so he, after notice of the assignment to the plaintiff, paid money to Gough so as to exhaust the contract price. By so doing, he could not, in my opinion, defeat or prejudice the plaintiff's right, and the judgment appealed from must in my opinion be affirmed.

BRETT, L.J.: I am sorry to say that, with great hesitation, I differ from the judgment which has been read. I consider the principle involved in this case to be of the highest importance. The defendant and Gough were parties to a contract for building a ship, the price of which was to be paid by instalments at different stages of the building, and the ship was to become the property of the purchaser according to the different times of the payments. Before the ship was finished the builder, through want of funds, became unable to proceed with the work. I do not mean to say that there is any finding that the defendant as purchaser was compelled to take possession of the ship if he did not advance money; but practically if he did not advance money the ship must have been thrown upon his hands, and he must have completed the building of the ship, a most onerous charge upon him. It is an ordinary mode of meeting a difficulty of this kind, an ordinary mode of transacting business, either that the purchaser shall take the ship into his own hands, or that he and the builder shall agree to modify the contract, so that he, instead of paying the purchase-money after a stage of work is completed, should advance the money beforehand; or, as it may be put in

1878

Brice v. Bannister.

579] another *way, the purchaser, when the builder is in difficulties, before the time of payment fixed by the contract has arrived, advances money upon the terms that he is to repay himself out of the money which he would have to pay when a particular stage is completed. It is true that the builder, in consideration of money previously advanced by the plaintiff, made an equitable assignment to him of the money which would become due to him at a following stage, and he afterwards did procure an advance before the appointed time from the defendant, in order to enable him to complete the ship. It is true that the defendant had notice of this so-called equitable assignment; but it was a matter between the builder of the ship and a third person, over which the defendant, the purchaser of the ship, had no control; and the question is whether we are to allow an equitable doctrine to hamper and impede an ordinary business transaction. I cannot bring myself to agree that, either by virtue of the Judicature Act or otherwise, business transactions are to be hampered by any doctrine which will prevent a man from doing what he otherwise might do, merely because something has happened between other parties. I would therefore confine this remedy to a case where a debt has actually accrued due from one person to another, or at least I certainly would confine it simply to the case where nothing remains to be done by the person who is the assignor. In that case nothing remains to be done by him but to receive money from the person who is to pay him, and that money he makes over to the equitable assignee. But I cannot bring my mind to think that this doctrine should be extended, so as to prevent the parties to an unfulfilled contract from either cancelling or modifying, or dealing with regard to it in the ordinary course of business. I quite agree that they ought not to be allowed to act *mala fide* for the purpose of defeating an equitable assignee; but if what they do is done *bona fide* and in the ordinary course of business, I cannot think their dealings ought to be impeded or imperilled by this doctrine, and it seems to me the purchaser of a ship and the builder might have cancelled the contract even after this assignment. Why may they not modify it? If they cannot modify it, it seems to me to denote a state of slavery in business that ought not to be suffered; but I apprehend the *parties to the contract can modify it. If they can modify it, why may they not act so that no money shall be due from the defendant in this case to the plaintiff? It seems to me there never was any money due to the assignor of the plaintiff. Before that

money became due, it was absorbed either by an advance made *bona fide* by the present defendant to the builder, or by a modification of the contract. The builder never could have sued this defendant for money due to him as for a debt; and therefore it seems to me no equitable assignment ought to be allowed to charge the defendant and make him practically pay twice over.

In what cases has this equitable doctrine been applied? Suppose a man writes upon paper, "I promise to pay A. B. the sum of £100 on demand:" the document, not being payable to bearer or to order, is not a promissory note, assignable or negotiable by statute or the law-merchant. Has any court of equity ever held, that if a person received such a paper it could be sued upon after being handed over to a third person? But this equitable doctrine would make a promissory note not payable to bearer an order transferable to a third party, without any writing upon it, and I apprehend that it is directly contrary to all practice, custom and law, and shows that this doctrine is not to be allowed to control or hamper ordinary business transactions.

I am, therefore, of opinion in this case the doctrine ought not to be allowed to hamper and impede the ordinary transactions which occurred between the defendant and the builder. The defendant had a right, with the consent of the builder, to modify this contract, and he modified it so far and to such a degree that no money was ever due from the defendant to the builder, and therefore the equitable assignment by the builder to the plaintiff had no legal or binding effect whatever. Therefore I am of opinion that the defendant in this case is entitled to succeed.

BRAMWELL, L.J.: I have reluctantly come to the conclusion that this judgment should be affirmed. I say reluctantly, because I feel the great force of my Brother Brett's observations; it does seem to me a strange thing and hard on a man, that he should enter into a contract with another and then find that because that other has entered into some contract with a third, he, the first *man, [58] is unable to do that which it is reasonable and just he should do for his own good. But the law seems to be so; and any one who enters into a contract with A. must do so with the understanding that B. may be the person with whom he will have to reckon. Whether this can be avoided, I know not; may be, if in the contract with A. it was expressly stipulated that an assignment to B. should give no rights to him, such a stipulation would be binding. I hope it would be. But as there is no such clause in the contract

1878

Brice v. Bannister.

here, the plaintiff has undoubtedly certain rights—to what? If it were only to money payable according to the terms of the contract, the plaintiff would fail, for no money ever became due according to the terms of the contract. It was paid in advance before the work was finished; so that an amendment of the statement of claim is necessary; and in strictness the plaintiff's case is this: "You, the defendant, had no right to pay in advance; you were bound to wait till the work was finished; you would then owe Gough money, and would then be bound to pay me." This seems to be the law, and certainly if Gough and the defendant had agreed to anticipate the time of payment to defeat the plaintiff, such a scheme ought not to succeed. On the other hand, if Gough had broken his engagement, or threatened to break his engagement to finish the vessel, or to finish it in a reasonable time, and the defendant to remedy and avert such breach, reasonably and *bona fide*, not to defeat the plaintiff but to protect himself, advanced money to Gough before it was due, so that it never became due according to the contract, I should have hesitated long before holding that the defendant was liable in this action. But in reading the correspondence I cannot see that this was the case. That the defendant acted *bona fide* I doubt not, but I think his advancing of the money as he did was quite voluntary and in no sense compulsory. I concur, therefore, in affirming the judgment.

Judgment affirmed.

Solicitors for plaintiff: *Reed & Lovell*, for Reed & Cook, Bridgwater.

Solicitors for defendant: *Chester & Co.*, for R. B. D. Bradshaw, Barrow-in-Furness.

See *Ex parte Hall*, 27 Eng. R., 149, 155 note; *ante*, p. 828 note.

Declaration that D., by writing, for valuable consideration, duly assigned to plaintiff the sum of \$500, money due and to become due unto D. by defendants, whereof defendants had notice in writing, and at the time of and after said assignment, and after said notice, and before action, defendants were indebted to D. in money sufficient to pay the sum so assigned to plaintiff, etc.: Held, on demurrer, bad, as not setting forth any fact from which the existence of and promise to pay a debt would be implied, distinguishing *Mitchell v. Goodall*, 44 U. C. Q. B., 898, and *Brice v. Bannister*, 3 Q. B. Div., 569, the principal case, *supra*.

A check operates as an equitable assignment, *pro tanto*, as between the holder and the assignee in insolvency of the drawer, where it is made and delivered prior to the assignment, and not presented for payment until after the drawee is notified of the assignment by the assignee: *First Nat. Bank, etc., v. Coates*, 8 Fed. Reporter, 540, Circuit Court, West. Dist. Mo.

The second count stated that D., being largely indebted to plaintiff and being pressed by him for payment, it was agreed that D. should assign to plaintiff, to secure part of said debt, \$500 due and to become due to D. by defendants for work done by D.; that D. gave plaintiff an order upon defendants to pay same to plaintiff; that

plaintiff notified defendants, who represented to plaintiff that if he would present said order as soon as they had examined said work, which would be before Dec. 1879, they would pay the \$500 to him; that by said representation plaintiff was prevented from proceeding against D. to recover said \$500; that afterwards, and before said December, defendants being liable to pay said sum, and well knowing that plaintiff,

relying on said representation, refrained from such proceedings, paid the same over to D. in fraud of plaintiff, and defendants thereafter wrongfully refused to pay same to plaintiff. Held good, as disclosing a cause of action upon an assignment of a debt due by defendants to D., for work and labor performed for them by D., and a promise on their part, to plaintiff, to pay such debt: *Smith v. Ancaster*, 45 U. C. Q. B., 86.

[8 Queen's Bench Division, 594.]

May 16, 1878.

[IN THE COURT OF APPEAL.]

***PICKUP V. THE THAMES AND MERSEY MARINE [594
INSURANCE COMPANY, Limited.**

Marine Insurance—Unseaworthiness—Loss by Perils of the Sea—Burden of Proof—Presumption—Misdirection.

In an action on a policy of insurance it was proved at the trial that the vessel put back from inability to proceed eleven days after she started on her voyage: the judge directed the jury that the time which elapsed between setting sail and putting back was sufficiently short to shift the onus of proof from the underwriters, and make it incumbent on the assured to prove that the unseaworthiness arose from causes occurring subsequently to setting sail:

Held, affirming the judgment of the Queen's Bench Division, a misdirection.

Watson v. Clark (1 Dow., 386), commented upon.

ACTION on policy of insurance on freight.

Pleas amongst others—1. That the ship was not lost by the perils insured against: 2. That the vessel was not seaworthy at the time of the commencement of her voyage.

The jury in answer to the learned judge found that the vessel was not seaworthy when she set sail from Rangoon upon the voyage insured, and that she was lost in consequence of her defective condition operated upon by such weather as was to be expected on the voyage.

An application was made to the Queen's Bench Division for a new trial on the ground of misdirection.

W. Williams, Q.C., *W. G. Harrison*, Q.C., and *Lodge*, for the defendants.

Butt, Q.C., *Cohen*, Q.C., and *J. C. Mathew*, for the plaintiff.

*The facts of the case and the course at the trial are [595 to be found fully stated in the judgment of the Queen's Bench Division.

March 5. The judgment of the Court (Cockburn, C.J., Mellor and Field, JJ.) was delivered by

1878

Pickup v. Thames Insurance Co.

COCKBURN, C.J.: This was an action on a policy of insurance on freight, on a cargo of rice shipped on board the ship *Diadem*, on a voyage from Rangoon to a port in the United Kingdom. Amongst other defences was one of unseaworthiness.

The cause came on for trial before my Brother Field and a special jury, at Guildhall, when, under the direction of the learned judge as to the law applicable to the case, the jury found a verdict for the defendants, on the ground that the vessel was unseaworthy on commencing the voyage.

The facts so far as they are necessary for the present purpose may be stated in a few words.

The ship having conveyed a cargo of coals to Point de Galle, proceeded in ballast to Rangoon, where she loaded a cargo of rice, the freight on which was the subject-matter of the insurance in question. She arrived at Rangoon on the 25th of April, 1874. Amongst other issues in the cause was one of unseaworthiness at the commencement of her voyage from Galle to Rangoon, but that issue the jury decided in favor of the plaintiff, and no question upon that arises here. For the present purpose the ship must be taken to have been seaworthy on her arrival at Rangoon. She remained there till the 4th of June following, when having loaded her cargo, she set sail on the homeward voyage. Between the 9th and 15th of June she encountered severe squalls and a heavy sea, and labored heavily, and made so much water that the master and crew becoming alarmed for the safety of the ship, and satisfied of her inability to perform the voyage home, determined on putting back to Rangoon. On the 19th of June, when in the Rangoon river, she grounded on the Silva Sand, but was got off again and proceeded to Rangoon, where she arrived on the 20th of June. In the course of the month of July surveys were held on the ship. She was found to be very much strained, and in several places where her copper was off, to be very much worm-eaten, and on the 15th of July she was pronounced to be unseaworthy, and 596] *there was no contest as to her having been so at that time. The question was whether the rough weather she had encountered between the 9th and 15th of June, and the straining thereby occasioned, had caused her leaky condition—in which case that condition would have been consistent with her having been seaworthy on starting on the voyage—or whether her leaky state had been brought about by the action of the worms, which, from the defective condition of some parts of her copper, had been able to eat their way into

her planks, so as to render many of them in an unsound condition.

Arguing on the latter hypothesis, the defendants contended that this worm-eaten condition must have arisen during the period the ship was loading in the Rangoon river—namely, from the 25th of April to the 4th of June;—the plaintiff on the other hand contending that the leaky state of the vessel was due to the weather she had encountered, and that her worm-eaten condition as apparent on the survey had been produced during her stay at Rangoon between the time of her return thither and the time of the survey—that is to say, between the 20th of June and the 15th of July—the waters there being greatly infested with the species of worms by which wooden vessels are liable to be attacked, and which, owing to portions of her copper having been rubbed off on the occasion of her stranding, had been thus enabled to get at the vessel.

After the close of the evidence and during the address to the jury the question was raised as to the party upon whom in this particular case the onus of proof lay, and the counsel for the underwriters submitted to the learned judge to tell the jury as a matter of law that the onus of proof was in this instance shifted to the plaintiff. This course, however, at that time the learned judge declined to adopt, but left the whole issue to the jury, putting the question of burden of proof to them in the language of Lord Eldon in *Watson v. Clark* (*), and laying before them the evidence on one side and the other, necessary to enable them to arrive at a conclusion.

At the close of the summing up the jury retired to consider their verdict, and after a protracted absence returned into court, *saying that they were unable to agree on [597 their verdict. In answer to a question put by the learned judge whether there was any point upon which he could give them any assistance, the foreman asked, "Whether the judge could give them any more precise and positive direction as to which of the parties had the onus of proof cast upon him," upon which my Brother Field again used the language of Lord Eldon, but dealt with it this time as a direction in point of law, and directed the jury as matter of law that, while the presumption of law was *prima facie* in favor of seaworthiness, and the burden of proving unseaworthiness was in consequence, in the first instance, on the insurers, yet that if the inability of a ship to proceed on the voyage becomes evident in a short time after her sailing,

(*) 1 Dow., at p. 344.

1878

Pickup v. Thames Insurance Co.

the presumption of law is that the inability arose from causes existing before she set sail ; and that in such event the burden of proof becomes shifted, and that it then rests with the assured to show that the inability arose from causes occurring subsequently to the commencement of the voyage. And with reference to the particular case, the learned judge directed the jury as matter of law that the time which elapsed between the departure of the ship from Rangoon on the 4th of June, and her putting back on the 15th, was a sufficiently short time to shift the onus of proof, and to make it incumbent on the assured to satisfy the jury that the unseaworthiness of the vessel arose from causes occurring subsequently to her setting sail on the voyage.

We are of opinion that this direction cannot be upheld and that there must be a new trial ; and in this view the learned judge on consideration himself concurs.

We do not say that time may not be an element in the consideration of questions of unseaworthiness. If a vessel very shortly after leaving port founders, or becomes unable to prosecute her voyage, in the absence of any external circumstances to account for such disaster or inability the irresistible inference arises, that her misfortune has been due to inherent defects existing at the time at which the risk attached. But this is not by reason of any legal presumption or shifting of the burden of proof, but simply as matter of reason and common sense brought to bear upon the question as one of fact, inasmuch as in the absence of every other possible cause the only conclusion, which can be 598] *arrived at, is that inherent unseaworthiness must have occasioned the result. Indeed, on closer consideration, it becomes apparent that time enters to a very limited extent only into the question in arriving at this conclusion. If the vessel strikes on a rock or a sandbank immediately after leaving port, or, while still in sight of it, is overpowered by a storm, the shortness of the time which has elapsed since she started becomes at once immaterial. On the other hand, though the vessel may have been at sea days, or even weeks, if during the whole of the time she has had favorable weather, fair winds, and calm seas, and yet goes down, or proves unable to continue on her course, the same inference as to inherent unseaworthiness presents itself as in the former case, though, perhaps, with diminished cogency in proportion as the interval has been longer. But in the latter case, as in the former, the inference arises from the impossibility of ascribing the result to any other cause than the condition of the vessel on starting on the voyage, the

interval of time being matter of very secondary consideration, if of any. It is from the entire absence of any other cause than inherent unseaworthiness that the probative value of such a combination of circumstances is derived. Time can enter to a very limited extent only, if it enters at all, into the question as a factor in leading to the result. It certainly cannot be said of itself and without more, to give rise to any new presumption of law, or as matter of law to shift the onus of proof from the party on whom the law has cast it.

This reasoning applies with peculiar force to the case before us. The ship had been at sea eleven days before she put back. Assuming, for the moment, that shortness of time intervening between the departure of a vessel and her inability to keep the sea could shift the burden of proof, we think it cannot be said that an interval of eleven days would be sufficiently short to warrant the application of such a principle, or to raise any presumption independently of other circumstances. In that time—it was the stormy season in the Eastern seas—the vessel might probably have encountered a cyclone. As it was, she was exposed during several days—from the 9th to the 15th of June, to severe squalls and a boisterous sea, and labored heavily. The question was whether her inability to pursue her voyage, and the unseaworthiness, *as afterwards ascertained, [599] were due to the action of the winds and waves, in other words to the perils insured against, or to the antecedent causes of unseaworthiness to which the defendants ascribed them. Under these circumstances, the time the vessel had been at sea became a matter of secondary consideration: and if to be taken into account at all, could only be so as an element in the inquiry, and as one of the facts in the case. It could not properly be held to be of itself, and independently of the other facts, sufficient to take the case out of the ordinary rule, and by giving rise to a new presumption to shift the burden of proof from the insured to the shipowner. As we are of opinion that the direction cannot be upheld, and as it is clear from what took place on the trial that the verdict of the jury was determined by the direction so given, it follows that judgment cannot be given for the defendants on the finding, and that the rule must be made absolute for a new trial.

Rule absolute.

The defendants appealed.

May 15, 16. *W. Williams, Q.C., W. G. Harrison, Q.C., and Lodge*, for the defendants: The order of the Queen's

1878

Pickup v. Thames Insurance Co.

Bench Division is wrong. The jury having found substantially that the vessel was not lost by the perils insured against, it is immaterial whether she was seaworthy at the commencement of the voyage; and therefore, although the direction as to the shifting of the burden of proof of seaworthiness may not have been quite accurate, the defendants are entitled to judgment on the findings. Whether the vessel was seaworthy or not is a question for the jury, *Foster v. Steele* (*), and the summing-up of the learned judge can be supported upon the judgments of Lord Eldon and Lord Redesdale in *Watson v. Clark* (†); *Parker v. Potts* (‡).

Butt, Q.C., Cohen, Q.C., and J. C. Mathew, for the plaintiff, were not heard.

BRETT, L.J.: I agree with the judgment of the Queen's Bench Division.

A good deal has been said on the argument about "the 600] burden *of proof" and "presumption." The burden of proof upon a plea of unseaworthiness to an action on a policy of marine insurance lies upon the defendant, and so far as the pleadings go it never shifts, it always remains upon him. But when facts are given in evidence, it is often said certain presumptions, which are really inferences of fact, arise, and cause the burden of proof to shift; and so they do as a matter of reasoning, and, as a matter of fact, for instance, where a ship sails from a port, and soon after she has sailed sinks to the bottom of the sea, and there is nothing in the weather to account for such a disaster, it is a reasonable presumption to be made that she was unseaworthy when she started; and a jury may be properly told that, upon such uncontradicted evidence, they may presume as a matter of reasoning and inference from the facts, the vessel must have been in an unseaworthy condition when she started; that is, when she started she was not in a fit state to encounter the ordinary perils of the voyage, and if a jury, with no other evidence than that I have stated, were to find the contrary, it would not be a finding against any principle of law, but it would be such a finding against the reasonable inference from the facts that it would amount to a verdict against evidence. And as a guide on the question of fact, and the mode in which the jury are to draw inferences, I think the jury might be told what is laid down in 2 Arnould on Marine Insurance (5th ed.), p. 666, namely, that where a ship becomes so leaky or disabled as to be unable to proceed on her voyage soon after sailing on it, and this cannot

(*) 8 Bing. N. C., 892.

(†) 1 Dow., 336.

(‡) 3 Dow., 23.

be ascribed to any violent storm or extraordinary peril of the sea, the fair and natural presumption is that it arose from causes existing before her setting out on her voyage, and, consequently, that she was not seaworthy when she sailed. That is only telling them, if no other facts are shown, "I should advise you, as reasonable men, to find that the ship was unseaworthy when she started." But the passage in Arnould proceeds to lay down that in such cases it is incumbent upon the assured to show that at the time of her departure she was in fact seaworthy, and that her inability has arisen from causes subsequent to the commencement of the voyage. Of course, he may be able to show that she was seaworthy. But the question what is a short time after sailing must surely depend on the circumstances; and it is for the jury *to say whether under the cir- [601] cumstances of the voyage they think that the time of loss was so soon after sailing that it raises the presumption of unseaworthiness.

Let us see whether there is any authority to the contrary. The case cited to us is *Watson v. Clark*⁽¹⁾. That case is more often cited for the question of law which Lord Eldon enunciated than for his treatment of the facts. It is cited as an authority for the principle that if a ship was seaworthy at the commencement of the voyage, although she became otherwise only one hour after sailing, the warranty is complied with, and the underwriter is liable. The case also deals with the question of presumption arising from the facts. But Lord Eldon and Lord Redesdale were sitting as a Court of Appeal from a decision of a court which decided both law and fact, and they were called upon, therefore, as upon a rehearing, not only to determine what the law was, but also whether they agreed with the court below upon the facts; and thus it is that they give their reasons for agreeing with the findings as to the facts. And when we find Lord Eldon and Lord Redesdale pointing out in the clearest terms a process of reasoning which is almost irresistible, it is a very good guide to a jury to point out to them that process of reasoning as one which they ought to follow. But I have never heard that this case was an authority for showing that a presumption of fact is really a proposition of law.

Now, if that be so, I think it cannot be denied that my Brother Field so expressed himself, that the jury would consider themselves bound to take it as a matter of law that it was a short time, and a time so short that it shifted the presumption. But my Brother Field, who was a party to the

(1) 1 Dow., 386.

judgment of the divisional court, on consideration, admitted that his direction was erroneous.

As to the question arising upon the issue as to the loss by perils of the sea, it seems to me upon the facts of this case, that when the jury were practically told that as a matter of law they were to take it that she was worm-eaten at Rangoon, unless the shipowner could show that she was not, that this direction must have had a vital effect upon the finding of the jury upon the loss by perils of the sea, and 602] that, therefore, even though as an abstract *proposition this would not be a misdirection upon that plea, it was such a direction as to lead to a wrong inference of fact: it was such a wrong direction that it would almost inevitably lead to an erroneous consideration of the issue and cannot be satisfactory. Therefore I think there must be a new trial.

COTTON, L.J.: I agree that there must be a new trial. I think on two grounds there was a misdirection in the summing-up of the learned judge: first, in telling the jury that the time was sufficiently short to create the presumption that the inability to proceed arose from causes existing before the vessel set sail: secondly, that as matter of law the burden of proof as to seaworthiness became shifted and thrown upon the assured. In my opinion the question of time is a question of fact for the jury, and it is for them to say, judging from all the circumstances, whether they are satisfied that the loss was occasioned by her defective condition on starting on her voyage. The direction of Field, J., I think induced the jury to believe the defendants were relieved from proving their plea of unseaworthiness, and that it was for the plaintiff to show seaworthiness at the commencement of the risk.

THESIGER, L.J.: I agree that this case must go back for a new trial.

There are two questions which the court have to decide, first, was there a misdirection? and, secondly, did that misdirection, within the meaning of Order xxxix, Rule 3, occasion substantial wrong or miscarriage, not only on the question raised by the issue of seaworthiness or unseaworthiness, but also upon the issue which was raised as to the cause of loss?

Now, it is convenient, I think, to take those two questions separately, and, first, to consider whether or not there was a misdirection upon the issue of seaworthiness, or unseaworthiness.

What was the position of the facts in the case at the time

when the learned judge gave his direction? On the one hand there had been evidence—I do not give any opinion as to the strength or weakness of that evidence—but there had been evidence that the ship had met with some severe weather during the course of the eleven days which elapsed between her leaving Rangoon and *the time when [603 she set sail to return to Rangoon. On the other hand there was evidence that, upon her return to Rangoon, upon the first survey some traces of worming were discovered, and upon later surveys taking place, at a considerable period after her return to Rangoon, her bottom was found to be very seriously worm-eaten, so much so as to be quite sufficient to account for the return to Rangoon.

Under those circumstances, what direction, either in fact or in law, could the learned judge give to the jury? It seems to me that he could not direct the jury that the burden of proof was shifted either in fact or in law. All that he could say was this: "The burden of proof remains as it originally remained, namely, that if there had been no evidence on the one side, or on the other, the plaintiff would have been entitled to a verdict on the question as to whether the ship was or was not seaworthy at the commencement of the voyage. There being evidence on both sides, it is for you, the jury, to consider whether the evidence as to the weather was such as to induce you to think that the loss was due to the weather, and therefore to a peril insured against; or whether the evidence which has been given as to the worming, coupled with the evidence as to the weather, satisfies you that the weather was insufficient to account for the loss, while the worming was amply sufficient." That seems to me to be the whole extent to which, under the circumstances of the case, the learned judge could fairly direct the jury.

That being so, what is the direction he gives them? He tells them, perfectly correctly, that upon the issue of seaworthiness the burden of proof rested upon the underwriters originally. But then he proceeds to tell them that, only eleven days having elapsed since the vessel left Rangoon, and between that time and the time of her return to Rangoon, the burden of proof which originally lay upon the underwriters had shifted, and the burden was thrown upon the plaintiff of showing that the loss of the vessel was due to the causes which had arisen subsequently to her sailing. The meaning of that was obviously this, that the jury must, from the short time that elapsed after her voyage commenced, presume *prima facie* that instead of the vessel be-

ing seaworthy, as they would have presumed without any 604] evidence, they *must presume that she was unseaworthy at the commencement, unless such evidence was given on the part of the plaintiff as to satisfy them that the loss was not due to unseaworthiness, but due to perils insured against. Therefore it appears to me that, although the words "as a matter of law" may have been used, what the learned judge really intended to say was, that the burden in point of fact had been shifted. But even in this point of view it seems to me that the learned judge misdirected the jury, and that there was nothing to show or to justify him in saying that the burden of proof, as a matter of fact, had shifted, because at the very same time that it was proved that a short time had elapsed since the vessel had started, it was also proved that there was weather which might possibly account for the loss which took place. Therefore, upon the question of seaworthiness, it seems to me that there was a clear misdirection.

Now arises the question, was the misdirection such upon the question of seaworthiness, that it must have necessarily affected the minds of the jury upon the issue as to loss by perils insured against? It appears to me that this question should be answered in the affirmative. In the first place, I think there was a misdirection as regards the issue raised upon the question of the cause of loss, and for this reason. It is perfectly true that upon that issue the burden of proof lies upon the plaintiff, and it may be true that the presumption of unseaworthiness, or the question of the onus of proof upon the issue of unseaworthiness is one that relates, as has been argued, solely to that issue, and does not in any way touch the issue of the cause of loss; but on the other hand this much is clear, that there is no presumption against seaworthiness, and that the plaintiff undertaking, as he is bound so to undertake, upon the issue to prove that the loss was occasioned by a peril insured against, would have fulfilled the burden thrown upon him if he proved that the policy had been effected upon his vessel, that the vessel had started upon her voyage, and that after the voyage the vessel met with such weather as would fully and fairly account for the loss which was sustained by him under the policy. But the position in which the learned judge left the matter to the jury under this subsequent direction placed a very much heavier burden upon the plaintiff, be- 605] cause he had directed the jury that the mere *fact of this short lapse of time was such as to raise a presumption counter to the original presumption of seaworthiness. And

logically followed out, that must mean a presumption of unseaworthiness, and consequently the plaintiff instead of undertaking the burden of proving a loss by peril insured against upon a ship which at all events is not presumed to be unseaworthy, although it may not be proved to be seaworthy, was undertaking a burden of proving that loss in respect of a ship, which according to the learned judge's directions was presumably unseaworthy when she started.

For these reasons it appears to me that there was a misdirection upon both points, and the observations which I have just made are sufficient to show that that misdirection must have been the cause of substantial wrong or miscarriage. Nothing could show that more plainly than this, that the very point on which the jury seemed to have been in disagreement about when they returned and discussed the matter with the judge, was the point as to on which side the onus of proof lay, and in the argument before us it was stated that the minds of the jury were equally balanced upon this point, that it was necessary to give some direction upon it. If their minds were in that state of equal balance, it follows that is just the occasion when the learned judge must necessarily be most accurate in the language, which he uses to the jury on the point which they discuss with him.

There is only one other matter to which I wish to refer, and that is the question of authority.

The learned judge, in giving his direction to the jury, appears to have relied upon the passage in *Watson v. Clark* ⁽¹⁾, taken from the opinion given by Lord Eldon, and when the passage upon which the learned judge relies is looked at, I think it is clear to every mind that Lord Eldon was not speaking of a presumption of law, but was speaking of a presumption of fact, or an inference which his mind would be led to from the facts of that particular case. And I think in the use of that expression, "burden of proof," in the cases there has been a little confusion. Burden of proof always remains the same as a matter of law. But while the learned judge has to direct a jury upon the burden of proof, *as a matter of law, I take it not to be the duty of a [606 learned judge under any circumstances to direct the jury as to the question of the burden of proof as to a matter of fact: that is a question for the jury, and beyond deciding the question which a judge must always decide, namely, whether there is any evidence at all to go to the jury, it seems to me on questions of fact the province of the learned

(1) 1 Dow., 336.

1878

Bradlaugh v. The Queen.

judge does not entitle him to go. But in Lord Eldon's opinion he says that *prima facie* the onus of proof that she is not seaworthy lies on the defendant, but where the inability of the ship to perform the voyage becomes evident within a short time after the sailing, the presumption is that it arises from causes existing before she set sail on the voyage, and that the ship was not then seaworthy ('). Now two points arise upon the observations that were made. In the first place it is clear that when Lord Eldon speaks of the inability of the ship to perform the voyage becoming evident a short time after the sailing, and the presumption being shifted, he must mean (and it is obvious from the context that he did mean) where no other facts are given in evidence. But he cannot be held to have meant this: that where at the very same time that the short period of the voyage is proved which is relied upon to raise a presumption, and there is also a cause proved which might fairly account for the loss, even as a matter of fact, that the presumption shifts back and is thrown upon the other party. And again: the second point for observation is this—that when he speaks of the presumption shifting back he is not speaking of a presumption of law, but he is speaking of a presumption of fact.

I think that there has been in this case a misdirection such as necessitates a new trial.

Judgment affirmed.

Solicitors for plaintiff: *Hollams, Son & Coward.*

Solicitors for defendant: *Freshfields & Williams.*

(¹) 1 Dow., at p. 344.

[3 Queen's Bench Division, 607.]

Feb. 12, 1878.

[IN THE COURT OF APPEAL.]

607] *CHARLES BRADLAUGH AND ANNIE BESANT v.
THE QUEEN (¹).

Criminal Pleading—Indictment for publishing Obscene Libel—Omission to set out Words charged as Obscene—Arrest of Judgment—Error—Defect not cured by Verdict.

In an indictment for publishing an obscene book, it is not sufficient to describe the book by its title only, for the words thereof alleged to be obscene must be set out; and if they are omitted, the defect will not be cured by a verdict of guilty, and the indictment will be bad either upon arrest of judgment or upon error.

Judgment of the Queen's Bench Division (2 Q. B. D. 569) reversed.

(¹) Reversing 21 Eng. R., 269.

ERROR upon a judgment of the Queen's Bench Division (*).

The record alleged that at the Central Criminal Court an indictment was presented against the plaintiffs in error, the first count of which was in the following terms:—

"Central Criminal Court, to wit: The jurors for our Lady the Queen, upon their oath present, that Charles Bradlaugh and Annie Besant unlawfully and wickedly devising, contriving, and intending as much as in them lay to vitiate and corrupt the morals as well of youth as of divers other liege subjects of our said Lady the Queen, and to incite and encourage the said liege subjects to indecent, obscene, unnatural, and immoral practices, and bring them to a state of wickedness, lewdness, and debauchery, heretofore, to wit, on the 24th day of March, in the year of our Lord, 1877, in the city of London, and within the jurisdiction of the said Central Criminal Court, unlawfully, wickedly, knowingly, wilfully, and designedly, did print, publish, sell, and utter a certain indecent, lewd, filthy, and obscene libel, to wit, a certain indecent, lewd, filthy, bawdy, and obscene book called 'Fruits of Philosophy,' thereby contaminating, vitiating, and corrupting the morals as well of youth as of other liege subjects of our said Lady the Queen, and bringing the said liege subjects to a state of wickedness, lewdness, debauchery, and immorality, in contempt of our said Lady the Queen and her laws, to the evil and pernicious example of all others in the like case offending, and against the peace of our said Lady the Queen, her crown and dignity."

*The second and only other count was precisely [608 similar, except that the date of the alleged offence was the 29th of March, 1877. The record then set forth the removal of the indictment into the Queen's Bench Division, by a writ specifying Middlesex as the county and jurisdiction in which the indictment was to be tried, the plea of not guilty by the plaintiffs in error, the joinder of issue thereon by F. Cockburn, as the Queen's coroner and attorney, and the award of jury process. The record afterwards alleged, amongst other matters unnecessary to be mentioned, that on the 18th of June, 1877, before Cockburn, C.J., a jury was impanelled and sworn, and a verdict of guilty was found against both the plaintiffs in error. The record afterwards proceeded as follows: "And because the court of our Lady the Queen now here, to wit, the Queen's Bench Division of the High Court of Justice, is not as yet advised about giving their judgment of and upon the premises whereof the said Charles Bradlaugh and Annie Besant are so convicted as aforesaid,

(*) 2 Q. B. D. 569; 21 Eng. R., 269.

1878

Bradlaugh v. The Queen.

day is therefore given as well to the said F. Cockburn, Esq., who for our said Lady the Queen in this behalf prosecuteth, as to the said Charles Bradlaugh and Annie Besant, until the 28th day of June, in the 41st year of the reign of our Lady the Queen, before our said Lady the Queen, at Westminster, that is to say, before the Queen's Bench Division of the High Court of Justice, to hear their judgment thereupon."

The record then alleged that on the 28th of June it was adjudged and ordered by the Queen's Bench Division, upon each of the counts of the indictment, that the plaintiffs in error should be severally imprisoned for six calendar months, and should severally pay a fine of £200, and should severally give security for good behavior for two years.

Error having been brought, the following were alleged as the grounds thereof:—

(I.) That the indictment shows no offence known to the law, and does not warrant the conviction and sentence.

(II.) That the libel in question was professedly a work on medical science and political economy, and that in the indictment in which the said work is alleged to be "an indecent, lewd, filthy, and obscene libel," such portions of the work as were libellous as aforesaid ought to have been set out.

609] *(III.) That the indictment does not show any specific offence, and that the particular words supposed to be criminal ought to have been expressly specified and set forth in the indictment.

The Queen's coroner and attorney joined in error.

Jan. 29, 30, 31. The plaintiff in error, *Bradlaugh*, in person: The omission to set out the book in the indictment renders it bad; whenever words formed the ground of complaint in an action of law, they must have been set out in the declaration, *Zenobio v. Axtell* (*), *Cook v. Cox* (*), *Wright v. Clements* (*); and this rule also applies to criminal cases, Archbold's Crim. Pl. and Evid., bk. i, pt. 1, ch. 1, s. 3 (ed. 18), p. 58. In *Rex v. Sparling* (*), where the defendant was convicted of profane cursing and swearing under 6 & 7 Wm. 3, c. 11, the conviction was held bad because the curses and oaths were not set out, and *Rex v. Popplewell* (*) is to the like effect. In *Hunter's Case* (*) an indictment for forgery was held bad under the then existing law, because the words alleged to be forged were insuffi-

(*) 6 T. R., 162.

(*) 3 M. & S., 110.

(*) 3 B. & Ald., 508.

(*) 1 Str., 498.

(*) 2 Str., 886.

(*) 2 Lea. C. C., 624.

ciently described. In *Rex v. Mason* (') it was held to be a fatal objection that the indictment did not disclose the nature of the false pretences, and this case has not been overruled by *Reg. v. Goldsmith* ('), in which the indictment was for unlawfully receiving goods knowing them to have been obtained by a false pretence. In a libel, the words complained of constitute the crime, and it is a rule of criminal pleading, that "whatever circumstances are necessary to constitute the crime imputed must be set out," *Rex v. Horne* ('); and the jury are entitled to judge for themselves whether the interpretation put upon the words in the indictment is the meaning intended to be conveyed in the libel, *Rex v. Fitzharris* ('); and any variance between the meaning alleged and the meaning proved will be fatal: Russell on Crimes, vol. iii, bk. 5, ch. 3, s. 13, 5th ed., p. 219, citing *Tabart v. Tipper* ('), and *Rex v. Bear* ('). Before the *Queen's [610 Bench Division] ('), for the crown reliance was placed upon *Dr. Sacheverell's Case* ('); but that case is really a very strong authority against this prosecution, for the judges present were unanimously of opinion that by the laws of England and constant practice in all prosecutions by indictment or information for crimes and misdemeanors by writing or speaking, the particular words supposed to be criminal must be expressly specified in the indictment or information ('). This proposition is really identical with the contention of the plaintiffs in error. It is true that the House of Lords decided (') that in a prosecution by impeachment it was unnecessary to set out the words complained of in the articles of impeachment; but then it may well be that proceedings in Parliament are governed by different rules from proceedings in courts of criminal law. In *Rex v. Layer* (') the judges overruled an objection that in an indictment for high treason the words complained of must be set out; but the real explanation of that decision is that in high treason words are not the gist of the offence, but merely evidence or proof of it: Archbold's Crim. Pl. and Evid., bk. i, pt. 1, ch. 1, s. 3 (ed. 18), p. 58. In *Rex v. Curl* ('), which appears to be the first case where an obscene libel was punished in the temporal courts, the passages complained of were set

(') 2 T. R., 581.

(') Law Rep., 2 C. C., 74; 5 Eng. R., 437.

(') 20 How. St. Tr., 792; per De Grey, C.J., delivering the unanimous opinion of the judges in the House of Lords.

(') 8 How. St. Tr., 356.

(') 1 Camp., 352.

(') 2 Salk., 417.

(') 2 Q. B. D., 571; 21 Eng. R., 269.

(') 15 How. St. Tr., 1.

(') 15 How. St. Tr., 466, 467.

(') 15 How. St. Tr., 467, 478.

(') 6 Har. St. Tr., 328, 329, 330, 331; 16 How. St. Tr., 315, 316, 317, 318.

(') 2 Str., 788; 17 How. St. Tr., 154.

out. The necessity of setting out the libellous matter correctly is pointed out in Folkard on Slander and Libel, ch. 42, p. 699. Before the Queen's Bench Division the counsel for the crown relied upon *The Commonwealth v. Sharpless* (¹), and *The Commonwealth v. Holmes* (²); but the rule in the American courts is that if the obscene libel is omitted it must be averred that it is too gross to be inserted in the indictment, *The Commonwealth v. Tarbox* (³); and no averment of that kind here occurs. Moreover, those authorities may be dismissed with the remark that they are the decisions of the tribunals of a foreign country, and that the validity of the present indictment depends upon the common law of England. A total omission of a necessary 611] *averment is not cured at common law by the verdict, *Hearne v. Stowell* (⁴); and as the indictment was not intended to relate to an offence either created or regulated by statute, the prosecution cannot rely upon the latter clause of 7 Geo. 4, c. 64, s. 21. The defect is not of a merely formal nature, and therefore the objection holds good, although this is not an appeal from a decision upon demurrer or upon a motion to quash the indictment before the jury were sworn: 14 & 15 Vict. c. 100, s. 25; *Sill v. Reg* (⁵).

Annie Besant, plaintiff in error, in person: According to the English precedents the indictment is bad for uncertainty; and the decisions in the American courts were pronounced by foreign tribunals and cannot countervail the current of authorities in England. The indictment alleges simply that the book is obscene: this is a hardship upon the plaintiffs in error, for they could not tell whether the whole of the book or only portions of it would be relied upon as obscene: if the words complained of were set out in the indictment, they would have known what charge they were called upon to meet.

Sir H. S. Giffard, S.G., for the Crown: The indictment discloses an offence at common law, and the objection is only that the facts constituting the crime are imperfectly averred: this defect is cured by the verdict. *Rex v. Mason* (⁶) can hardly be deemed to be good law after *Reg. v. Goldsmith* (⁷); but if it can be supported it is distinguishable, for the indictment charged the defendant with obtaining money by "false pretences:" now false pretences relating to future events are not indictable, and the indictment

(¹) 2 Ser. & Raw. (Pennsylvania), 91.

(²) 17 Massachusetts, 336.

(³) 1 Cush. (Massachusetts), 66.

(⁴) 12 Ad. & E., 719.

(⁵) 1 E. & B., 553; 22 L. J. (M.C.), 41.

(⁶) 2 T. R., 581.

(⁷) Law Rep., 2 C. C., 74; 5 Eng. R., 437.

was therefore uncertain ; but the publication of an obscene book is always indictable, whatever the motive of the person publishing it may be⁽¹⁾. In *Heymann v. Reg.*⁽²⁾ it was held that a defective averment in an indictment for conspiracy was cured by the verdict of guilty. In *Rex v. Bishop of Llandaff*⁽³⁾ it was held that an omission to allege a presentation was cured by the verdict, and as is pointed out in Serjeant Williams' *note to *Stennel v. Hogg*⁽⁴⁾, [612 the decision proceeded upon the ground of the common law. Upon a similar principle a declaration, which simply charged the defendant with maliciously prosecuting the plaintiff for perjury, was held good after verdict: *Pippet v. Hearn*⁽⁵⁾. The recent decision in this court of *Reg. v. Aspinall*⁽⁶⁾ strongly supports the principle laid down in *Heymann v. Reg.*⁽⁷⁾. An indictment for keeping a disorderly house may be framed in general terms, and no valid reason exists why greater strictness should be required as to an indictment for an obscene libel. The defect being only formal, it is now too late to raise any objection to it, 14 & 15 Vict. c. 100, s. 25 ; and it may be admitted for the Crown that the indictment would be held bad upon demurrer.

[BRAMWELL, L.J.: If the defect were only formal, it might have been amended by the court ; but how could the court direct the officer to amend the indictment, and thereby make it charge that the grand jury had presented as obscene those portions of the book, which the presiding judge considered to be obscene ?]

Even in high treason the words complained of need not be stated: *Rex v. Stayley*⁽⁸⁾ ; *Rex v. Layer*⁽⁹⁾. In *Dugdale v. Reg.*⁽¹⁰⁾, the objection was not taken that the obscene words and prints must be set out in the indictment, and this case forms strong negative evidence that the present indictment contains all that is necessary. In many offences it is not necessary that the indictment should state the offence with particularity ; thus, in *Rex v. Gill*⁽¹¹⁾, an indictment charging the defendants with conspiring by false pretences to obtain money was held good. The defect being an imperfect averment only, the cases as to the effect of a total omission, such as *Reg. v. Gray*⁽¹²⁾, do not apply: the dif-

⁽¹⁾ See *Reg. v. Hicklin*, Law Rep., 3 Q. B., 360 ; and *Steele v. Brannan*, Law Rep., 7 C. P., 261 ; 2 Eng. R., 575.

⁽²⁾ Law Rep., 8 Q. B., 102 ; 4 Eng. R., 241.

⁽³⁾ 2 Str., 1006.

⁽⁴⁾ 1 Notes to Saunders by Williams, 260, at p. 267.

⁽⁵⁾ 5 B. & Ald., 634.

⁽⁶⁾ 2 Q. B. D., 48 ; 19 Eng. R., 198.

⁽⁷⁾ Law Rep., 8 Q. B., 102 ; 4 Eng. R., 241.

⁽⁸⁾ 6 How. St. Tr., 1501.

⁽⁹⁾ 16 How. St. Tr., 815, 816, 817, 818.

⁽¹⁰⁾ 1 E. & B., 435.

⁽¹¹⁾ 2 B. & Ald., 204.

⁽¹²⁾ L. & C., 365 ; 33 L. J. (M.C.), 78.

1878

Bradlaugh v. The Queen.

ference between an imperfect averment and a total omission is pointed out in *Reg. v. Aspinall* (*).

F. Mead, for the Crown: It is unnecessary in an indictment *for an obscene libel to set out the words complained of, and no objection can be taken to their omission even upon demurrer, or by motion to quash. The authorities relied upon by the plaintiffs in error relate to defamatory libels; and the publication of a blasphemous, seditious, or defamatory libel is an offence standing upon a different footing from the publication of an obscene libel: thus, by 5 & 6 Vict. c. 38, courts of quarter sessions are forbidden to try blasphemous, seditious, or defamatory libels, but they are not prohibited from trying obscene libels. In *Dugdale v. Reg.* (*), decided after the passing of that statute, the indictment contained counts for obscene libels, and the prisoner was found guilty thereon at the Middlesex sessions. *Rex v. Curll* (*) merely established that the publication of an obscene book is indictable as an offence *contra bonos mores*, and punishable in the temporal courts; it was not decided that it is an offence of the same nature and subject to the same rules as a defamatory, blasphemous, or seditious libel. The offence charged upon this indictment is like that contained in the indictment in *Rex v. Sedley* (*), and it is not a libel in the true sense of the word: it is more like the offence of common nuisance. It is, therefore, unnecessary that the words should be set out; and although there may be no decisions in the English courts to that effect, yet the precedents in 2 Chitty's Criminal Law, ch. 3, pp. 43, 45, show that the words may be omitted: it is true that this indictment, unlike those precedents, does not contain an averment that the matters contained in the book are too gross to be set out; but that defect is cured by the verdict; and at all events, the omission of that averment is supplied by the description of the book as "an indecent, lewd, filthy, and obscene libel." The cases in the American courts clearly support the argument for the Crown: thus, in *The Commonwealth v. Sharpless* (*), it was held to be unnecessary to set out an indecent picture in an indictment, and *The Commonwealth v. Holmes* (*), and *The People v. Girardin* (*), and *The Commonwealth v. Tarbox* (*), show that the

(1) 2 Q. B. D., 48, at p. 58; 19 Eng. R., 198.

(2) See the report in Dearsley, 64, where the indictment is set out in full.

(3) 2 Str., 788.

(4) 1 Sid., 168; 1 Keb., 620; 17 How. St. Tr., 155.

(5) 2 Serg. & Rawl. (Pennsylvania), 91.

(6) 17 Massachusetts, 336.

(7) 1 Mann. (Michigan), 90.

(8) 1 Cush. (Massachusetts), 66.

words of an obscene *libel may be omitted if they [614 are so foul as to defile the records of the court.

Plaintiff in error, *Bradlaugh*, in reply: The defect consists in an entire omission of a necessary averment. *Heymann v. Reg.* (') is not in point; for the offence there charged was a conspiracy to defeat the operation of a statute; here the offence is regulated solely by the common law. In *Rex v. Wilkes* (') the passages complained of in the Essay on Woman appear to have been set out in the information. *Rex v. Sedley* (') stands upon a totally different footing from the present case. It is submitted that all prosecutions for libel are subject to the same rules, whether the words are defamatory, blasphemous, seditious, or obscene. The general words of the indictment would apply to any book which is in any degree obscene (').

Plaintiff in error, *Annie Besant*, in reply: In order to establish that the words ought to have been set out in the present indictment, it is necessary only to cite the following cases: as to a seditious libel, *Rex v. Paine* ('); as to a blasphemous libel, *Rex v. Williams* ('); and to an obscene libel, *Rex v. Curll* (').

Cur. adv. vult.

Feb. 12. BRAMWELL, L.J.: This case comes before us upon a question of substantial importance, but nevertheless of a purely technical nature, and the decision which we have to pronounce is quite apart from the merits, and quite apart from the consideration *whether any wrong has or [615 has not been done to the plaintiffs in error.

The question has arisen under the following circumstances: An indictment was preferred against the plaintiffs in error charging them with publishing an obscene libel, "to wit, a certain indecent, lewd, filthy, and obscene book called 'Fruits of Philosophy;'" upon this indictment they were

(') Law Rep., 8 Q. B., 102; 4 Eng. R., 241.

(') 4 Burr., 2527; 19 How. St. Tr., 1075.

(') 1 Sid., 168; 1 Keb., 620; 17 How. St. Tr., 155.

(') The plaintiff in error, Bradlaugh, also argued that the judgment in the Queen's Bench Division was erroneous on the ground that the trial having taken place on the 18th of June was held upon a day which, under the practice existing before the Judicature Acts, would have fallen in the sittings after Trinity Term, and that the continuance should have

been to a day in what would have been the following Michaelmas Term, and not to the 28th of June. The court intimated that the argument was unsustainable, the Judicature Act, 1873, s. 26, having abolished terms except for the purpose of computing time. They, however, gave no judgment upon this objection, as the decision of the main question rendered it unnecessary to consider it. See 11 Geo. 4 & 1 Wm. 4, c. 70, s. 9.

(') 22 How. St. Tr., 357.

(') 26 How. St. Tr., 658.

(') 2 Str., 788; 17 How. St. Tr., 153.

found guilty. They afterwards moved the Queen's Bench Division in arrest of judgment, and the rule which they asked for was refused; and the question before us is whether the judges of that court were right in refusing that rule, or whether they ought to have granted it. The objection taken was that the indictment stated, but did not show, that an offence had been committed; or, as it may be put in somewhat different language, the objection was that the indictment simply averred that an offence had been committed, and did not show how it had been committed. For the Crown it was almost admitted by the Solicitor-General that if the objection had been taken by demurrer, it would have been good; but it was urged that it was cured by the verdict, on the ground that the jury could not have found the plaintiffs in error guilty, unless an obscene libel had been proved at the trial to have been published by them.

It is undoubtedly a rule that an indictment for any offence must show that the offence has been committed, and must show how it has been committed; and if these particulars are omitted judgment will be arrested. No doubt that is the general rule; and I do not intend to allude to alterations made by statute as to criminal pleading, because no statute is applicable to this case; therefore in the observations which I shall make as to the form of indictments, I shall speak as if the common law were unaltered. It is not enough to indict a person for that he committed murder, or murdered A. B.; at common law it must be shown what he did; so that if the acts charged are proved to have been perpetrated, it would be shown that he committed murder; in other words, it is not enough to allege that he committed the crime, it must be shown how he committed it. Similarly in an indictment for burglary, it is not enough to allege that the accused committed a burglary, or to allege [616] that he committed a burglary at the house *of A.; it must be charged that he burglariously entered between certain hours, with other circumstances showing how the crime was committed, and those facts must be stated which constitute the crime said to have been committed. For this rule three reasons were assigned, two of which I do not think very important, at all events, at the present time; but the third is of a more substantial character. One of these reasons was, that the person indicted for the commission of a crime might know what charge he had to meet; if he were charged with murder or burglary generally, he would not know what particular act was alleged against him, and what he had to meet. Another reason was that, if convicted or

acquitted on an indictment of that kind, the accused could not plead or prove, with the same facility as otherwise he might, a plea of *autrefois* convict or *autrefois* acquit. At the present day, I think those two reasons may be disregarded, because an accused person is very rarely ignorant of the charge which he is called upon to meet, and no real difficulty exists as to pleading or proving a former conviction or acquittal. But even as to these reasons I must admit that a very plausible observation was made by the female plaintiff in error, namely, that the book, as a whole, was charged as an offence against her, and she could not possibly tell what passages would be selected as those on which the charge was to be supported. The third reason, in my opinion, is to this day substantial, and cannot be disregarded. It was that a defendant is entitled to take the opinion of the court before which he is indicted by demurrer, or by motion in arrest of judgment, or the opinion of a court of error by writ of error, on the sufficiency of the statements in the indictment. It is true that a defendant has the decision of the judge presiding at the trial as to the validity of the indictment, yet it is not unreasonable that he should be at liberty in some way to question the decision of that judge. But whether these three reasons were good or bad, they clearly existed with reference to the form of indictment, which accordingly, as I have already intimated, must show not only that the accused committed the offence, but must also state the facts which constituted it.

In some instances, words are the subject-matter of an indictment; and it follows from this principle, which I have mentioned, *that wherever the offence consists of [617 words written or spoken, those words must be stated in the indictment; if they are not, it will be defective upon demurrer, in arrest of judgment or upon writ of error. For instance, upon an indictment for perjury, it was necessary that the facts constituting the perjury should be set forth, and that necessity existed until 23 Geo. 2, c. 11. The authorities will be found in 2 Chitty's Crim. Law, ch. 9, page 307, 2d ed. That statute recited the extreme difficulty of getting convictions for perjury by reason of difficulties attending the prosecutions for them, and effected an alteration whereby the offence was allowed to be stated in a more general way. In like manner, upon an indictment for forgery it was necessary to set out the words of the forged instrument, as appears from 3 Chitty's Crim. Law, ch. 15, page 1040, 2d ed. In like manner, there can be no doubt that in an indictment for defamatory libel it was necessary to set

out the words complained of, so that the court might judge whether they were or could amount to a libel. Now, in support of this doctrine, I will refer to *Cook v. Cox* ⁽¹⁾. The action was for slander, and after a general verdict for the plaintiff a motion was made in arrest of judgment, on an objection to the last count, which did not set out the words complained of. Lord Ellenborough, C.J., in delivering the judgment of the court, said ⁽²⁾: "The objection is, that in a count for slander by words the words themselves should be set out, in order that the defendant may know the certainty of the charge, and may be able to shape his defence, either on the general issue, or by plea of justification accordingly, and that this defect is not cured by verdict." Now, that is what his Lordship states to be the objection. Then he says ⁽³⁾: "The allegation then amounts to this; that the defendant by words, or by words coupled with acts, slandered the plaintiff in his trade, and therefore it is bad, and not cured by verdict, as a charge in the alternative. But supposing it to be taken as a charge of oral slander only, the weight of authorities is against the setting out words by their effect only. This count is equivalent to an allegation that the defendant used certain words to the effect of imputing insolvency to the plaintiff." Lord Ellenborough [618] then goes on to *cite the authorities, beginning with *Newton v. Stubbs* ⁽⁴⁾, which he says, "is an express authority that a count for using words to the effect following, &c., is bad after verdict," and he cites a variety of other cases, amongst them, *Dr. Sacheverell's Case* ⁽⁵⁾, and he says ⁽⁶⁾: "There seems to be no reason for any difference in this respect between civil and criminal cases; the action arises *ex delicto*." And, most certainly, if there was a difference, it would be that less strictness is required in civil than in criminal cases. Then he proceeds, after mentioning another case: "Unless the very words are set out, by which the charge is conveyed, it is almost, if not entirely, impossible to plead a recovery in one action in bar of a subsequent action for the same cause. Identity may be predicated with certainty of words, but not of the effect of them as produced upon the mind of a hearer. It has been said that this is not like the case of a defective title, but is more analogous to that of a title defectively set out. If, however, the authorities cited are law, and they are supported by

⁽¹⁾ 3 M. & S., 110.

⁽²⁾ Page 113.

⁽³⁾ Page 114.

⁽⁴⁾ 2 Show., 435.

⁽⁵⁾ 5 Har. St. Tr., 828; S. C., 15 How. St. Tr., 466, 467.

⁽⁶⁾ Page 116.

more ancient ones, it is of the substance of a charge for slander by words that the words themselves should be set out with sufficient innuendoes, and a sufficient explanation, if required, to make them intelligible; it is of the substance of a charge of slander of any sort that it should not be laid in the alternative. Upon the whole, we think that this count is so defective in substance, that no intendment can be made to supply its defects from what can be presumed to have passed at the trial; and consequently that the judgment must be arrested." Now, that was the opinion of the Court of King's Bench, in an action for slander. I may mention that that case is referred to and recognized in *Solomon v. Lawson* (¹), in which it was held that where a declaration for a libel set out a publication which referred to a previous publication, but, unless by reference to the language of the previous publication, contained no libel, such previous publication must be considered as incorporated in the publication complained of, and must appear in the declaration to be set out verbatim, and not merely in substance. It is true that these two cases relate to actions at law, and the first is an action *for slander. But, as [619 was said by Mr. Justice Blackburn, in *Heymann v. Reg.* (²), at common law there is no difference between civil and criminal pleading except that, as I have before intimated, according to the spirit in which our law is administered, if there were a difference, more strictness would be required in criminal than in civil pleading. On these authorities it is manifest that where words constitute the offence, they must be stated in the indictment; and the authorities distinctly show that where a defamatory libel is complained of, as was almost admitted by the Solicitor-General, it must be stated in the indictment. It seems to me that whatever reason there is for setting out the words of a defamatory libel, is equally applicable to other writings that are called libels; though possibly, as Mr. Mead argued, they are called libels in a different sense from that in which defamatory writing is called a libel. Lord Justice Brett has collected authorities upon the matter. I do not know that there is any case in which judgment has been arrested on an indictment or information for a seditious, a blasphemous, or an obscene libel for want of setting out the words. But no precedent can be found in which they have not been set out, except in certain American cases, to which I shall presently refer; and except in two precedents in 2 Chitty's Crim.

(¹) 8 Q. B., 823, at p. 839.

(²) Law Rep., 8 Q. B., 102, at p. 105; 4 Eng. Rep., 241.

1878

Bradlaugh v. The Queen.

Law, pp. 43, 45, with which also I will deal, when I come to the American cases; and then there has been no judgment in an English court of justice that they need not be set out, and no decision that the indictment will not be bad in arrest of judgment; and I repeat that whatever reason can be given for setting out the very words in defamatory libels, is equally true in blasphemous, obscene, or seditious libels. First, I will cite *Rex v. Curl* (¹), where it was held that an obscene book is punishable as a libel in the temporal courts, and I will mention *Rex v. Sparling* (²), in which it was held that a conviction for cursing and swearing was bad, because it did not set out the words which had been used.

That being the general principle, we must deal with the argument that obscene libels need not be, and indeed ought not to be, set forth on the record; the reason given being that the records of the court should not be defiled by any [620] indecency of that kind. *Speaking with the greatest respect to those who have thought otherwise, I think the objection fanciful and imaginary. The records of a court of justice are not read with a view to entertainment or amusement; and if the objection has any weight, why does it not apply to other libels, and to other offences? I suppose the majority of mankind would think much worse of a blasphemous libel than even of an obscene libel, and would consider it much more objectionable that the terms of the former should be perpetuated than those of the latter. I suppose excellent reasons could be given why seditious language, possibly alluding disrespectfully to the Sovereign, should not be perpetuated on the court rolls. But there is another kind of libels, which, to my mind, if it were possible, ought to be effaced from the rolls, and yet it is admitted that they must be set out on the record—I mean libels defaming the character of a private person. Let us see which is the worst in its consequences. Suppose a man indicted for a libel charging an infamous crime against another. It must be set out upon the record, for it is a defamatory libel. Then the defendant may never plead, or may not be arrested, or he may die, and thus the charge may never be tried, and yet that statement is to remain on the record for all time, and no answer will be given to it. In some respects it would be well that such an imputation as that should be effaced from the records of the court—an imputation so grievous to the individual and all connected with him. However, the argument as to this point on the part

(¹) 2 Str., 788.

(²) 1 Str., 497.

of the Crown was supported by authority. The only semblance of authority in English law was the precedents which I have mentioned. We are in the habit of looking at precedents as containing the law; but that is when there is a series of them, so that we may be sure that they would not be in existence or perpetuated unless they had received the sanction of the courts; these are in truth but one precedent, and therefore I do not think I need pay much attention to them. In support of this contention for the Crown, some American cases were cited. Decisions in the courts of the United States are not binding authorities; and although they may be expressly in point, yet if they are contrary to our law, they must be disregarded. Whatever respect we may be disposed to pay to the judge who pronounced the decision, the only manner in which an American *case can be used as a guide is to consider it as [621] the expression of the opinion of an able person acquainted with the general spirit of our law; and therefore we may look at it in much the same way, as we may consider the decisions of the judges of French, Italian, or other courts who have pronounced opinions upon mercantile law, which to a certain extent is common to ourselves. But I do not think that the American cases cited before us assist the case for the prosecution. It seems to have been assumed in the Queen's Bench Division that *The Commonwealth v. Holmes* ⁽¹⁾ showed that generally an obscene libel need not be set forth in terms; but the plaintiff in error, Bradlaugh, has produced before us *The Commonwealth v. Tarbox* ⁽²⁾, which was not cited in the court below. In that case the indictment was held to be good without setting forth the obscene words, because there was an allegation that the libel was so obscene that it could not be, with decency and propriety, put upon the record. The rule in the American courts appears to be that when there is no allegation excusing the statement of the words on the record, on the ground of what may be called their infamy, they must be set out. In *The People v. Girardin* ⁽³⁾ a vigorous and forcible judgment was pronounced in favor of the view now put forward on behalf of the Crown; but even in that case some description of the nature of the obscenity complained of was inserted in the indictment. Here the indictment does not allege that the words are too obscene to be inserted; and therefore in any point of view the American cases assist the argument for the plaintiffs in error. It was suggested that the insertion of the words complained of is sufficiently excused, be-

⁽¹⁾ 17 Mass., 386.⁽²⁾ 1 Cush. (Mass.), 66.⁽³⁾ 1 Mann. (Mich.), 90.

cause it is averred that the plaintiffs in error published "a certain indecent, lewd, filthy, and obscene libel." That was very well met with this argument: Would not those words be the proper prefatory description of every obscene libel? and that in order to bring this indictment within the authority of the American cases it would have been necessary to aver that the libel was so utterly indecent, filthy, lewd, and obscene that it ought not to appear on the records of the court. For the prosecution reliance was placed also on 622] *Dugdale v. The *Queen* (1), but the decision in that case does not affect the rule of law laid down in previous authorities.

We are not asked to say that the law is altered, because no power can alter it but the Legislature; and it is not pretended that the Legislature has altered it. What in effect we are called upon to do is, to say that the law has been mistaken and misunderstood, and that it is not necessary to set forth words when they constitute a crime. Reliance has been placed upon certain cases as to the law relating to false pretences, in which it has been held that after verdict judgment could be arrested, although the false pretence had not been stated. Now I do not think it necessary to go critically into those cases. I do not suggest for a moment that they were not rightly decided, but I wish to make this observation about them, namely, that they are cases in which the courts have held, rightly or wrongly, that the defect was not a failure to state the ingredients of the offence, but they were cases in which those ingredients had been imperfectly stated. This distinction is explained in the judgment of Blackburn, J., in *Heymann v. The Queen* (2), where he says: "The objection to the count therefore is that it does not state that the agreement or confederacy was in contemplation or expectation of an adjudication; and if the question had arisen upon demurrer, I am not quite prepared to say that that might not have been a good objection. But it is a general rule of pleading at common law—and I think it necessary to say where there is a question of pleading at common law there is no distinction between the pleadings in civil cases and criminal cases—where an averment, which is necessary for the support of the pleading, is imperfectly stated, and the verdict on an issue involving that averment is found, if it appears to the court after verdict that the verdict could not have been found on this issue without proof of this averment, there, after verdict, the de-

(1) 1 E. & B., 435; 22 L. J. (M.C.), 50; (2) Law Rep., 8 Q. B., 102, at p. 105; Dears., 64. 4 Eng. Rep., 241.

fective averment, which might have been bad on demurrer, is cured by the verdict." That rule was held to apply in *Reg. v. Goldsmith* (*). The prisoner was indicted for receiving goods, knowing them to have been obtained by means of false and fraudulent pretences, which were not set out; she was convicted, and the Court *for Crown Cases [623 Reserved held the conviction must be affirmed. I concurred in thinking that the judgment ought not to be arrested, and my reason for so thinking was, that it was impossible that if the false pretence used by the principal offender had been proved at the trial to be a future promise, or a matter of opinion, the judge would have let that case go to the jury. A false pretence *prima facie* imports not a promise, but a misrepresentation as to something existing. These are the only observations which I shall make about this case; but whether it was rightly or wrongly decided, it is impossible that the judges who decided that case could have intended to lay down a different law from that, which had been established by previous authorities. It is the duty of judges to administer the law as they find it, and to leave the Legislature to amend whatever defects there may be. Therefore, even if this case may appear to be difficult to reconcile in principle with previous cases, it does not overrule the current of authorities, which show that the offence, and the facts constituting the offence, must be stated; that where those facts consist in words, the words must be set forth; and that if they be not, the indictment is bad, either on demurrer, or in arrest of judgment, or upon a writ of error.

Before concluding I ought to consider the reasons given by the judges of the Queen's Bench Division for the opinion they expressed, and I need scarcely say that I entertain the greatest respect for their decision. I think the Lord Chief Justice gives three reasons. First, he thinks it would be inconvenient to set out in an indictment the whole of a book alleged to be obscene, if in its entirety it is made the subject of a prosecution, and he alludes to the inconvenience of setting out in extenso the whole of a publication which may consist of two or three volumes (*). With great submission to the Lord Chief Justice, I think it very unlikely that a work contained in many volumes will ever be published, the obscenity of which cannot be made apparent without the whole being set out in the indictment. But if the question of convenience were to determine whether the libel is to be set out, it would be necessary to adopt

(*) Law Rep., 2 C. C., 74; 5 Eng. Rep., 487.

(*) 2 Q. B. D., 572, 578; 21 Eng. Rep., 289.

some rule, and that rule would probably be that the words of a libel need not be set out when it is very long. But 624] then it would be very difficult to *determine what length would render it unnecessary to set out the libel; would two volumes be too many, would one volume, 100 pages, or what other amount? It may be a great inconvenience that a long libel should be put upon the record; but whatever the inconvenience may be, it seems to me that upon an indictment for private defamation, blasphemy, obscenity, or sedition, where the objection is to the whole, and not to a part, the whole must be set out.

The next reason assigned by the Lord Chief Justice was that the objection ought to have been taken by demurrer (*). It might be more convenient for the administration of justice to enact that if a man will not take an objection to an indictment by demurrer, he shall not be at liberty to take it by motion in arrest of judgment, or by error. I think that many reasons can be urged in favor of limiting the power to take advantage of technical defects, but that is a matter to be considered by the Legislature, and the answer which I have to give to the second reason assigned by the Lord Chief Justice is that the law of the land, as it at present stands, allows technical objections to an indictment to be taken upon arrest of judgment or by writ of error.

Then the Lord Chief Justice proceeds to mention the third objection, namely (*), that "although the subject-matter of this indictment falls within the law of libel, it to a certain extent arises out of the general law as being *commune nocumentum*, a matter of complaint as to which arises from its being subversive of public morals, and therefore a public nuisance." It may be admitted that an offence of the kind alleged in the indictment before us is *commune nocumentum*, and that it may still be so described; but the answer to the third reason assigned by the Lord Chief Justice is, that whether the offence is *commune nocumentum* or not, the plaintiffs in error are charged with having committed it, and therefore the law requires that it should be fully stated in the indictment. I find no exception to the general rule, that where the offence is alleged to be *commune nocumentum*, the ingredients of it, the facts which constitute it, need not be stated in the indictment. I cannot feel the force of the difficulties propounded by the Lord Chief Justice.

Then my Brother Mellor bases his decision upon the 625] ground *that an objection of this kind could be taken

(*) 2 Q. B. D., 573, 574; 21 Eng. R., 269.

(*) 2 Q. B. D., 574; 21 Eng. R., 269.

by demurrer to the indictment, and says that the point may still be taken upon error⁽¹⁾. The Lord Chief Justice also says⁽¹⁾: "We shall, however, shelter ourselves under the decisions of the American courts, leaving the ultimate decision of this matter—an important one, no doubt—to the Court of Error." I am glad to find those two statements of opinion, because when one has the misfortune to differ from the views of learned judges, it is a very great comfort to know that those views were not entertained strongly. I cannot help thinking that the opinions expressed by the Lord Chief Justice and my Brother Mellor show that they thought this was a matter which was fairly open to argument, and which might be reviewed in the Court of Error. It results, therefore, to my mind, that the authorities to which I have referred are unimpeached and are binding upon us, and no sufficient reason has been given why we should not act upon them.

Now this indictment is not merely doubtful, but wholly defective; not only are the words not set forth, but no description of any kind is given. The offence alleged is that the plaintiffs in error "did print, publish, sell, and utter a certain indecent, lewd, filthy, and obscene libel, to wit, a certain indecent, lewd, bawdy, and obscene book called the 'Fruits of Philosophy.'" The words following "to wit" serve only as a mere identification of the alleged libel, and therefore the indictment may be read as though it had merely charged that the plaintiffs in error had uttered a certain indecent, lewd, filthy, bawdy, and obscene libel. Under these circumstances certainly I am of opinion that the judgment ought to have been arrested, and we ought now to pronounce judgment to that effect, and reverse the judgment of the Queen's Bench Division. I repeat that I wish it to be understood that we express no opinion whether this is a filthy and obscene, or an innocent book. We have not the materials before us for coming to a decision upon that point. We are deciding a dry point of law, which has nothing to do with the actual merits of the case.

BRETT, L.J.: It seems to me that we are not called upon to differ from any strongly formed opinion of the Lord Chief Justice and Mr. Justice Mellor; I think that [626 their judgments show that they did not form a strong opinion as to the point which we shall have to determine in this case. Some of the authorities which we have had to consider were not brought before the Queen's Bench Division; and with regard to the argument for the Crown there, it must be

(1) 2 Q. B. D., 574; 21 Eng. R., 269.

observed that, except *Reg. v. Dugdale* (¹), the only decisions cited as to indictments were American cases, and I think it will appear that *Reg. v. Dugdale* (¹) is not in point for the present proceedings. It is evident from the terms of his judgment that Mr. Justice Mellor came to the conclusion that the words complained of ought to be set out, and that their omission would have made this indictment bad on demurrer; and one ground of the judgment of the Lord Chief Justice was likewise that the objection ought to have been taken by demurrer. The only real point, therefore, upon which we differ from the learned judges, is, that the omission in this case was so great a defect that it is not cured by the verdict.

It seems to me that the questions raised in this case are, first, what is it necessary to set out in such an indictment as this; secondly, what kind of omissions can or cannot be cured by verdict; and thirdly, whether in this indictment the omission was so great a defect that it could not be cured by the verdict.

The first question really comes to this, whether in an indictment of this kind it is necessary to set out the words relied upon as constituting the offence. I cannot express what I believe to be the rule with regard to indictments more accurately in my view than was done in *Reg. v. Aspinall* (²). In that case almost every sentence of the judgment delivered by me on behalf of Lord Justice Mellish and myself was, I may venture to say, the result of many cases; as to each sentence a laborious examination of cases was made, and it was intended to express what we considered to be the result of those cases, and I cannot find better words now in which to express the result. With regard to indictments, it is there said (³) that "every pleading, civil or criminal, must contain allegations of the existence of all the facts necessary to support the charge or defence set up by such pleading. 627] An indictment *must, therefore, contain allegations of every fact necessary to constitute the criminal charge preferred by it. As in order to make acts criminal, they must always be done with a criminal mind, the existence of that criminality of mind must always be alleged. If, in order to support the charge, it is necessary to show that certain acts have been committed, it is necessary to allege that those acts were in fact committed. If it is necessary to show that those acts, when they were committed, were done with a particular intent, it is necessary to aver that intention. If

(¹) 1 E. & B., 435; 22 L. J. (M.C.), 50;
Dears., 64.

(²) 2 Q. B. D., 48; 19 Eng. R., 198.
(³) 2 Q. B. D., at p. 56; 19 Eng. R., 198.

it is necessary, in order to support the charge, that the existence of a certain fact should be negatived, that negative must be alleged." Where the crime alleged in an indictment consists of words written or spoken, it seems to me that the words are the facts which constitute the crime, and that for this reason the words must be set out.

Now, the word "libel," as popularly used, seems to mean only defamatory words; but words written, if obscene, blasphemous, or seditious, are technically called libels, and the publication of them is by the law of England an indictable offence. The publication of obscene words comes also under another class of offences, namely, the class of offences against morality. I am aware that in a valuable book lately published, Stephen's Digest of the Criminal Law, ch. xviii, art. 172, p. 104, obscene words written are not put under the class of libels, but they are put under the class of offences against morality. But they have long been treated as falling within the legal meaning of the term "libel." Therefore libels may be divided into seditious, blasphemous, obscene, and defamatory. There are other offences which consist in words, either written or spoken, such as perjury, false pretences, forgery, letters demanding money with threats, and the administration of unlawful oaths, and I think it will be found that indictments for committing any of these offences are all within the principle which I have stated, namely, that inasmuch as the crime consists in the words, the words must be stated; and I think I shall show that in every one of those cases there is authority for saying that the words must be set out, unless the necessity for setting out the words is excused by statute; and it seems to me that each of the statutes which have been passed to excuse the necessity of setting out the words, is *an authority [628 that without the statute, by the common law, the words must have been set out, and of course wherever it has been decided that the omission to set out the words is a fatal objection, even after verdict, the decision shows still more strongly than the statutes which I have mentioned, the necessity for setting out the words, and that the objection must be fatal on demurrer. As we have to deal with a decision of such high authority as that of the Queen's Bench Division I thought it right to look carefully into the authorities, and those authorities I feel bound to cite, in order to justify the conclusion at which I arrived.

One of the earliest cases relates to the offence of cursing and swearing and uttering of profane oaths, which of course

consists in words: it is *Rex v. Sparling* (*). This conviction was for profane cursing and swearing under 6 & 7 Wm. 3, c. 11, and it set forth that the defendant did "profanely swear 54 oaths, and did profanely curse 160 curses," but none of them were set out. There having been a conviction there must have been a trial, and a decision of the court of petty sessions, but it was held that the conviction was nought, because the oaths and curses were not set forth. The Court of King's Bench, including Lord Holt, gave as a reason—"For what is a profane oath or curse is a matter of law, and ought not to be left to the judgment of the witness; he may think false evidence is so; suppose it was for seditious or blasphemous words, must not the words themselves be set out, be they ever so bad, that the court may judge whether they are seditious or blasphemous." *Rex v. Popplewell* (*) and *Rex v. Chaveney* (*) are cases of a similar kind, and relate to the same subject-matter. They are all after conviction, and they seem to me to be authorities for saying that whenever words are complained of they must be set out, and that the omission of the words is fatal after verdict or decision.

I will now refer to the law as to letters demanding money. In *Lloyd's Case* (*), an indictment following the words of the Black Act, 9 Geo. 1, c. 22, charged the prisoner with feloniously sending a letter, without any name subscribed [629] and signed thereto, demanding *money. After conviction it was moved in arrest of judgment that the indictment was bad on two grounds, one of which was that neither the letter nor even the substance of it was set forth in the indictment. It was held bad in arrest of judgment, and the reason was that in every indictment a complete offence must be shown, and the report states that the precedents which had been looked through generally set forth the letter.

With regard to false pretences, it is only necessary to refer to *Rex v. Mason* (*). That case is always quoted. I know it was said by Mr. Justice Mellor, in *Heymann v. Reg.* (*), that it had been virtually overruled, and in *Reg. v. Goldsmith* (*), Lord Justice Bramwell expressed his concurrence with the remark of Mr. Justice Mellor. But I have failed to find any case before *Heymann v. Reg.* (*), which treats *Rex v. Mason* (*) as overruled; on the contrary it has been again and again approved of and cited as a binding au-

(*) 1 Str., 497.

(*) 2 Str., 686.

(*) 2 Ld. Raym., 1368.

(*) 2 East's Pleas of the Crown, ch. 23, par. 5, p. 1122.

(*) 2 T. R., 581.

(*) Law Rep., 8 Q. B., 102, at p. 103; 4 Eng. Rep., 241.

(*) Law Rep., 2 C. C., 74, at p. 79; 5 Eng. Rep., 437.

(*) Law Rep., 8 Q. B., 102; 4 Eng. R., 241.

thority. The indictment was that the defendant had obtained from "one Robert Scofield divers sums of money, that is to say, the sum of two guineas, of the value of two pounds and two shillings of lawful money of Great Britain, of the proper moneys of the said Robert Scofield, by false pretences, with an intent then and there to cheat and defraud the said Robert Scofield of the same." The defendant pleaded not guilty, and on his trial at the quarter sessions at Worcester he was convicted, and sentenced to transportation; but the judgment was reversed by the Court of King's Bench upon a writ of error. The first objection was that the offence imputed was not specified with sufficient particularity. "Several objections," said Mr. Justice Buller (at p. 586), "have been made on the part of the defendant, but the material one on which I found my judgment is, that the indictment does not state what the false pretences were. . . . I am of opinion the first objection is fatal, and that the judgment must be reversed:" and Mr. Justice Grose says he is of opinion, "that the objection that the pretences are not specified is decisive, and for the reasons mentioned by the defendant's counsel; that the defendant may know what he is to defend, and the court may see what punishment they are to inflict." I think that those are reasons why the words should be *set out, but to [630 my mind the fundamental reason is, that the words are the ground of complaint. *Rex v. Perrott* (*) is to the same effect. It was an indictment for obtaining money by false pretences, and the judgment was arrested for the reason that, although the false pretences were set out, there was not an averment stating that they were false; but Lord Ellenborough says (p. 385): "Every indictment ought to be so framed as to convey to the party charged a certain knowledge of the crime imputed to him. The Legislature have so held, and have recorded their opinion to that effect in the cases of perjury." And then he mentions the statute as to perjury, 23 Geo. 2, c. 11, which allows the substance of the charge to be set forth. He also cites *Rex v. Mason* (*), and approves of it.

The cases with regard to perjury I do not propose to cite, because 23 Geo. 2, c. 11 (*) is a strong authority pronounced by the Legislature itself, that by the common law, upon an indictment for perjury, the words must be set out.

As to the law of forgery I will mention *Hunter's Case* (*).

(*) 2 M. & S., 379.

(*) 2 T. R., 581.

(*) Repealed by 30 & 31 Vict. c. 59,

having been practically superseded by 14 & 15 Vict., c. 100, s. 20.

(*) 2 Leach. C. C., 624.

The prisoner was charged with the forgery of a navy bill, and the objection taken was that, although the indictment alleged the forgery of a receipt for money, there was not a sufficient averment to show how the fabricated words amounted to a receipt. I quote the case for the opinion of the judges, delivered by Grose, J. ('). "The material objection to this indictment was, that it did not contain any averment amounting to a capital offence, for although it avers that the prisoner forged a certain receipt for money, yet there is nothing stated in any of the counts to show that the instrument set out, which does not on the face of it import to be a receipt, is in fact a receipt." *Rex v. Mason* (') is then cited, and the learned judge afterwards adds, "In indictments for forging a bill, bond, note, will, or other instrument, an exact copy of the instrument respectively charged to have been forged must be stated" (').

Now the next head which I will mention is the administering *unlawful oaths. This offence clearly consists in using the forbidden words. There are two statutes with regard to it, the 37 Geo. 3, c. 123, which in s. 4 excuses the setting out of the words, and provides that it shall be sufficient to set out only the substance and effect, and the 52 Geo. 3, c. 104, which in s. 5 contains a similar provision. The Legislature excuses the setting out of the words, and, therefore, as it seems to me, admits that the words must have been set out if it had not been for the provisions in these statutes.

The next case which I shall cite is a decision with regard to a seditious libel, and it is *Rex v. Horne* ('). There the words relied upon were set out, and the information was held good. It was in many respects a remarkable case.

I will now go to cases as to defamatory words, and the first which I will cite is *Newton v. Stubbbs* ('). It was an action for words spoken of the plaintiff, and it was alleged that on one occasion the defendant spoke the words "*ad effectum sequentem*." It was objected that this was uncertain, and the court held that this mode of pleading was wrong.

I will next refer to *Zenobio v. Axtell* ('), which was cited in the course of the argument. It was an action for publishing a defamatory libel in the French language, in a newspaper called the *Courrier de Londres*. The declaration al-

(') Page 681.

(') 2 T. R., 581.

(') See as to the now existing law, 14 & 15 Vict. c. 100, ss. 5, 6, 7, and 24 & 25
Vict. c. 98, ss. 42, 43.

(') 2 Cowp., 672.

(') 2 Show., 435.

(') 6 T. R., 162.

leged that the libel was "according to the purport and effect following in the English language," and then it set out the translation. It stated that what had been said was in the French language, and then assumed to state its purport and effect in English, and it did not say, "which being translated into English has the following meaning." Upon that ground Lord Kenyon, C.J., said: "That this objection must prevail, is evident from the uniform current of precedents, in all of which the original is set forth. The plaintiff should have set out the original words, and then have translated them."

Now in *Wright v. Clements* (') the declaration stated that the defendants did publish a certain libel, "containing amongst other things, certain false, scandalous, malicious, defamatory, and libellous matters, of and concerning the plaintiff, in substance as follows, *that is to say," [632 and then it set out the words with innuendoes. The words were introduced by the allegation "in substance as follows." There was a motion in arrest of judgment, and it was argued, that although the words were not set out according to their tenor, yet, inasmuch as they were alleged to be set out according to their substance, it was sufficient after verdict. Lord Tenterden said, p. 506, "Judgment must be arrested. In actions for libel, the law requires the very words of the libel to be set out in the declaration, in order that the court may judge whether they constitute a ground of action; and unless a plaintiff professes so to set them out, he does not comply with the rules of pleading. The ordinary mode of doing this is to state that the defendant published of and concerning the plaintiff the libellous matters to the tenor and effect following."

Then Holroyd, J., says, p. 508, "Now where a charge either civil or criminal is brought against a defendant arising out of the publication of a written instrument, as is the case in forgery or libel, the invariable rule is, that the instrument itself must be set out in the declaration or indictment, and the reason of that is that the defendant may have an opportunity, if he pleases, of admitting all the facts charged and of having the judgment of the court, whether the facts stated amounted to a cause of action, or a crime."

Lord Justice Bramwell has cited the case of *Cook v. Cox* ('), and that case lays down the same principle. Now, these decisions were pronounced in 1814 and 1820, after Fox's Act, 32 Geo. 3, c. 60, passed in 1792. Therefore any argument based upon Fox's Act cannot prevail. It is true that

(') 8 B. & Ald., 603.

28 ENG. REP.

(') 3 M. & S., 110.

1878

Bradlaugh v. The Queen.

before that statute the judges held that upon the trial of an indictment or information for libel, all that the jury had to find was, whether the defendant had published the writing, and whether the innuendoes were true, and that it was for the court to say whether the writing was a libel or not. Fox's Act declared that view of the law to be wrong. Whether the Legislature were right in principle, or whether the judges were right, is not for us to discuss; and we must accept the declaration of the Legislature as an authoritative statement of the law. But it seems to me that Fox's Act leaves untouched the validity of an objection to the omission of words from 633] an indictment *or information when they form the substance of the offence charged. In principle the only difference made by that statute is, that if the written instrument can be a libel, then it is for the jury to say whether it is a libel (''); but there remains a preliminary question which it is for the court or judge to decide, namely, whether the writing can be a libel, whether in truth there is any evidence upon which a jury can say it is a libel, and that question is still open, and is a question for the court (''); and therefore the reason which is given by Holroyd, J., in *Wright v. Clements* (') still prevails, that the words ought to be set out, in order that the defendants may demur and may raise the objection that the words cannot by any reasonable construction amount to a libel. Moreover, by the 4th section of Fox's Act, 32 Geo. 3, c. 60, the power to move in arrest of judgment is expressly preserved for the benefit of a defendant who is found guilty, and I think that the Legislature intended to allow a defendant, either before verdict by demurrer, or after verdict by motion in arrest of judgment, to object that the words complained of either do not amount to a libel or are wholly omitted from the information or indictment, as the circumstances of the case may allow.

Now I come to what seems to me to be a remarkable case. It is not a decision of a court upon the present question, but it seems to me to be a great authority; I mean *Rex v. Wilkes* ('). In that case an information was exhibited in the Court of King's Bench for the publication of an obscene and impious libel. That obscene and impious libel was in the book styled an 'Essay on Woman.' The facts now material are (p. 2528) that Mr. Wilkes having pleaded not guilty, and the records having been made up and sealed,

(') See *Fray v. Fray*, 34 L. J. (C.P.), 45.

(') 3 B. & Ald., 503, at p. 509.

(') See *Mulligan v. Code*, Law Rep., 10 Q. B., 549; 14 Eng. Rep., 352.

(') 4 Burr., 2527.

"the counsel for the Crown thought it expedient to amend them by striking out the word 'purport' and in its place inserting the word 'tenor.' The proposed amendments were in all those parts of the information where the charge was that the libel printed and published by Mr. Wilkes contained matters 'to the purport and effect following, to wit: ' which the counsel for the Crown thought it advisable to alter into words importing that such libel contained matters 'to the tenor and effect following, to *wit.' " It is [634 clear that the words were set out; yet, because they were introduced by the words "to the purport and effect following" instead of "to the tenor and effect following," the Attorney-General, Sir Fletcher Norton, considered it unsafe to go on even after plea pleaded and issue joined, and thought it advisable to amend the record. That seems to me a very important authority.

The second question which I have proposed is what kind of omissions can or cannot be cured by verdict, and all the cases which I have cited seem to me to form a strong current of authorities to show that in every kind of crime which consists in words, if the words complained of are not set out in the indictment or information, the objection is fatal in arrest of judgment.

Now we come to the cases which are said to be to the contrary, and I will deal very shortly with them. The first is a case upon which the Crown has relied: *Dugdale v. Reg.* ('). The only counts of the indictment in that case material to be now mentioned are the first and second; the first count charged the defendant with obtaining and procuring obscene prints, with intent to publish them, and the second count charged him with preserving and keeping them with the like intent. The second was held not to disclose an offence for another reason, that is, that the mere having them in his possession was not indictable. The first count was held to be good, because it alleged a step towards committing a misdemeanor. In my opinion, if a man, knowing prints to be obscene, procures them for the purpose of publishing them, his offence is complete, although he has never looked at them, and therefore the actual nature of the prints was not a part of the charge, and it was unnecessary to describe them. But further, I would strike out of the category of the cases which we are considering all cases with regard to obscene prints and obscene pictures. The publication of obscene prints and obscene pictures may be in one sense libellous, but they are not

(') 1 E. & B., 435; Dears., 64.

words, and therefore they do not seem to me to fall within the rules as to criminal pleadings which we are considering here to-day; the publication of them is an offence like that committed by Sir Charles Sedley (¹), who was convicted, not of libel, but of indecent exposure.

635] *Now I come to *Reg. v. Goldsmith* (²): I see but little difficulty in dealing with that case, if it were not for the expressions used by some of the judges. The prisoner was indicted, not for obtaining money by false pretences, but for unlawfully receiving goods knowing them to have been obtained by false pretences. The objection was that the false pretences were not set out. It seems to me that the crime charged in that case is complete, although the prisoner does not know what the false pretences were, and in this view the words actually used in making the false pretences formed no material part of the charge. If a man receives goods, being told and believing that they have been obtained by false pretences, he is just as guilty of the crime as if he knew what the false pretences were; upon a similar principle if a man receives goods, knowing them to be stolen, he may not know from whom they were stolen, where they were stolen, or when they were stolen; but all that is wanted, in order to constitute the offence, is that he should know the fact that they have been stolen. In *Reg. v. Goldsmith* (³) it was sufficient to allege and to prove that the prisoner knew that the goods had been obtained by false pretences. It seems, therefore, to me that it was not necessary for the decision of that case to rely upon Serjeant Williams' note to *Stennel v. Hogg* (⁴), where it is laid down that a defect, imperfection, or omission in pleading is cured by the verdict of the common law.

Now comes the case of *Heymann v. Reg.* (⁵). That was a case of conspiracy to defraud, and in order to constitute that crime it is only necessary to show that persons have agreed together to defraud; and as was pointed out in *Heymann v. Reg.* (⁶), and also *Reg. v. Aspinall* (⁷), the crime of conspiracy is complete so soon as the agreement to commit the unlawful act is come to; and the conspiracy may be complete, although the guilty parties have not yet agreed upon what means they should use; in a case like *Reg. v.*

(¹) 17 How. St. Tr., 155.

(²) Law Rep., 8 Q. B., 102; 4 Eng.

(³) Law Rep., 2 C. C., 74; 5 Eng. Rep., 437.

Rep., 241.

(⁴) 1 Notes to Saund. by Williams, at p. 261.

(⁵) Law Rep., 8 Q. B., 102, at p. 105; 4 Eng. Rep., 244.

(⁶) 2 Q. B. D., 48, at p. 58; 19 Eng. Rep., 198.

Aspinall (¹), where the agreement was to defraud such persons, as might buy shares, by false pretences with regard to those shares, the conspiracy is complete the moment the parties *thereto agree to deceive such purchasers, [636 although they have not as yet agreed on the false pretences. The crime of conspiracy does not consist in words, but in the agreement; and it follows that the crime is complete, although the false pretences never were used, and although the false pretences might never have been agreed upon. In the case of *Reg. v. Aspinall* (¹), amongst the objections put forward it was urged that the false pretences were not set out; this objection was overruled upon the authority of the decided cases (²), but there were other matters which were not perfectly stated, and the imperfection in the statement of the indictment was much relied on, and it was necessary for this court to consider whether the defect was capable of being cured by verdict. The rule as to what can be cured is pointed out in *Reg. v. Aspinall* (³): "It (the rule) is thus stated in *Heymann v. Reg.* (⁴): 'Where an averment which is necessary for the support of the pleadings is imperfectly stated, and the verdict on an issue involving that averment is found, if it appears to the court after verdict that the verdict could not have been found on this issue without proof of this averment, then, after verdict, the defective averment which might have been bad on demurrer is cured by the verdict.' Upon this it should be observed that the averment spoken of is 'an averment imperfectly stated,' i.e., an averment which is stated, but which is imperfectly stated. The rule is not applicable to the case of the total omission of an essential averment. If there be such a total omission, the verdict is no cure. And when it is said that the verdict could not have been found without proof of the averment, the meaning is, the verdict could not have been found without finding this imperfect averment to have been proved in a sense adverse to the accused." And it seems to me obvious that must be the rule, upon referring to Serjeant Williams' note to *Stennel v. Hogg* (⁵), where it is said that the defect is cured by the verdict, if the issue joined be such as necessarily required on the trial proof of the facts "defectively stated." What are the issues in a criminal case? The plea of not guilty is general, and denies every averment necessary to *constitute the offence, in other words, [637

(¹) 2 Q. B. D., 48; 19 Eng. Rep., 198.

(²) At p. 60.

(³) 2 Q. B. D., 48, at p. 55; 19 Eng. Rep., 198.

(⁴) Law Rep., 8 Q. B., 102, at p. 105; 4 Eng. Rep., 241.

(⁵) 1 Notes to Saund. by Williams, at p. 261.

1878

Bradlaugh v. The Queen.

every averment which is a necessary part of the indictment, and does not deny what is totally omitted therefrom. That which is totally omitted from the indictment is no part of the dispute when issue is taken upon the plea of not guilty, and the jury must find for the Crown, if everything stated on the face of the indictment is proved to be true. Therefore, it is true to say that every averment contained in an indictment, although inaccurately stated, is involved in the issue, and that the inaccurate statement of it is cured by the verdict, because after a conviction that inaccurate averment must be taken to have been proved adversely to the prisoner; and it is immaterial that the indictment would be bad before verdict by reason of that inaccurate statement. Therefore, I take the rule to be that an inaccurate averment is cured by verdict, but that an averment which is totally absent cannot be supplied even after verdict.

Now the third and remaining question is whether there is such a total absence in the present case of material words, that the defect has not been cured by the verdict. The introductory part of each count alleges that the book complained of falls under the category of an obscene libel; but that introductory part does not justify the total omission of the words, which are relied upon as constituting the crime. Now, what is charged as to those words? It is said the defendants did "print, publish, sell, and utter, a certain indecent, lewd, filthy, and obscene libel, to wit, a certain indecent, lewd, filthy, bawdy, and obscene book called the 'Fruits of Philosophy.' It is obvious that the title of the book, 'Fruits of Philosophy,' was not enough to be relied on. Words cannot be more innocent—they never were or could be relied upon as the obscene libel charged. That which was to be relied upon was something written in the book which was so called, and there is no description of anything contained in that book. What is contained in that book, is not even attempted to be described according to its tenor and effect. There is a total omission of the contents, and yet it was the contents, or some part of the contents, which was to be relied on by the Crown. The words complained of are necessary to the averment in the indictment, and the total omission of them cannot be cured by the verdict.

With regard to the American cases, I must say that, to 638] my *mind, they are either contrary to the law of England or in favor of the plaintiffs in error. A rule of practice seems to exist in the United States of America, that when an indictment contains an averment that the words

are so obscene that if set out they would pollute the records of the court, it is unnecessary to set them forth; but that where there is not this averment, the words must be set out, and if there is an omission both of the words and of the averment, the indictment is bad in arrest of judgment. Therefore the American cases, if they are to be regarded as authorities, are against the prosecution, and in favor of the plaintiffs in error in this case; because, besides the omission of the words, there is also the omission of that averment which is a necessary substitute for them. I confess, however, that I know of no authority saying that any similar rule exists in English law. I have read Lord Holt's view, as expressed in *Rex v. Sparling* (¹), that the words of a blasphemous libel must be set out, however shocking they may be, and it seems to me, to say the least of it, a more robust rule to set out the obscene words upon the face of the indictment than to attempt to preserve the purity of the records, when the ears of every one in court must be polluted by the words being read out before the judge and jury. I cannot follow the reasoning as to the advisability of the records of the court being kept pure. It seems to me that it is a reason which does not bear examination, at all events, the principle that obscene words may be omitted if they are so obscene that they would pollute the records of the court, is not the law of England, and if it were it does not apply to this case, as the indictment does not contain an averment that the words are too obscene to be inserted. Therefore, to my mind, this indictment is bad, and the plaintiffs in error are entitled to judgment. They are entitled to judgment, as all persons charged with crime in England are, for want of sufficient accuracy in the instrument by which they are charged.

This decision leaves the verdict really untouched. I confess I have felt humiliation in having to discuss such a question as this in the presence of one of the plaintiffs in error. We know not the particular ground on which the verdict passed; but it does seem to me sad that such a charge should have been brought against a *woman. Although [639 on a point of law the judgment in this case must be reversed, yet if the book complained of is published again, and the plaintiffs in error are convicted upon a properly framed indictment, the reiteration of the offence must be met by greater punishment.

COTTON, L.J.: The question which we have to consider is, whether, on the indictment as framed, there is sufficient

(¹) 1 Str., 497.

1878

Bradlaugh v. The Queen.

to support the judgment against the plaintiffs in error. Although it is a mere question of criminal pleading, it is nevertheless of considerable importance, because especially in criminal matters no departure should be allowed from those rules, which have been laid down for the purpose of guiding the courts in the administration of justice. In the present case the offence charged is that of publishing an obscene libel. That offence consists of publishing obscene written words. Has any rule been laid down for framing an indictment for it? I cannot do better than take the rule quoted with approval by Lord Ellenborough in *Cook v. Cox*⁽¹⁾. That rule, which was stated by ten judges, is as follows: "By the law of England, and constant practice, in all prosecutions by indictment or information for crimes or misdemeanors by writing or speaking, the particular words supposed to be criminal ought to be expressly specified in the indictment or information" ⁽²⁾.

This rule established so long ago as the reign of Queen Anne, has been ever since recognized, and to show how uniform the practice has been, it is only necessary to refer to the numerous authorities and cases alluded to by Lord Justice Brett, amongst which I may especially mention *Wright v. Clements*⁽³⁾. Is there any authority to counter-vail this rule on behalf of the prosecution? Practically no decision has been quoted which enables it to be argued that this rule does not now prevail. The only English case which was referred to as not following the rule was *Dugdale v. Reg.*⁽⁴⁾; but I wish to remark that in that case there was no decision that the actual words need not be set out; the point was not raised, and that case cannot in any way be looked upon as a decision meeting the long current of 640] authority establishing and *following the rule. When a rule is so well established as this, it is almost unnecessary to consider what the reason of it is; but here certainly one reason is apparent, namely, that when words constitute the alleged crime, if the words complained of are not set out, the defendant is precluded from raising, either by demurrer or by proceedings in the Court of Error, the question whether or not the circumstances charged are in fact, according to the law of England, criminal; and it is of the utmost importance in dealing with cases of this kind, that it should not be considered whether or not in the particular case any injustice has been done to the accused persons, or whether or not they have suffered any substantial

⁽¹⁾ 3 M. & S., 110, at p. 116.

⁽²⁾ 5 Har. St. Tr., 828.

⁽³⁾ 3 B. & Ald., 503.

⁽⁴⁾ 1 E. & B., 435; Dears., 64.

disadvantage. In my opinion we ought to adhere strictly to the principles and the rules which have been laid down, without nicely speculating as to whether any advantage or disadvantage exists in the particular case.

On what ground is it contended that this indictment is sufficient? I will first take the point which was principally relied upon in the Queen's Bench Division. I do not understand that either of the learned judges who decided the case in the court below thought that, according to the English decisions, there was an exception to the general rule in this kind of libel. It is true the Lord Chief Justice does refer to the inconvenience of setting out libels of this sort, or books of this sort, on the indictment; but he does refer to, and expressly says, that he relies upon the decisions of the American courts, and I must therefore consider whether or not those decisions do justify the judgment in the Queen's Bench Division upon this indictment. We are in no way bound by the American decisions, their effect is simply that they may enable us to see how principles recognized by the law of England ought to be applied, by showing us how learned judges in other countries have acted on those principles; but if in fact the judgments of the American courts are founded upon principles which we do not recognize, then of course those decisions are perfectly useless, and can be neither guides nor authorities. In the American cases referred to the judges certainly recognized the rule to which I have referred, and which I have quoted from *Cook v. Cox* ('); they recognized it as a general rule; but as against that general *rule they rely upon another, namely, [64] that it is necessary to keep the records of the court pure; but it was only upon an allegation that the book or libel in question was so gross that no records ought to be defiled by it, that they held the indictment to be sufficient without setting out the actual words relied upon. It might be sufficient to say that these cases have no bearing on the present, because there is no such allegation in the present case, and if the present indictment is held to be sufficient, every indictment for any offence in the nature of an obscene libel must also be sufficient, although it does not follow that general rule to which I have referred. But the matter does not rest here. Does the law of England recognize, so as to make it available for the prosecution, that rule upon which the judges in American courts rely? It is perfectly true that the English courts do require their records to be kept pure in this sense, that they will not allow their records to

(') 3 M. & S., 110.

1878

Bradlaugh v. The Queen.

be the means of propagating defamation or obscenity under the pretence of its being part of a judicial proceeding. They will require anything impure or scandalous to be removed from their records when it is irrelevant to the matter to be tried, but if the matters on the records of the court or in an affidavit are really relevant to the matter to be tried, they are not scandalous, and no principle recognized by the English courts requires any statement to be removed from their records, if relevant to the issue to be tried, simply because it is impure. Does the principle that the records must be kept pure justify the absence of what would otherwise be a necessary averment in the indictment, on the ground that it is gross and impure? In my opinion it does not, and for this reason, the duty of the court is to administer justice, either as between party and party, or as between the Crown and those who are accused; and for the purpose of doing so it ought not to consider its records as defiled by the introduction upon them of any matter, which is necessary in order to enable the court to do justice according to the rules laid down for its guidance; a defendant has a right to say that he shall have fair notice, in order that he may not be prejudiced in defending himself against proceedings, whether civil or criminal, and therefore, in my opinion, the principle upon which those American cases are decided does not avail [642] in this case. Those cases can be *no guide or assistance to us. If it is desirable that in cases of this sort there should be an exception to the rule as to the statement of words, it is not the duty of the court to make an exception; it must be for Parliament to interfere, as it has done in other cases mentioned by Lord Justice Brett.

I think that disposes of the ground principally relied on in the Queen's Bench Division, but there is another ground to which I must refer, that is, that the defect has been cured by the verdict. The rule is very simple, and it applies equally to civil and criminal cases; it is, that the verdict only cures defective statements. In the present case the objection is not that there is a defective statement, but an absolute and total want in stating that which constitutes the criminal act, namely, the words complained of, and the judgment of Lord Ellenborough in *Cook v. Cox* (1) shows that the omission of words, when they form the substance of the offence, cannot be cured by verdict, when he says, "It is of the substance of a charge for slander by words that the words themselves should be set out." Here we have not the substance set out, we have not a mere defective aver-

(1) 8 M. & S., 110.

ment; we have an absolute omission to aver that which was relied upon as lewd and indecent. My opinion is that the defect is not a matter cured by the verdict, and it is perfectly open to the plaintiffs in error to rely on this as a fatal defect in the indictment even after verdict.

In my view, therefore, this indictment is not framed in accordance with settled rules, and neither on authority or principle can the omission of the words complained of be excused, and this judgment cannot stand.

Judgment reversed.

Solicitor for the prosecution : *T. J. Nelson.*

See 21 Eng. R., 274 note; see *ante*, p. 423.

As to validity of an order for destroying alleged obscene books, see *Reg. v. Truelove*, 5 Q. B. Div., 836, 14 Cox's Cr. Cas., 408, to appear in succeeding volume.

The provision of § 3894 of the U. S. Revised Statutes, as amended by § 2 of the act of July 12, 1876 (19 U. S. Stat. at Large, 90), prohibit the carrying in the mail of letters or circulars concerning lotteries, and punish as a crime the offence of knowingly depositing or sending anything to be conveyed by mail in violation of said section 3894 and apply to sealed letters, and are not unconstitutional or invalid: *Matter of Jackson*, 14 Blatchf., 245.

See *Matter of Jackson*, 96 U. S. R., 727.

The statute which forbids the depositing in the mail of any obscene or indecent publication, are not repugnant to any provision of the constitution of the United States: *U. S. v. Bennett*, 16 Blatchf., 338, 8 Reporter, 38.

It is not necessary that an indictment under that statute in respect to a book should set forth in *hæc verba* the alleged obscene book, or the alleged obscene passages in it, if the indictment states that such book is so indecent that it would be offensive to the court and improper to be placed on its records; and that therefore the jurors do not set forth the same in the indictment, and if the book is sufficiently identified in the indictment for the defendant to know what book is intended.

The defendant can always procure information of the charge which he is to meet, so far as regards being fur-

nished with a copy of the publication or with a copy of the alleged obscene parts of it, by applying to the court, before the trial, for particulars.

The question whether, on the matter alleged to be obscene, a verdict that it is obscene would be set aside as clearly against evidence and reason, can be fully raised before the trial by a motion to be made on the indictment and a bill of particulars; and, under all other circumstances, it is for the jury to say whether the matter is obscene or not.

A pamphlet of 24 pages, consisting of a sheet and a half secured together by stitching, and with a cover of four pages, and having a title-page, is properly described as a book in an indictment under said statute. Whether a count in respect to a publication merely, without averring what kind of publication, is bad for uncertainty, *quære*.

It is sufficient if the indictment alleges that the defendant knowingly deposited the obscene book, without alleging that he knew it to be non-mailable matter under the statute: *United States v. Bennett*, 16 Blatchf., 338, 8 Reporter, 38.

There should be some general description of the writing. It is not necessary to copy the paper or minutely describe the print, but it is necessary to give a general description thereof and to aver their evil tendency; sufficient information should be given to fairly inform the defendant as to what is charged against him, and the subject of the obscenity should be stated: *People v. Hallenbeck*, 52 How. Pr., 502, 2 Abb. N. C., 66; *Com. v. Holmes*, 17 Mass., 336; but see *Com.*

1878

Bradlaugh v. The Queen.

v. Tarbox, 1 Cush., 66; Com. v. Wright, Id., 46.

An indictment framed under section 223 of the criminal code, for printing, having in possession, and giving away, an obscene and indecent pamphlet, must set out the supposed obscene matter, unless the publication is in the hands of the defendant, or out of the power of the prosecution, or the matter is too gross and obscene to be spread on the records of the court; either of which facts, if existing, should be averred as an excuse for failing to set out the obscene matter. Whether matter published is obscene or not, is a question of law and not of fact, and that question is for the court, and not for the jury, to determine: *McNair v. People*, 89 Ill., 441; Com. v. Tarbox, 1 Cush., 66; Com. v. Wright, Id., 46.

Under chapter 777 of 1878, prohibiting the publication of obscene literature, and providing that any person convicted thereof shall, if twenty-one years of age or upwards, be punished as therein provided, and prescribing a different punishment if he be under twenty-one years of age, it is not necessary to state the age of the prisoner in the indictment for a violation of the statute.

It is not obligatory upon the court to call witnesses to determine the age of the prisoner, but the court itself may determine his age from its own observation.

Quere, whether the court may, under the Constitution, examine the prisoner as to his age for this purpose: *People v. Justices*, etc., 10 Hun, 224.

See *People v. Keeper*, 37 How. Pr., 494.

In Indiana it is held, and we think with much the better reason, that the appearance of a person in respect to his age, as seen by the court or jury,

cannot be considered as evidence: *Shinger v. State*, 53 Ind., 251; *Stephenson v. State*, 28 id., 272.

So a mere naked opinion as to the age of a party from his appearance was rejected, though the court thought that if the witness had stated the facts indicative of age, and then followed with an opinion, that would have been admissible: *Morse v. State* 6 Conn., 9; see also *Porter v. Pequonoc*, etc., 17 id., 267, *Abbott's Trial Evidence*, pp. 87, 91.

An opinion formed from the physical appearance of another as to his probable age, whether he was over or under twenty-one years of age, is admissible if he state the facts upon which he bases such opinion: *McFadden v. Benson*, 1 Wilson's Super Ct. R. (Ind.), 527, affirmed 50 Ind., 431; *State v. Kalb*, 14 id., 404; *Kansas*, etc., v. *Miller*, 2 Col., 444; *Whart. Crim. Ev.*, 8th ed., § 311.

Though, in Missouri, it is held that testimony as to the size, appearance and general development of a person will not be received for the purpose of proving her age, if that is susceptible of direct proof: *State v. Griffith*, 67 Mo., 287.

The entry of a physician, in his register of births, of the time of birth of a person, is admissible if the physician be dead: *Arms v. Middleton*, 23 Barb., 571.

But see *Matter of Paige*, 62 Barb., 476.

So of a lawyer, in his register: *Fisher v. Mayor*, 67 N. Y., 73, 77.

A party's age may be proved by family reputation: *Whart. Crim. Ev.*, 8th ed., § 236; *Hill v. Eldredge*, 126 Mass., 234; *Cheever v. Congdon*, 34 Mich., 296; *Watson v. Brewster*, 1 Penn. St. R., 381, 383; *State v. Cain*, 9 W. Va., 559, 569-570.

[3 Queen's Bench Division, 643.]

Feb. 1, 1878.

[IN THE COURT OF APPEAL.]

*HOGARTH V. LATHAM & Co.

[643]

Bill of Exchange—Blank Acceptance—Authority of Partner to accept a Bill in Partnership Name.

The plaintiff and C. were partners, and the defendants, L. and F., carried on, in partnership, the business of shipbrokers. C. being in debt to the plaintiff and being pressed by him for payment, delivered to him two bills purporting to be accepted in the partnership name of the defendants; at the time of handing over the bills to the plaintiff, no drawer's name had been filled in, but C. stated to him that the consideration consisted of coals supplied. The plaintiff received the bills, believing that they had been lawfully accepted; but he afterwards began to suspect that there was something wrong. After his suspicions had been aroused, he filled in the names of his firm as drawers. It afterwards appeared that F. had accepted the bills without the authority of L.:

Held, that the plaintiff could not recover upon the bills against L.

ACTION on two bills of exchange by indorsee against acceptors.

At the trial before Hawkins, J., the following facts were proved. The plaintiff carried on the business of provision merchant in London in partnership with Cotton, under the name of Hogarth & Cotton. The defendants were shipbrokers at Dover, the members of the firm being Forster & Latham. Before February, 1876, Cotton borrowed of the plaintiff on his private account sums amounting to £3,000. Before the 15th of February the plaintiff pressed Cotton for repayment of the loan, and Cotton thereupon promised to give the plaintiff two bills of exchange, to be accepted by the defendants, which he stated he should very shortly receive, and further stated, in answer to the plaintiff, that the consideration for the bills was for coals supplied for the use of the steamship *Castalia*; the plaintiff, knowing that Cotton was connected with the steamship company that owned the *Castalia*, accepted this explanation. On the 15th of February Cotton sent the bills sued on to the plaintiff; they purported to be accepted by Latham & Co.; the bills were in every respect perfect except that the drawer's name was blank. The body of the bills was in Cotton's handwriting, they were at three months' date, and were drawn "pay to our order;" the acceptance was in Forster's handwriting. It was admitted that he had no actual authority to accept bills in the name of the firm. Cotton [644 stated to the plaintiff, that he had arranged with Latham &

1878

Hogarth v. Latham.

Co. that the bills might be drawn in the name of Hogarth & Cotton, in order that the plaintiff might the more readily discount them with his bankers. In May, before the bills became due, the plaintiff filled in the names of Hogarth & Cotton as drawers and indorsees, and his own name as indorsee. The bills fell due on the 18th of May, but were not presented at the request of Cotton. From the month of May to July, Cotton paid to the plaintiff sums of money from time to time on account of the bills. On the 3d of August Cotton absconded, and a few days later Forster also disappeared. It was admitted that the plaintiff had given value for the bills. There was no evidence of a general usage to draw bills in blank, but there was some evidence that in mercantile transactions it was frequently done, and that it was usual not to fill up the blank until the bill was wanted to be discounted or presented.

The jury found that the plaintiff, when he received the bills from Cotton took them *bona fide*, believing them to be perfectly good bills, but afterwards, and at the time he filled in the names of Hogarth & Cotton, suspected that there was something wrong.

The learned judge directed judgment to be entered for the defendant Latham.

The plaintiff appealed.

Jan. 31; Feb. 1. *Cohen*, Q.C., and *R. M. Bray*, for the plaintiff.

McIntyre, Q.C., and *Wheeler*, for the defendant Latham.

The arguments are sufficiently stated in the judgments hereinafter set forth; the following cases were cited: *Snaith v. Mingay* (1); *Cruchley v. Clarence* (2); *Attwood v. Griffin* (3).

BRAMWELL, L.J.: I think that the judgment must be affirmed. With the exception of *Chemung Canal Bank v. Bradner* (4) and a case which I tried at the last Chester assizes, I have never heard of an action such as this. The facts of the case at the Chester assizes were almost identical [645] with the present; there, however, the firm *who purported to accept the bill were really indebted to the person to whom it was sent, and if the bill had been drawn by the creditor upon the defendants in that action it would have bound them as it was a bill for value, and the partner who sent it would have had authority to forward it; but as it was drawn in blank and sent to the creditor who handed it to

(1) 1 M. & S., 87.

(2) 2 M. & S., 90.

(3) R. & M., 425; 2 C. & P., 368.

(4) 44 New York Rep. (5 Hand), 680.

the plaintiff in the action, who filled it up, not with the creditor's name but with his own, I ruled that it was not a mercantile business transaction and that it was not within the authority of the partner to bind the firm. This is a weaker case, because, as it must be assumed, no debt was due from the defendant's firm to Cotton, and I am of opinion that it was not a mercantile business transaction and was not within the presumable authority of the partner Forster. Anybody who takes such an instrument as this, knowing that when it was accepted the bill had not the name of any drawer upon it, takes it at his peril and must show that in fact the partner who did not write the acceptance authorized the attaching of the partnership name to the document with intent that it should be filled up by any person who got it. Mr. Bray has told us that we shall put a restriction upon the circulation of bills of exchange, if we decide against the plaintiff. I think, on the contrary, that we shall be laying down a good rule, which will protect honest traders against the acts of their fraudulent partners. Mr. Bray said that if one member of a firm drew a check on a bank payable to A. in respect of a debt due to B., he would be exceeding his partnership authority. As between the bank and the partners he would not, because the bank could not tell that it was so. Then Mr. Bray ingeniously said, supposing the holder of the check brought an action, could not he maintain it although the partnership authority had been exceeded? As to that I should like to take time to consider the point, when the case arises. I am not prepared to say that if A. and B. owe a debt to C., one partner without the authority of the other has any right to make the check payable to D., at all events without something to show that it has been given in satisfaction of C.'s debt. I should not like to lay down a rule upon this point. I can imagine cases, where it would be monstrous to hold that the firm were not liable, if it really turned out that there was a debt due to C., and that C.'s debt would be satisfied on payment of the *check. I should be very unwilling to hold [646 that such a document as that was not within the partnership authority, and I should be very unwilling to hold that if the firm of A. and B. owed C. a sum of money, and a bill was accepted in blank by one of the partners and sent to C., and C. put his name in as the drawer, the other partner was not bound, though he did not know of it and had given no special authority for its being done. But it would be a perfectly immaterial question if the bill passed into the hands of a *bona fide* holder; in that case the firm would be liable.

1878

Hogarth v. Latham.

If it remained in the hands of the drawer, if the debt was due to him, it would matter very little whether he could recover on the bill of exchange, because the debt was due to him. I say nothing about that, but in this case in point of fact no debt was due to Cotton, although the plaintiff may have supposed otherwise owing to Cotton's statement. A bill of exchange supposes value, and is a negotiable instrument; but I am not at all sure that a man who takes what is not a negotiable instrument has a right to presume any value, or that he does not take it at his peril if there is no value. But supposing that the plaintiff had a right to assume value between Cotton and the defendant's firm, yet since the acceptance was in the handwriting of one partner only, I am of opinion that he had not as against the other partner and as matter of right the power of putting in his name as the drawer, he not being the creditor; and that as he did put in the name of his firm as drawers, he must show that the partner whose writing is not on the bill authorized his partner to put that document into circulation and gave authority to any holder to put in his name as drawer. I am of opinion that there was no evidence of partnership authority here—certainly none in point of law. Evidence was given that it was a common practice for persons to accept bills of exchange in blank and remit them to their creditors. I dare say it may sometimes happen that a tradesman may write his acceptance across a piece of paper and send it to a wholesale dealer for the amount of the debt that is due to him, but with the intention that the creditor shall put his own name and not anybody's else; and with very great respect to the judges who decided the case of *Harvey v. 647*] *Cane* (1), I should *doubt very much whether in such a case as that anybody else who puts his name does not put it at the peril of having to show that the acceptor of the bill gave him authority to do it. It is one thing to authorize a creditor to put his name into a bill, and it is another thing to authorize him to insert the name of a third person. I cannot help referring to *Aude v. Dixon* (2). Baron Parke there says (p. 872): "I do not gainsay the position that a person who puts his name to a blank paper impliedly authorizes the filling of it up to the amount that the stamp will cover. Here the instrument to which the defendant's name is attached is delivered to his brother with power to make it a complete instrument on one condition only—that is, provided Robinson would be a joint surety with him. This, therefore, is an instance of a limited authority where, in

(1) 84 L. T. (N.S.), 64.

(2) 6 Exch., 869.

case of a refusal by Robinson to join, there is a countermand. Robinson refused to join, and consequently the defendant's brother had no authority to make use of the instrument. A party who takes such an incomplete instrument cannot recover upon it, unless the person from whom he receives it had a real authority to deal with it. There was no such authority in this case, and unless the circumstances show that the defendant conducted himself in such a way as to lead the plaintiff to believe that the defendant's brother had authority, he can take no better title than the defendant's brother could give. The maxim of law is '*nemo plus juris in alium transferre potest quam ipse habet.*' It is a fallacy to say that the plaintiff is a *bona fide* holder of value, he has taken a piece of blank paper, not a promissory note. He could only take it as a note under the authority of the defendant's brother and he had no authority: consequently the instrument is void as against the defendant." This reasoning is applicable here, and to my mind there is no reason why the plaintiff should recover, and there are reasons why he should not.

It was said by Mr. Cohen that this was a negotiable instrument even before the holder's name was put into it. I am of opinion that it was not, and that the cases do not show that it was. *Harvey v. Cane*⁽¹⁾ has been relied upon, but that case wholly differs from the present, for there was only one acceptor who himself accepted in blank. There are, however, some cases that show that an incomplete *instrument [648 may be made complete by a person to whom it was not originally handed, not on the ground that it was a negotiable instrument, but on the ground that the defendant, when he parted with it, must be taken to have given authority to any one into whose hands it might come to fill up the blank. It is not, therefore, a negotiable instrument, but authority has been given to every *bona fide* holder into whose hands it may come to make it a perfect instrument.

But the answer to that argument is that, before the plaintiff purported to exercise the supposed authority, he knew, not indeed that it was revoked, but that it never existed. A presumable authority exists in a partner of a trading firm to bind his partner by an acceptance. If I go to a man and say, "There is no such authority between me and my partner," he may draw a bill of exchange upon the firm; but he can maintain no action against me upon it, although accepted by my partner. The result follows not upon the ground of the authority being revoked, but upon the ground

(¹) 34 L. T. (N.S.), 64.

of his knowing that the presumable authority does not exist. In like manner the plaintiff before he filled up this instrument knew the presumable authority, or rather presumable power in the partner to give him the authority, did not exist; and therefore he knew that he himself had no authority.

As I am adverse to the plaintiff upon the point which I have mentioned, it is unnecessary to consider whether, if he had filled the instrument up at the time of receiving it, he might have made it a binding instrument, and he would have had a right to suppose that Forster had power to bind the defendant, his partner, and that he had himself had authority to fill up the bill. But I may say that although it may seem a little hard upon him perhaps that he should be worse off because he did at a later period that which he might have done at an earlier period, yet as he did not fill in the bill at the time when he might possibly have supposed he had authority to do it, he could not fill it in after he had received information which aroused his suspicions.

It has been said that if this bill got into the hands of a *bona fide* holder, that is, if Hogarth had indorsed it to a *bona fide* holder, the *bona fide* holder could have maintained an action. I am inclined to think that this argument is right for [649] this reason—*A partner in such a firm as this has power to accept a bill of exchange; a *bona fide* holder would have taken what upon the face of it would have been a perfect bill of exchange, and the defendant could not say to him, as he says here to the plaintiff: "You knew as a fact that it was a question whether there was actual authority to do this, and not a presumable authority." The *bona fide* holder would be entitled to say, "I have given credit to the partnership signature to an instrument valid upon the face of it, and I am entitled to recover." The difference between that case and the present case is this, that there the holder would not have had the notice which the plaintiff had upon this occasion.

I think that the judgment was right, and I think so without imputing any fraud to the plaintiff in this matter. To some extent it may be a hard case upon him. If he had not had this piece of paper which he thought he might fill up, he would possibly have pressed his remedies against Cotton all the more; but in my judgment our decision should be in favor of the defendant.

BRETT, L.J.: In this case the plaintiff brought an action against the two defendants Latham and Forster. Forster allowed judgment to go by default; and the question is whether the action is maintainable against Latham. Apart

from the instrument sued on, no privity existed between the plaintiff and the defendant, and therefore the plaintiff is driven to rely upon the instrument itself. That instrument purports to be a bill of exchange drawn by Hogarth & Cotton and accepted by Latham & Co. It seems to me that as against Latham the plaintiff must show either that the bill was drawn by Hogarth & Cotton or by their authority, and was accepted by, or by the authority of, Latham & Co., or he must show that he had a right to believe and did believe that the bill was drawn by Hogarth & Cotton, and was accepted by Latham & Co. with Latham's authority. In my opinion the plaintiff fails to show that he had a right to believe that the bill was drawn by Hogarth & Cotton, and he equally fails to show in this case that he had the right to believe that the bill was accepted by Latham & Co. with the authority of Latham. With respect to the drawing by *Hogarth & Cotton the bill never was in fact drawn [650 by Hogarth & Cotton. The person who signed the names of the drawers was the plaintiff himself, and the alleged drawing upon which he has to rely is a signature of the alleged drawers, made by himself. He cannot therefore rely upon it as a drawing by Hogarth & Cotton, unless he can show that he had a right to believe that he had the authority of the firm of Latham & Co. to put the names of Hogarth & Cotton as drawers.

Now what are the facts in the case? The acceptance was given to the plaintiff by Cotton upon what was in fact the representation to him that Cotton was the person who had a right to draw the bill. Therefore the first representation made to him was that Cotton was in fact the drawer, but the acceptance was offered to him as an acceptance in blank. It seems to me that the utmost which at that time he had a right to assume was, that the defendants were willing to accept a draft, in which Hogarth & Cotton's name might be put; but it does not seem to me that even at that time he had any right to suppose that he might put in the name of anybody else. I have seen no case which goes the length of saying that the plaintiff could in the name of a third person. But at the time that he received the bill if he supposed that he had authority he did not exercise the authority, and there was no drawer to the bill. The plaintiff has to show that he had the right to suppose that Hogarth & Cotton could lawfully be made the drawers of the bill. Even if he had the right to suppose that Cotton might give him authority to put in Hogarth & Cotton's name he did not do it at first, and before he inserted a drawer to the bill he in

1878

Hogarth v. Latham.

effect knew that Cotton had not the authority of Latham & Co. Therefore, at the time that he with his own hand made a drawer to the bill, he knew in effect that the defendant had given no authority to draw the bill. Under those circumstances it seems to me impossible to say that he had a right to believe that Hogarth & Cotton were lawfully the drawers of the bill, the alleged drawing in fact being done by his own hand at a moment when he knew that Latham & Co. did not authorize him to draw the bill.

Even if we assume all the cases to have been correctly decided and to bear out the propositions for which they have 651] been cited, *none of them go the length necessary to support the plaintiff's intention, for even if I have to agree entirely with the case of *Harvey v. Cane* (*) it does not go that length. That is all that it is necessary to say now, and I reserve to myself the power of considering whether or not that case was rightly decided, whenever the question comes before us. Even *Chemung Canal Bank v. Bradner* (†) does not go this length, because there at the time the blank was filled in there was no evidence of knowledge that there was no authority to fill in the name. It seems to me to be contrary to every rule of law as to principal and agent and to every rule of mercantile law, to suppose that this plaintiff had the right to assume that Hogarth & Cotton could be lawfully made the drawers of the bill. They were not the drawers of the bill. The plaintiff had no right to assume that they were, and therefore he cannot rely upon the drawing of the bill.

The acceptance of the bill was not authorized either expressly or impliedly by Latham. It was not an acceptance which Forster was entitled to give in respect of a partnership transaction, for there was none. Therefore neither expressly nor impliedly did Latham authorize Forster to write this acceptance.

Then comes the question whether the plaintiff, even supposing he was otherwise entitled to succeed, had a right to assume, contrary to the fact, that this acceptance was authorized by Latham. Now until a custom of merchants is proved, and proved so satisfactorily that the court may afterwards take notice of it, to the effect that it is an ordinary transaction for one partner to draft an acceptance in blank and to deliver it, so that any person who takes it may have a right to fill up the drawer's name, I shall agree with Lord Justice Bramwell in what he held at Chester, that an instrument thus drawn is invalid. Was such a custom proved in this case? I think it was not. Mr. Bray has made a strong

(†) 34 L. T. (N.S.), 64.

(*) 44 New York Rep. (5 Hand), 680.

observation that this point was not taken, and that therefore we ought to say that he might have proved it. But I think the utmost that we are entitled to assume is that he might have had other witnesses to prove the same thing which the one witness proved, and if he had had twenty witnesses to prove the same thing which the witness who was called did prove, it does not seem to me that he *would have [652 proved a custom binding to the extent that it is necessary for him to go. Therefore I come to the conclusion that the person who takes an acceptance with the drawer's name in blank has no right to say that he may assume that that acceptance entitles any holder to put in any name which he may think fit. I agree with the ruling of Lord Justice Bramwell at Chester. Of course if such a custom should hereafter be proved, that custom will overrule the present principles of law.

I therefore in the result think that here the plaintiff had no right to assume that the drawing was by those who purported to draw, and he had no right to assume that the acceptance was an acceptance by the persons who purported to be the acceptors—that is, that it was an acceptance by Latham & Co.—it was not in fact drawn by those who purported to draw it, it was not in fact accepted with the authority of Latham; and therefore the plaintiff fails on both grounds, and the judgment was right; and I think that the reasoning in *Awde v. Dixon* (¹), though the facts are not in point, fortifies us entirely in the conclusion at which we have arrived.

I wish to say that I give my opinion upon the draft in the form in which it is, and viewed under all the circumstances which accompanied it. If it had been indorsed on to another person, and held for value, I should have thought that that person could sue Latham upon this acceptance.

COTTON, L.J.: I am of opinion that the appeal must fail.

The action is brought on a bill of exchange alleged to have been drawn by Hogarth & Cotton on the defendant's firm.

The only question is whether Latham is liable, his partner, who was the actual party to the transaction, having suffered judgment to go by default.

The plaintiff alleges that he became the holder of a negotiable instrument for value without notice of there being anything unlawful about it, and therefore he is entitled to succeed. The question is whether the plaintiff had notice of any illegality. At the time when he actually received this instrument it was an acceptance and not a bill, that is to say,

(¹) 6 Exch. 869.

1878

Hogarth v. Latham.

653] it was a piece of stamped *paper with the acceptance of Latham and Forster, the defendant's firm, written on it, but there was no drawer's name; that was left in blank. It was conceded in the argument, and it could not be disputed, that at the time when the plaintiff got possession of the document, it was one on which he could not sue legally—this admission is fatal to the contention that he then had a negotiable instrument. As I understand the law, a negotiable instrument, either by mere delivery where it is payable to bearer, or by indorsement where it is payable to a particular person, enables the right of action to be transferred. But here no right of action was created by the possession of this document, when it came into the hands of the plaintiff.

How did he acquire any right to sue? He says that this was an acceptance by the defendant's firm empowering any one who liked to fill it up and make it a draft on the firm, that is to say, that any one who might receive this document had authority from the defendant to fill it up and put in his own name as drawer. At the time when the plaintiff received the acceptance, could he think that he had the authority of the firm to fill it up because he had the authority of Forster? I am of opinion that he did not and could not so think. In the present case I do not think it necessary to discuss what is the result of a single individual writing his acceptance on a piece of paper with no drawer's name, namely, whether a drawer's name can afterwards be inserted. Another question may hereafter arise, namely, whether it is within the partnership contract that one partner should bind the firm by writing the name of the firm as acceptor on a blank draft. In my opinion it is not within the partnership contract. But, in reality, those two questions do not arise here, because the allegation of the plaintiff is that he had the authority of the defendants to fill in the names of Hogarth & Cotton as drawers, and the question is whether at the time when he so affixed their name to the instrument he could make it one on which he could bring his action. It is true that when he got the piece of paper he knew nothing wrong about it; but although there is no fraud upon his part, yet at the time when he filled in the names of Hogarth & Cotton as the drawers he did know that there was something wrong—he had notice that in fact this was a fraud by Forster 654] on his partner. He *knew that Forster never was in a position to give the authority of the firm to him to fill in Hogarth & Cotton's name to the blank draft which Forster had accepted in the name of his firm; it is not a question of Latham revoking any authority given to Forster after some

person had acted upon the authority by giving value or putting himself in a worse position by acting upon it. The position of partner impliedly gave Forster power to use the name of the firm for all purposes within the partnership contract; but at the time when the plaintiff filled in the names of the drawers, he had notice that the authority purporting to be given did not exist, that is to say, that Forster had no right to give the authority of the firm to the plaintiff to draw this bill upon them. I am of opinion, therefore, that as at the time when he made this an apparently perfect instrument, he had notice that Forster had no authority to bind the firm, he cannot sue upon the instrument. In my opinion he must fail, and the judgment is right. I take it as a question simply between two innocent persons. It is simply a question whether or no there is a legal right on the part of the plaintiff as against the defendant.

Judgment affirmed.

Solicitors for plaintiff: *May, Sykes & Batten.*

Solicitors for defendant Latham: *Woodwards & Co.*

[8 Queen's Bench Division, 654.]

Aug. 6, 1878.

[IN THE COURT OF APPEAL.]

ALLHUSEN V. LABOUCHERE.

*Practice—Striking out Interrogatories—Party—Witness—Questions to Credit Answers
tending to Criminate—Order XXXI, Rule 5.*

A party who applies to strike out interrogatories must, unless they are altogether an abuse of the practice of the court, specify those to which he objects.

Questions which go merely to the credit of the witness, and might be put in cross-examination, cannot be put as interrogatories to a party, and are as such irrelevant.

Where the answer to an interrogatory might tend to criminate the person interrogated, he may refuse to answer, but the interrogatory is not therefore objectionable.

1877

Lewis v. Brass.

[3 Queen's Bench Division, 667.]

Dec. 11, 1877.

[IN THE COURT OF APPEAL.]

667]

*LEWIS V. BRASS.

Contract—Condition Precedent—Acceptance of Tender with intimation that formal Contract shall be subsequently prepared.

An intimation in the written acceptance of a tender that a contract will be afterwards prepared, does not prevent the parties from becoming bound to perform the terms in the tender and acceptance respectively mentioned, if the intention of the parties was thereby to enter into an agreement, and if the preparation of the contract was contemplated merely for the purpose of expressing the agreement already arrived at in formal language.

CLAIM, that it was agreed between the plaintiff and the defendant, that the defendant should execute complete certain works for the plaintiff in such manner and upon such terms and within such time, as was then agreed upon, for the sum of £4,193; but that the defendant omitted and refused to do the work, whereby the plaintiff suffered damage.

Defence, after denying the allegations in the claim, stated that the plaintiff intending to have certain work done at some houses belonging to him, through A. E. Hughes advertised for tenders; a contract between the plaintiff of the one part, and the builder selected to do the work of the other part, and containing the terms on which the same was to be executed, was to be prepared by the plaintiff's solicitors and signed by the plaintiff and such builder. A tender for the execution of the work was prepared upon the defendant's behalf and sent in, but afterwards, and before any contract had been entered into, the defendant discovered that a mistake had been made in the estimate upon which the tender was framed, and thereupon he withdrew the tender and declined *to enter into any contract upon the basis of it for the execution of the work.

Reply, joining issue.

At the trial, before Hawkins, J., the following facts were proved: the plaintiff being desirous of making certain alterations in his premises above mentioned, sent, through his architect, A. E. Hughes, bills of quantities to several builders, inviting them to make tenders stating the amount at which they would be willing to execute the work. The defendant sent in a tender in these terms:

"I hereby agree to execute complete, within the space of twenty-six weeks from the day of receiving instructions to

commence, the whole of the work required to be done in alterations and additions to the above premises, with the best materials, in strict accordance with the drawings and specification, and to your entire satisfaction, for the sum of £4,193."

The plaintiff's architect thereupon wrote to the defendant in the following terms:

"I am instructed by my client, Mr. John Lewis, to accept your tender of £4,193 for works as above referred to. The contract will be prepared by Messrs. Underwood & Colman, Mr. Lewis's solicitors, and I have no doubt it will be ready for signature in the course of a few days."

The defendant afterwards found that he had made a mistake in his tender and thereupon withdrew it; the plaintiff then entered into a contract with certain other builders for the execution of the work, and was obliged to pay to them a sum greatly exceeding the amount mentioned in the defendant's tender.

Hawkins, J., asked the jury whether by the tender and acceptance, the parties intended to enter into a contract; the jury found that the plaintiff and the defendant intended that the tender and acceptance should form a contract; the learned judge thereupon ordered the judgment to be entered for the plaintiff. The defendant subsequently moved in the Queen's Bench Division for a new trial; but the motion was refused. The defendant now appealed from both the judgment of Hawkins, J., and the refusal of the new trial rule by the Queen's Bench Division.

*Dec. 6, 7. *Arthur Charles, Q.C., and Edwyn Jones*, for the defendant: The plaintiff's architect did not accept unconditionally the tender of the defendant, and the parties did not get beyond mere negotiation. The formal contract to be subsequently prepared, as intimated in the letter of the plaintiff's architect, must necessarily have contained further terms and conditions not agreed upon at the time of the correspondence; and until those terms and conditions could be ascertained, there could be no final agreement, *Crossley v. Maycock* ⁽¹⁾; and the signing of a formal contract was a condition precedent to the parties being bound: *Rossiter v. Miller* ⁽²⁾. The plaintiff's counsel may rely upon *Ridgway v. Wharton* ⁽³⁾; but that case really

⁽¹⁾ Law Rep., 18 Eq., 180; 9 Eng. R., 727. ⁽²⁾ 5 Ch. D., 648; 22 Eng. Rep., 382. reversed 24 Eng. Rep., 684.

⁽³⁾ 6 H. L. C., 288.

1877

Lewis v. Brass.

shows that an agreement to execute an agreement containing new and additional stipulations is a contradiction in terms, and that the circumstance of instructing the plaintiff's solicitors to prepare a formal agreement affords cogent evidence, that the parties did not intend to bind themselves until the contract should be reduced into form.

Herschell, Q.C., and Horace Smith, for the plaintiff: The nature of the transaction must be borne in mind, and the documents must be construed with reference to the subject-matter with which the parties were dealing. If an offer is made and is accepted, there is a binding contract; if the acceptance be conditional upon something being done, for instance a contract being drawn up, then it is different. But this is a contract to do certain works upon certain specifications at a certain price and within a certain time; the defendant agrees that he will fulfil the contract with the usual stipulations. Suppose nothing had been said about the formal contract: the offer and acceptance would necessarily import all customary stipulations.

[BRAMWELL, L.J.: If the defendant had begun the work, would he be paid anything until it was completed? By the ordinary rule of law he would be paid when the contract was completed; can a custom to pay by instalments be imported into the contract?]

It might be shown that in that trade there is a custom to 670] pay *by instalments, just as in a mercantile contract it might be shown that payment was to be cash fourteen days after delivery. The law imports into the contract all the customs, which the parties can be supposed to have had in their minds when they entered into the contract: *Heyworth v. Knight* ⁽¹⁾. In the present case the acceptance does not contain any terms such as "subject to signing a contract," and it was not intended that the agreement was to be conditional upon signing a contract. The defendant never complained that terms were imposed on him which the plaintiff was bound not to put on him: he withdrew his tender because he found out that his prices were too low. The mere mention of a "contract" does not import in itself a condition. The words merely point to an embodiment of the terms agreed upon in a formal instrument. Here what is to be done is perfectly well ascertained on both sides, and the word "contract" does not make any difference, and the jury have found that the parties intended this to be the contract. None of the authorities affect the principle applica-

⁽¹⁾ 17 C. B. (N.S.), 298.

ble to this case. In *Rossiter v. Miller* ⁽¹⁾ the offer was made on conditions, and one of the terms was that a contract containing a number of conditions should be signed: until that was done, no contract was arrived at; *Governor, &c., of the Poor of Kingston-upon-Hull v. Petch* ⁽²⁾ does not turn upon the question whether there was sufficient evidence to go to a jury; the court drew the inference of fact, that neither party intended the agreement to be a contract. The question really turns upon the construction of the documents: it seems a strange argument that there was no contract, but it was a mere negotiation, the jury having found that it was the intention of the parties to make the contract. The defendant cannot escape from liability merely because the cost of the work was miscalculated: *Scrivener v. Pask* ⁽³⁾.

Charles, Q.C., in reply: A contract may be absolute upon the face of it, and yet be really conditional: *Pym v. Campbell* ⁽⁴⁾. The learned judge ought not to have left any question to the jury; he treats the answer of the jury as if they said the two letters *should operate as the contract [671] between the parties. The jury only said that the parties intended the tender and acceptance to be a contract, not the contract. There was no mutual assent to any definite terms, and hence no contract was arrived at: *Chinnock v. Marchioness of Ely* ⁽⁵⁾.

Cur. adv. vult.

Dec. 11. The following judgments were delivered:

BRAMWELL, L.J.: I think that the decisions appealed from must be affirmed. There was sufficient evidence to go to the jury that the parties were doing more than negotiating, and the entry of the judgment was right; but it has been argued in this court that the tender was not accepted "pure and simple," but with an additional term; and this contention was founded upon the circumstance that the letter of the plaintiff's architect, after stating that the defendant's tender was accepted, proceeded to say that the contract would be prepared by the plaintiff's solicitors. I do not take this to be the true construction of the documents; it was merely intended that a formal instrument should be drawn up, such as is usually prepared when works of magnitude are undertaken, and in support of this construction I may observe that the defendant made no objection to the letter from the architect. The acceptance therefore was

⁽¹⁾ 5 Ch. D., 648; 22 Eng. Rep., 382, reversed 24 Eng. R., 684.

⁽²⁾ 10 Ex., 610; 24 L. J. (Ex.), 28.

⁽³⁾ Law Rep., 1 C. P., 715.

⁽⁴⁾ 6 E. & B., 870; 25 L. J. (Q.B.), 277.

⁽⁵⁾ 4 De G. J. & S., 638.

1877

Lewis v. Brass.

pure and simple, and did not impose any additional terms. It is possible that the formal contract would have contained terms not specially mentioned in the tender by the defendant and in the letter from the plaintiffs' architect, for instance, as to the payment of the contract price by instalments, or as to what part of the work was to be first commenced; but the defendant might have successfully objected to the introduction of such terms, and the work would have been proceeded with upon the terms contained in the tender and in the letter.

BRETT, L.J.: I am of the same opinion. At the trial the question was whether at the time when the documents were signed the parties had a contracting mind; the jury found that they had, and thereupon according to the ordinary rule of law the true construction of the letters became a matter for the *determination of the court. I think that when the letter of the plaintiffs' architect had been written and received, a contract was made and completed. The contract mentioned in the letter was merely formal. I think that the plaintiff is entitled to succeed.

COTTON, L.J.: I should have added nothing, if it were not that reference has been made to *Rossiter v. Miller* (*). In the case before us there are two appeals, one from the judgment at the trial before Mr. Justice Hawkins, and the other from the refusal of the Queen's Bench Division to grant a new trial. The jury have found that there was a contract between the parties, and I think that the evidence justified that finding. As the parties did intend to contract, we have to consider whether the tender and acceptance did in point of law constitute a contract. The tender is drawn up in formal terms, and it was followed by the letter of acceptance. When the existence of a contract is to be gathered from a correspondence, there must be an unqualified acceptance of the offer, and no term must be introduced; if a new term is introduced, there is no contract. It often happens that the language used is ambiguous, and doubts arise whether the parties are *ad idem*. If the plaintiff's architect by his letter introduced new terms, the acceptance was not unqualified; but I do not think that he did, and if it were not for the reference to the preparation of a subsequent contract, it could not have been argued that the contract was incomplete: no new terms as to the execution of the works or payment of the price are mentioned, and if any other terms were contemplated at the time of the negotiations, it was competent to the plaintiff not to insist upon them. I

(*) 5 Ch. D., 648; 22 Eng. Rep., 382, reversed 24 Eng. Rep., 684.

think that the rule of construction laid down in *Crossley v. Maycock* (*) is correct, and that the acceptance of an offer accompanied by the expression of a wish for a more formal instrument is sufficient to enable a court of justice to hold that a final agreement has been arrived at. The defendant has relied upon *Rossiter v. Miller* (*): I do not think that that case is at variance with our decision: there the court held that upon the construction of the documents no final contract had been arrived at; and it is to be observed that by the conditions the purchaser was "required to sign a contract." The language *used was different from [673 that in the present case, and the decision is no authority against the conclusion to which we have come.

Appeals dismissed (*).

Solicitors for plaintiff: *Underwood & Colman*.

Solicitors for defendant: *John Mackrell & Co.*

(*) Law Rep., 18 Eq., 180, at p. 181; (†) 5 Ch. D., 648; 22 Eng. Rep., 382, reversed 24 Eng. Rep., 682.
9 Eng. Rep., 727.

(‡) See *Winn v. Bull*, 7 Ch. D., 229.

See 25 Eng. Rep., 181 note.

A policy of insurance contained a provision availing it in case the assured had, at the time of insurance, or thereafter, made other insurance without the consent of the company written thereon. There was, at the time the insurance in question was effected, other insurance, which was not consented to in writing. It appeared that the policy in question was issued by one O. as de-

fendant's agent; that the other insurances were effected through O. and were known to him to be in existence when the insurance in question was made. Held, that, under the circumstances, the issuing of the insurance by O., without noting a written consent to the other insurance, was a waiver of the provision binding upon the defendant: *Richmond v. Niagara Fire Ins. Co.*, 79 N. Y., 280, reversing 15 Hun, 248.

1878

Reg. v. Drage.

[14 Cox's Criminal Cases, 85.]

MIDLAND CIRCUIT.

Northampton Spring Assizes. March 18, 1878.

(Before Lord Justice Bramwell.)

85] *REG V. DRAGE and Others (').

Receiving stolen goods—Guilty knowledge—Possession of other stolen property—Prevention of Crimes Act (34 & 35 Vict. c. 112, s. 19).

In order to show guilty knowledge, under 34 & 35 Vict. c. 112, s. 19, it is not sufficient merely to prove that "other property stolen within the preceding period of twelve months" had at some time previously been dealt with by the prisoner;

86] *It must be proved that such "other property" was found in the possession of the prisoner at the time when he is found in possession of the property which is the subject of the indictment.

Prisoner was indicted for receiving stolen goods. To show guilty knowledge evidence was tendered, under 34 & 35 Vict. c. 112, s. 19, to show that a short time previously the prisoner had sold for half its value and had otherwise disposed of other property stolen within the preceding period of twelve months.

Held, that words of the statute, 34 & 35 Vict. c. 112, s. 19, did not extend to such evidence, which was therefore inadmissible.

THE prisoner was indicted, with others, for receiving goods knowing them to have been stolen. The prosecutor proved that on the night of the 27th November, 1877, the warehouse of Messrs. Mann, of Cogenhoe, was broken into, and a large number of boots, boot tops, and skins stolen therefrom; that on the 22d day of December the prisoner, Oliver Drage, under the name of Alfred Knight, was finishing a boot, the top of which was one of the tops stolen from Messrs. Mann, and that he gave no account of how the top came into his possession.

The prosecution then, with a view of showing guilty knowledge, under sect. 19 of 34 & 35 Vict. c. 112 (') called witnesses to prove that, a few weeks before the warehouse of Messrs. Mann was broken into, the premises of Messrs. Evans' and Nicholls, of Desborough, were entered, and reels of silk and thread to the value of £80 stolen therefrom. That in December, 1877, these same reels were sold by Drage in great quantities at about half their value to the

(') Reported by GILBERT G. KENNEDY, Esq., Barrister-at-Law.

(') This section provides that, "Where proceedings are taken against any person for having received goods knowing them to be stolen, or for having in his possession stolen property, evidence may be given at any stage of the proceedings

that there was found in the possession of such person other property stolen within the preceding period of twelve months, and such evidence may be taken into consideration for the purpose of proving that such person knew the property to be stolen, which forms the subject of proceedings taken against him.

witnesses, and that he handed over to one witness, for work and labor done, a number of the stolen reels instead of a money payment.

In answer to his Lordship, the police stated that none of the reels of silk or thread were found at the premises of the prisoner at the time when he was found finishing the boot, the top of which was part of the subject-matter of the indictment. Upon this answer being given, *Harris*, on behalf of the prisoner, submitted that the evidence as to the reels was not within the section and must be withdrawn from the jury.

BRAMWELL, L.J.: The evidence is clearly not within the words, whatever may have been the intention of the Legislature.

A. K. *Loyd* (*W. A. Metcalfe* with him), for the prosecution: The words, "there was found in the possession of such person," are not to be read as if they had been "there was discovered in the possession of such person at the time of finding the stolen *property the subject of the in- [87 dictment." [BRAMWELL, L.J.: Who can be said here to have "found" the reels?] Finding the reels in his possession is an equivalent expression to finding him in possession of the reels. Here the witnesses to whom the prisoner sold the reels found him in possession of the reels, in other words, found the reels in his possession. A possession of other property stolen within the previous twelve months is what proves the guilty knowledge, not the "finding" of the reels in the sense of their being discovered upon a search by the police. No time or place for the finding is specified by the section.

BRAMWELL, L.J.: If counsel had not pressed the admission of this evidence I should have said that no doubt could exist on the point. The words of the section do not extend to the evidence tendered here to prove the guilty knowledge. I am asked to direct the jury that they may take the evidence into consideration and to reserve the point, but as I entertain no doubt I shall tell the jury they are not entitled to consider the question of the reels upon this charge.

Solicitor for the prosecution: *C. C. Becke*, of Northampton.

Solicitor for the defence: *A. J. Jeffery*, of Northampton.

1878

Reg. v. Roberts.

[14 Cox's Criminal Cases, 101.]

COURT OF CRIMINAL APPEAL.

Saturday, May 18, 1878.

(Before Lord Coleridge, C.J., Mellor, J., Lush, J., Cleasby, B., and Lopes, J.)

101]

*REG. V. MORRIS ROBERTS (').

Perjury—Deputy County Court judge—Evidence of appointment—9 & 10 Vict. c. 95, s. 111.

An indictment for perjury alleged the offence to have been committed before J. U., then being and sitting as the duly qualified and appointed deputy judge of the county court of W. Proof was given that the perjury took place in the presence of J. U. at the county court, and a certified minute, under the seal of the court, of the proceedings, was put in evidence, intituled "Minute of judgments, orders, and other proceedings, at a court holden at, &c., before J. U., deputy judge of the said court."

Held, that there was sufficient proof of J. U. acting as deputy judge, and therefore *prima facie* evidence of his appointment as such.

Held, also, per Lord Coleridge, C.J., that by the County Court Act (9 & 10 Vict. c. 95, s. 111), the minute of the proceedings, being made evidence of the proceedings and of their regularity, was evidence of the regularity of J. U.'s appointment.

CASE reserved for the opinion of this court by the Recorder of London.

The prisoner was tried before me at the Central Criminal Court on the 10th of May inst. upon an indictment for perjury.

The indictment alleged the offence to have been committed before "Joseph Underhill, Esq., then being and sitting as the duly qualified and appointed deputy judge of the County Court of Warwickshire."

A minute of the proceedings of the county court was put in as evidence on the part of the prosecution, which was intituled as follows:

102] *"Minute of judgments, orders, and other proceedings at a court holden at Birmingham, in the county of Warwick, on the 13th day of November, 1877, before Joseph Underhill, Esq., deputy judge of the said court."

A certificate was written on the minute in these words:

"We hereby certify that the above is a true copy of an entry in the minute book of judgments, orders, and other proceedings of the County Court of Warwickshire holden at Birmingham.

"Dated this 4th day of December, 1877.

"JOHN COLE,
"EDWIN PARRY, } Registrars."

(') Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

The certificate bore the seal of the county court.

Proof was also given that the alleged perjury took place in the presence of Mr. Underhill, at the county court.

An objection was taken by the counsel for the prisoner that proof should have been given of the appointment of Mr. Underhill as deputy judge.

I overruled the objection and left the case to the jury, who convicted the prisoner; but upon the application of the prisoner's counsel I have reserved this case for the opinion of the court for the consideration of Crown Cases Reserved.

Whether it was necessary that further or any proof of the authority of the presiding judge at the county court beyond his acting in that capacity, and the production of the minute above mentioned should have been given.

(Signed)

THOMAS CHAMBERS.

Jelf (*Archibald* with him), for the prisoner: The conviction was wrong. There was no proof of the material fact that the person before whom the perjury was alleged to have been committed had authority to administer an oath. In other words, there was no sufficient proof of the appointment of the deputy judge. In 1 Hawk. P. C., bk. 1, c. 69, s. 4, it is said, "It seemeth clear that no oath whatsoever taken before persons acting merely in a private capacity; or before those who have taken upon them to administer oaths of a public nature without legal authority for their so doing; or before those who are legally authorized to administer some kind of oaths, but not those which happen to be taken before them; or even before those who take upon them to administer justice by virtue of an authority seemingly colorable, but in truth unwarranted and merely void, can ever amount to perjuries in the eye of the law, because they are of no manner of force, but are altogether idle." The onus of proving that the deputy judge was duly appointed was upon the prosecutor, and the minute produced was not sufficient evidence thereof. A county court judge has the power of appointing a deputy by the 9 & 10 Vict. c. 95, s. 25, which enacts "that in case of illness or unavoidable absence, the cause whereof shall be entered on the minutes of the court, it shall be lawful for the judge, &c., to appoint some other person," &c. [LUSH, J.: If an appointment had been legally proved in other respects, would you contend that it was necessary to prove the "cause" thereof?] *It would be necessary to prove some fact from which [103 the cause might be presumed. In the present case the prosecution should have shown such an acting as deputy

judge as to lead to the reasonable inference that the deputy was properly appointed. [LORD COLERIDGE, C.J.: In *Berryman v. Wise* (4 T. Rep., 366), Buller, J., said that in the case of all peace officers, justices of the peace, constables, &c., it was sufficient to prove that they acted in those characters without producing their appointments.] All the cases go to show that there must be evidence, not that the person acted *pro hac vice*, but that he had acted in the capacity on former occasions. [LORD COLERIDGE, C.J.: Would you contend that if perjury were committed before a county court judge the first time he acted, that his appointment should be formally proved? The 111th section of 9 & 10 Vict. c. 95, provides that the minutes, or a copy thereof, bearing the seal of the court, and purporting to be signed and certified as a true copy, shall be admitted in all courts and places as evidence of the proceedings and of the regularity of such proceedings.] The mere fact that a person has once acted in a public capacity is not sufficient proof that he has been regularly appointed. In *Rex v. Verelst* (3 Camp., 433) it appeared that Dr. Parson had acted as surrogate for twenty years, and that was held to be *prima facie* evidence only of his due appointment. [LORD COLERIDGE, C.J.: The once acting in a public capacity is sufficient to make a *prima facie* case that the person so acting is duly appointed (*Wolton v. Gavin*, 16 Q. B., 48; 20 L. J., 73, Q. B.; *Reg. v. Essex*, Dears. & B., 369, 7 Cox's C. C., 384).] The evidence in the present case is consistent with the fact that the barrister acting as deputy judge had been merely asked to act *eo instante* in the particular case without any written or proper appointment.

LORD COLERIDGE, C.J.: I am of opinion that the conviction should be affirmed. One of the best recognized principles of law, *Omnia præsumentur esse rite et solemniter acta donec probetur in contrarium* is applicable to public officers acting in discharge of public duties. The mere acting in a public capacity is sufficient *prima facie* proof of their proper appointment; but it is only a *prima facie* presumption, and it is capable of being rebutted, and in the case of *Rex v. Verelst* that presumption was rebutted in fact, and the person who there had acted as surrogate for twenty years, was proved to have been improperly appointed. The case of *Rex v. Verelst* is exceedingly like this; there the fact of Dr. Parson having acted as surrogate was held by Lord Ellenborough, C.J., to be sufficient *prima facie* evidence that he was duly appointed, and had competent authority to administer an oath, and for that proposition *Rex*

v. *Verelst* was referred to as good law by Lord Campbell, C.J., in *Wolton v. Gavin*. But it was further shown in *Rex v. Verelst* that Dr. Parson had never been regularly appointed as surrogate, and Lord Ellenborough then held that the evidence that Dr. Parson was not duly appointed a surrogate could not be shut out, however long he *might [104 have acted in that capacity, and that the presumption arising from his acting only stood until the contrary was proved. That is an instructive case, as showing the true rule as to the *prima facie* presumption in such cases. It is laid down in all the text books as a recognized principle that a person acting in the capacity of a public officer is *prima facie* to be taken to be so, and that principle was adopted by Patteson, J., in *Doe dem. Bowley v. Barnes* (8 Q. B., 1043). In that case there was a demise by the churchwardens and overseers of some parish property, and the fact that they acted as churchwardens and overseers at the time of the demise was held to be sufficient *prima facie* proof for the purpose of an action of ejectment without proving their appointment. His Lordship then referred to the decision of Tindal, C.J., to the same effect in *Reg. v. Newton* (Car. & Kir., 469), and to *Reg. v. Jones* (2 Camp., 131). This objection, if it were good, would extend very widely, for, suppose perjury committed on the first time of acting in his office before a judge or a recorder, or a county court judge, or any person who fills a responsible public position, would it lie on the prosecution to show the appointment of such an officer in the strictest possible way? Mr. Jelf has not satisfied me that it would, and no member of the court has any doubt that there is no ground for such a contention. But further, the County Court Act (9 & 10 Vict. c. 95), s. 111, provides that a copy of the minutes of the court bearing the seal of the court shall be evidence of the proceedings of the court and of the regularity of such proceedings, and a copy of the minutes bearing the seal of the court was proved which showed that Mr. Underhill was acting as deputy judge of the courts. The statute therefore makes this evidence of the regularity of the proceedings before him. The conviction will therefore be affirmed.

The rest of the court concurred.

Conviction affirmed.

See 8 West. Jur., 12.

As to what is an *office* and not a mere employment, see *Hall v. State*, 39 Wisc., 79; *Wilcox v. People*, 90 Ills., 186.

As to what is a new office and not an

addition to the duties of an old one: *Davenport v. Mayor*, 67 N. Y., 456.

When a person acts as a public officer he is presumed to be authorized to do so: 2 Whart. Ev., § 1344.

Even in his own favor or against him:

1877

Reg. v. Roberts.

Colton v. Beardsley, 88 Barb., 29; Dean v. Gridley, 10 Wend., 254; Briggs v. Taylor, 85 Verm., 57.

A *special* deputy of a sheriff is in no sense a public officer, but merely the private agent or officer of the sheriff, and neither his appointment nor his relation to the sheriff can be presumed from his acts: Myers v. Bishop, 27 N. J. Eq., 141, affirmed 28 id., 239.

Otherwise as to a *general* deputy: Briggs v. Taylor, 85 Verm., 57.

A commission issued by the Governor, appointing one to a vacancy in an office, is *prima facie* evidence of its own recitals, but is not conclusive: Board v. Titus, 61 Ind., 379, 387.

A judgment of ouster in an action in the nature of a *quo warranto* does not conclude one who is in no sense a party to the action, and who does not take office from, or in any way hold under, the defeated party; nor is it competent evidence against him: People v. Murray, 73 N. Y., 535.

The proceedings of a court not authorized by the constitution, are *coram non jure* and void: Matter of Snyder, 64 Mo., 58.

The rule as to the validation of the acts of *de facto* officers is one of policy, and may be applied, not only where there is no *de jure* officer, but where the legal office itself no longer exists. Where the person claiming to hold the office is not a mere usurper, but, owing to a mistake of fact, held under a perfect color of right, which justified men in concluding that he was a legal officer holding a legal office, and where the fact that the office was abolished remained for a time unknown, owing to a false announcement of election returns, his acts as such officer, done after the abolition of the office and before the fact was known, may be validated for the purpose of supporting contracts made with him, where money and labor have been expended on the faith of his authority to act and contract as such officer: Adams v. Lindell, 5 Mo. App. Rep., 197, 72 Mo., 197.

Where one is an officer *de facto* with color of legal title, his right to exercise the office cannot be attacked collaterally: People v. White, 24 Wend., 525; Nelson v. People, 23 N. Y., 296; Hamlin v. Dingman, 5 Lans., 61; Matter of Walker, 3 Barb., 162; Read v. Buffalo, 4 Abb. App. Dec., 22, 3

Trans. App., 79, 8 Keyes, 447; Sheehan's Case, 122 Mass., 445; Barlow v. Stanford, 82 Ills., 298; Matter of Strang, 21 Ohio St. R., 610; State v. Carroll, 38 Conn., 449; Wilson v. Peterson, 69 N. C., 113; Kelly v. Story, 6 Heisk. (Tenn.), 202; Peirce v. Wear, 41 Iowa, 378; Trumbo v. People, 75 Ills., 562; Mechanics, etc., v. Burnet, etc., 32 N. J. Eq., 236.

See Van Slyke v. Trempeleau, 39 Wisc., 390.

An officer *de facto* is a person who is such by color of election, though in eligible, or though the office was not vacant: Gregg, etc., v. Jamison, 55 Penn. St. R., 468; Mechanics, etc., v. Burnet, etc., 32 N. J. Eq., 236.

To support the acts of one, on the ground that he is an officer *de facto*, they must have been done under color of the office whose duty should have been discharged by the person filling it: Bayley v. Fisher, 38 Iowa, 229.

See State v. Carroll, 38 Conn., 449.

To constitute an officer *de facto*, he must have a presumptive or an apparent right to exercise the office, resulting from either full and peaceable possession of the powers thereof, or reasonable color of title with actual use of the office: Ex parte Norris, 8 S. C. (N.S.), 408; Kimball v. Acorn, 45 Miss., 151.

See Adams v. Lindell, 5 Mo. App. R., 197.

Where the alleged appointing power has no authority to make the appointment, he cannot bestow upon his alleged appointee the outward signs and symbols of the office, and his appointee cannot therefore be said to be in by color of title, so as to make his acts legal and his warrant a protection to persons executing it: People v. Carter, 29 Barb., 208; People v. Blake, 49 id., 12; Christian v. Gibbs, 53 Miss., 314; People v. Murray, 77 N. Y., 535; Kimball v. Acorn, 45 Miss., 151; Van Slyke v. Trempeleau, 39 Wisc., 390.

See State v. Carroll, 38 Conn., 449; Lane v. McGlavin, 28 Wisc., 364; Kelly v. Story, 6 Heisk. (Tenn.), 202; Adams v. Lindell, 5 Mo. App. Rep., 197.

To constitute an officer *de facto* of a legally existing office, it is not necessary that he should derive his appointment from one competent to invest him with a good title to the office. It is sufficient if he derives his appointment from one

having colorable authority to appoint; and an act of the legislature, though not warranted by the constitution, will give such authority: *Matter of Strang*, 21 Ohio St. R., 610; *State v. Carroll*, 88 Conn., 449; *Lane v. McGlavin*, 28 Wisc., 364.

See *Van Slyke v. Trempealeau*, 89 Wisc., 390; *Kelly v. Story*, 6 Heisk. (Tenn.), 202; *People v. Beach*, 77 Ill., 52; *People v. McKinney*, 53 N. Y., 874; *State v. Leay*, 64 Mo., 89; *Adams v. Lindell*, 5 Mo. Ap., 197.

Where one sets up title to property by virtue of an office, and comes into court to recover it, or is sued for not doing an official act, he must be an officer *de jure* as well as *de facto*: *People v. Nostrand*, 46 N. Y., 375, 882-3; *People v. Hopson*, 1 Den., 574; *Burditt v. Barry*, 6 Hun, 657; *Colton v. Beardsley*, 88 Barb., 29; *Newman v. Tiernan*, 37 id., 159; *Hamlin v. Dingman*, 5 Lans., 61; *Walker v. Moseley*, 5 Den., 102; *Bentley v. Phelps*, 27 Barb., 524; *Green v. Burke*, 23 Wend., 490; *Copley v. Rose*, 2 N. Y., 115; *People v. Tiernan*, 8 Abb., 859; *Smith v. Mayor*, 37 N. Y., 518; *McVeany v. Mayor*, 80 id., 185, 59 How. Pr., 106; *Halleck v. Mayor*, 10 Abb. Pr., 439; *Roberts v. Holmes*, 54 N. H., 560; *Outhouse v. Allen*, 72 Ill., 529; *Christian v. Gibbs*, 53 Miss., 314; *Kimball v. Acorn*, 45 id., 151; *Olmsted v. Dennis*, 77 N. Y., 378; *Miller v. Callaway*, 32 Ark., 666; *People v. Weber*, 89 Ill., 347.

See *Clearwater v. Brill*, 63 N. Y., 627; *State v. Goss*, 69 Maine, 22.

One who receives an appointment to office from a proper authority is an officer *de facto*, though his appointment is informal: *Hamlin v. Dingman*, 5 Lansing, 61; *Matter of Walker*, 8 Barb., 163; *Cronin v. Grundy*, 16 Hun, 520; *Sheehan's Case*, 122 Mass., 445; *Kimball v. Acorn*, 45 Miss., 151.

See *Cummings v. Clark*, 15 Verm., 653; *Wilson v. Peterson*, 69 N. C., 118; *State v. Leay*, 64 Mo., 89.

Though if required to be in writing, an oral appointment does not make him an officer *de jure*: *Burditt v. Barry*, 6 Hun, 657; *Cummings v. Clark*, 15 Verm., 653.

See *Hoke v. Field*, 10 Bush (Ky.), 144; *People v. Fitz Simmons*, 68 N. Y., 514; *People v. Murray*, 70 N. Y., 521.

The insertion of the name of a person, as collector of the assessed taxes, in

a warrant of a power authorized to appoint, is not a sufficient appointment to that office: *Rex v. Radley, Forrest* (Exch.) Rep., 150.

But see *Hamlin v. Dingman*, 41 How. Pr., 182, 186.

In an action by the State, on the relation of one claiming to be sheriff, to compel the board of county commissioners by mandate to approve his official bond, the defendant made a return, alleging that a third person had been declared by the board of canvassers elected sheriff, and had received from the clerk of such board a certificate thereof, and had entered upon and was then lawfully discharging the duties of sheriff; that there was no vacancy in the office; that the relator had never been elected or appointed sheriff; and that he had procured his commission from the Governor on false and fraudulent affidavits and representations, varying the declarations of such canvassers and the certificate of their clerk: Held sufficient: *Board, etc., v. State*, 61 Ind., 879.

Where two persons are each in possession of the office and claiming by an apparent title, and the question as to which is entitled to discharge the functions of the office arises in a collateral proceeding, it must be decided by determining which has the best apparent right: *Ex parte Norris*, 8 S. C. (N.S.), 408.

See also *Mayor v. Flagg*, 6 Abb. Pr., 303; *Conover v. Devlin*, 15 How. Pr., 471, 476-480, 6 Abb. Pr., 228.

Where there is one office there cannot be one officer *de jure*, and another officer *de facto* in possession at the same time. In such case there cannot be an officer *de facto* who can do any valid act as to third persons: *Boardman v. Halliday*, 10 Paige, 228; *Cronin v. Gundy*, 16 Hun, 524.

The distinction between an officer *de jure* and an officer *de facto*, explained: *Mayor v. Flagg*, 6 Abb. Pr., 296, 302; *Conover v. Devlin*, 15 How., 471, 476-480; 6 Abb. Pr., 228; *Matter of Walker*, 8 Barb., 163; *Cronin v. Gundy*, 16 Hun, 520; *Kimball v. Acorn*, 45 Miss., 151; *State v. Carroll*, 88 Conn., 449; *Foot v. Stiles*, 57 N. Y., 408; *State v. Leay*, 64 Mo., 89; *Adams v. Lindell*, 5 Mo. App. R., 197; *Mechanics, etc., v. Burnet, etc.*, 32 N. J. Eq., 236.

An officer deriving his authority

1878

Reg. v. Greathead.

from the appointment of officers *de facto* is an officer *de jure*: *Roberts v. Holmes*, 54 N. H., 560.

See *Matter of Strang*, 21 Ohio St. R., 610.

A failure to take an oath or to give a bond required of an officer, if otherwise an officer *de jure*, will not render him an officer *de facto* so as to render his official acts void in such a sense as to make him liable as a trespasser therefor: *Foot v. Stiles*, 57 N. Y., 399, 402; *Weeks v. Ellis*, 2 Barb., 320; *Board v. Fonda*, 77 N. Y., 350, questioning *Rounds v. Mansfield*, 38 Maine, 585, and distinguishing *Hardmann v. Bowen*, 88 N. Y., 196; *People v. Benton*, 29 id., 534; *Cronin v. Gundy*, 16 Hun, 520; *Gregg v. Jamison*, 55 Penn. St. R., 468; *Springbrook, etc., v. Thomas*, 8 Luz. Leg. Reg., 112.

But see *Bentley v. Phelps*, 27 Barb., 524; *Whitney v. Blanchard*, 8 Gray, 208; *Courser v. Powers*, 84 Verm., 517, 1 Am. Law Reg. (N.S.), 268; *Rounds v. Mansfield*, 38 Maine, 586.

See *People v. McKinney*, 52 N. Y., 374.

In *Kansas*, on *quo warranto*, it is held, that the failure of an officer elect to file his official oath and bond within the time fixed by statute, vacates his

office: *State v. Matheny*, 7 Kansas, 327.

But see, in New York, *Cronin v. Gundy*, 16 Hun, 520.

Accepting one office not inconsistent with another, does not vacate the first: *People v. Murray*, 77 N. Y., 535; *Davenport v. Mayor*, 67 id., 456; *State v. De Gress*, 53 Tex., 387; *People v. Com. Council*, 77 N. Y., 503; *State v. Leay*, 64 Mo., 89; *Sheehan's Case*, 122 Mass., 445; *State v. Butt*, 9 S. C. (N.S.), 156; *People v. Harifan*, 96 Illinois, 420; *Woodside v. Wagg*, 71 Maine, 207.

If a judge of a court who has been elected to, and has taken a seat in the legislature, continues publicly to exercise his judicial office, the question whether he is disqualified to act as judge under art. 8 of the constitution cannot be determined upon a writ of habeas corpus sued out by a person whom he has tried and sentenced to imprisonment: *Sheehan's Case*, 122 Mass., 445; *Woodside v. Wagg*, 71 Maine, 207.

See also *Gregg, etc., v. Jamison*, 55 Penn. St. R., 468.

The presumption that public officers have done their duty, does not supply proof of independent and substantive facts: *United States v. Ross*, 92 U. S. R., 261; *Hill v. Draper*, 10 Barb., 455.

[14 Cox's Criminal Cases, 108.]

COURT OF CRIMINAL APPEAL.

Monday, May 18, 1878.

(Before Lord Coleridge, C.J., Mellor, J., Lush, J., Cleasby, B., and Lopes, J.)

108]

*REG. V. GREATHEAD (').

False pretences—Indictment—Evidence—Check.

By means of a false wage-sheet the prisoner obtained from his master a check for the amount stated in the sheet to pay the men's wages. The check was informally drawn, and payment was refused by the bank. The prisoner returned it to his master, telling him of the cause of its non-payment, and the master tore it up and gave another, which the prisoner cashed and appropriated the difference between what was really due for wages and what was falsely stated to be due in the wage-sheet.

On an indictment charging prisoner with obtaining 8s. 6d., the actual sum appropriated by the prisoner, it was objected that the above evidence did not prove the charge, for that he had by it only obtained the first check, which was a valueless piece of paper.

Held, that the false pretence was a continuing one, that the second valuable check was obtained thereby equally with the first, and that the charge was proved.

(') Reported by JOHN THOMSON, Esq., Barrister-at-Law.

CASE stated for the opinion of this court by the chairman of the West Riding of Yorkshire Quarter Sessions.

The defendant William Greathead was tried at the adjourned General Quarter Sessions of the peace for the West Riding of Yorkshire, held at Wakefield, on the 12th day of April, 1878, on an indictment charging him with obtaining certain moneys by false pretences from John Charles Collins, the prosecutor in the indictment mentioned.

The first count in the indictment alleged that the defendant unlawfully obtained on the 12th day of January, from the said John Charles Collins, 8s. 6d. in money, his property, with intent to defraud.

The second count alleged that the defendant unlawfully *obtained on the 2d day of February, from the said [109 John Charles Collins, £1 in money, his property, with intent to defraud.

On the trial it was proved that the prosecutor engaged the defendant as his foreman over workmen employed by the prosecutor, and it was his duty to keep an account of the work done by the several workmen (who were paid by time) and of the wages due to them, and on the Saturday of each week to lay before the prosecutor a wage-sheet, showing the names of the different workmen employed and the number of days each man had worked during the week, and the amounts due to them respectively, upon the production of which wage-sheet, and acting upon such wage-sheet as correct, the prosecutor paid the amount either by cash or by check upon his bankers.

On the Saturday of the week ending the 12th day of January, the defendant made out the usual wage-sheet and presented it to the prosecutor, in which sheet a workman of the name of Cookson was represented to have worked five and a half days and to be entitled to the sum of £1 3s. 9d., and another workman of the name of Wells was represented to have worked a like number of days and to be entitled to a like amount.

It was proved by the prosecutor that Cookson had worked only four and a half days in that week, and not five and a half days, and was entitled for work done in that week to the sum of 19s. 6d., and not £1 3s. 9d., as appeared by the wage-sheet, and that Wells had also only worked four and a half days, and was also only entitled to 19s. 6d., and not £1 3s. 9d., as appeared by the wage-sheet, and that the total sum appearing by the wage-sheet for the week as £6 16s. 6d., included the two sums of 4s. 3d. respectively, being the difference between the before mentioned two sums of 19s. 6d.

1878

Reg. v. Greathead.

and £1 3s. 9d., and that therefore the sum of 8s. 6d. was not due as appeared by the said wage-sheet.

The prosecutor, relying on the accuracy of the wage-sheet by the false pretence set out in the first count of the indictment, paid the total amount appearing due on the wage-sheet by a check on his bankers, but on presentation for payment at the bank it was found that there was a material omission in the body of the check, and the same was sent back to the prosecutor by the defendant, and the defendant informed the prosecutor of the fact, whereupon the prosecutor tore up the check and gave another check to the defendant for the same amount in lieu of the first, which second check was presented by the defendant to the bank and duly honored and cashed, and the proceeds paid to the prisoner, who applied the 8s. 6d. to his own use, but properly disposed of the remainder.

There was no evidence of any further pretence at the time the defendant received the last mentioned check. Unless the objection raised on behalf of the prisoner hereinafter 110] set forth was *valid there was ample evidence to go to the jury on the charge mentioned in the first count of the indictment.

Further evidence was given and facts proved in support of the second count of the indictment charging the defendant with obtaining a further sum by false pretences on the 2d day of February, and it was not contended on behalf of the defendant that there was no evidence to go to the jury on that count.

At the close of the case for the prosecution it was objected by defendant's counsel that the evidence failed to support the first count of the indictment, on the ground that the whole matter was determined on the handing over the first check, and that instead of obtaining the sum of 8s. 6d. by false pretences the defendant had only obtained a piece of paper purporting to be a check of the value of £8 16s. 6d., which was of no value. And it was further contended that there was no evidence at the time of the defendant receiving the second check to show what was passing in the prosecutor's mind, as it might have been given to remedy the first check, and sustain the prosecutor's credit.

It was contended on behalf of the prosecution that there was a continuing pretence.

I overruled the objection of the defendant's counsel, but reserved the point and left the case to the jury.

The jury found a general verdict of guilty, and after it was objected that the verdict ought to have been entered

upon the counts respectively, I sentenced the prisoner to four months' imprisonment with hard labor. I agreed to admit him to bail, but bail was not forthcoming.

The question for the consideration of the Court of Crown Cases Reserved is whether on the above facts the conviction should be quashed. HENRY LEATHAM, Chairman.

No counsel appeared to argue on either side.

LORD COLERIDGE, C.J.: The circumstances of this case are shortly these: The prisoner presented a false wage-sheet to his master, the prosecutor, and thereby got from him a check for the purpose of paying the men's wages as stated in the wage-sheet. He presented the check to the bank, and could not get it cashed, as there was a material omission in the body of it. The prisoner returned that check to the prosecutor and told him of the omission, and the prosecutor thereupon tore it up and drew another, which he gave to the prisoner. The prisoner cashed the second check and appropriated to his own use the difference between the actual amount of the wages and the amount falsely stated in the wage-sheet. Nothing was said by the prosecutor, but he merely substituted the good check for the informal one. Now, the good sense of the thing is, that the false pretence upon which the first check was given was continued in force, and was the acting motive which influenced the prosecutor's mind in giving the second check. The conviction will, therefore, be affirmed.

*LUSH, J.: I am of the same opinion. This was [111 merely the substitution of a second check for the first, and it was given and obtained on the same false pretences as the first.

The rest of the court concurred.

Conviction affirmed.

[14 Cox's Criminal Cases, 111.]

COURT OF CRIMINAL APPEAL.

Saturday, May 11, 1878.

(Before Lord Coleridge, C.J., Mellor, J., Lush, J., Cleasby, B., and Grove, J.)

REG. V. JARMAN (').

False pretences—Indictment—Proof—Note of a non-existing bank.

The prisoner was convicted of attempting to obtain a sewing machine by false pretences. The indictment alleged that the prisoner did falsely pretend that a paper partly in print and partly in writing, produced by the prisoner to the prosecutor and purporting to be a bank note for the payment to the bearer of £5, was then a good, genuine, and available order for the payment of the sum of £5, and was then

(¹) Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

1878

Reg. v. Jarman.

of the value of £5, &c.; by means of which false pretence the prisoner did unlawfully attempt to obtain a sewing machine. The evidence was that the prisoner bargained for the purchase of the sewing machine for 35s., and said that a friend had told her to get one and had sent her the money to pay for it, and at the same time gave a worthless bank note for £5, payable to the bearer, of the Devonshire Bank, which had stopped payment many years ago. The prisoner knew at the time that the bank had stopped payment and that the note was of no value.

Held, that the indictment, though inartificially framed, sufficiently alleged that the prisoner falsely represented the note to be a good and genuine note of an existing bank, and of the value of £5, and that the evidence supported the conviction.

CASE stated for the opinion of this court by the Recorder of the city of Exeter.

At the Quarter Sessions for the city and county of the city 112] of *Exeter, holden at Exeter, on the 4th day of April, 1878, Jane Jarman was convicted before me of having attempted to obtain goods by false pretences.

The indictment charged that the said Jane Jarman unlawfully, knowingly, and designedly did falsely pretend to James Turner, that a certain paper, partly in print and partly in writing, produced by the said Jane Jarman to the said James Turner, and purporting to be a bank note for the payment to the bearer of the sum of £5, was then a good, genuine, and available order for the payment of the sum of £5, and was then of the value of £5. By means of which said false pretence the said Jane Jarman did then unlawfully attempt to obtain from the said James Turner one chainstitch sewing machine of the goods and chattels of Messieurs. Taylor and others, with intent thereby to defraud. Whereas in truth and in fact the said paper partly in print and partly in writing was not then a good, genuine, and available order for the payment of the sum of £5, nor was the same then of the value of £5, as she, the said Jane Jarman, then well knew at the time when she did so falsely pretend as aforesaid, against, &c.

The evidence was that the prisoner went to the shop of Messieurs Taylor & Co., and bargained with their manager, James Turner, for the purchase of one of their chainstitch sewing machines for the sum of 35s.; that she said a friend had told her to get one of them, and had sent her the money to pay for it, and at the same time gave him a bank note for the purpose of paying for it, which was partly in print and partly in writing, and of which the following is a copy :

"No. A. 914, Devonshire Bank, £ Five.

"I promise to pay the bearer on demand £5 value received.

A.

"Exeter, 5th day of November, 1817. 914.

"For Williams, Cann, Searle & Co.

"Five pounds.

John Searle."

That the said James Turner told her that the note was worthless, and that he should detain it.

That the bank had stopped payment many years ago, and that the notes of the bank were of no value.

There was ample evidence to go to the jury that the prisoner knew, when she tendered the note to James Turner, that the bank had stopped payment, and that the note was of no value, and that she tendered the note with intent to defraud. There was no further evidence of any false pretence by words.

I was of opinion that the said note was not an order for the payment of money, and that there was no evidence to support the allegation in the indictment that the prisoner falsely pretended that the said paper was a good, genuine, and available order for the payment of £5, and I entertained some doubt whether there was evidence for the jury to support the indictment, and whether, having regard to the want of proof of the alleged false pretence *that the said [113 paper was an order for the payment of money, the indictment was sufficient to sustain a conviction. But I left the case to the jury, directing them to find the prisoner guilty if the evidence satisfied them that she knew, when she tendered the note to James Turner, that the bank had stopped payment, and that the note was of no value.

The jury found the prisoner guilty, and I postponed judgment, and discharged the prisoner on recognizance of bail to appear at the next quarter sessions for the said city and county and receive judgment, and I have stated this case for the consideration of the Court for Crown Cases Reserved as to whether there was evidence for the jury to support the indictment, and whether the indictment was sufficient to sustain the conviction, and whether the conviction ought to be affirmed or quashed.

C. G. PRIDEAUX, Recorder of Exeter.

No counsel appeared on either side.

LORD COLERIDGE, C.J.: I am of opinion that the conviction should be affirmed. The case states that the prisoner was convicted of having attempted to obtain goods by false pretences. And the indictment alleges that the prisoner unlawfully, knowingly, and designedly, did falsely pretend to the prosecutor that a certain paper, partly in print and partly in writing, produced by the prisoner to the prosecutor and purporting to be a bank note for the payment to the bearer of £5, was then a good, genuine, and available order for the payment of the sum of £5, and was then of the value

1878

Reg. v. Young.

of £5, by means of which said false pretences the prisoner did then unlawfully attempt to obtain from the prosecutor a sewing machine with intent to defraud. Without saying that the words of the indictment describe the legal effect of this document (and I do not pause to inquire whether they give a strictly accurate description of it—it may be they do not), yet the ingredients of the offence appear to me to be set out in the indictment. It does, I think, sufficiently state that the prisoner attempted by false pretences to obtain the property of the prosecutor with intent to defraud, and that she falsely pretended that a piece of paper, which she produced to the prosecutor, was a genuine note of a bank then existing and having power to issue notes. It was proved that there was no such existing bank and that the prisoner knew this and that the note was of no value.

The rest of the court concurred.

Conviction affirmed.

[14 Cox's Criminal Cases, 114.]
COURT OF CRIMINAL APPEAL

Saturday, May 18, 1878.

(Before Lord Coleridge, C.J., Mellor, J., Lush, J., Cleasby, B., and Lopes, J.)

114]

*REG V. YOUNG (').

Rape—Married woman asleep—Belief that the prisoner was her husband.

While a married woman was asleep in bed with her husband, the prisoner got into the bed and proceeded to have connection with her, she being then asleep. When she awoke, she at first thought he was her husband, but on hearing him speak, and seeing her husband at her side, she flung the prisoner off, and called out to her husband, when the prisoner ran away:

Held, the prisoner was guilty of the crime of rape.

CASE stated for the opinion of this court by Huddleston, B.

The prisoner, John Young, was indicted for a rape upon Johanna Hurley.

The evidence proved that the prosecutrix, a married woman, being partially under the influence of drink on the 2d day of February, 1878, went to bed in her lodgings in the Seven Dials with her youngest child about nine o'clock; her husband with another child came home about midnight.

About four o'clock in the morning, when all four were asleep, the prisoner entered the room, the door not having been locked, got into the bed, in which were the prosecutrix, her husband, and the two children, and proceeded to have connection with the prosecutrix, "she being at the time

(') Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

asleep. When she awoke," (') at first the prosecutrix thought that it was her husband, but on hearing the prisoner speak she looked round, and seeing her husband by her side, she immediately flung the prisoner off her, and called out to her husband.

The prisoner ran away, but before he could make his escape he was secured by a police constable. None of the parties had ever seen the prisoner before.

*In answer to questions put by me the jury found [115 that the prosecutrix did not consent before, after, or at the time of the prisoner's having connection with her, that it was against her will, and that the conduct of the prosecutrix did not lead the prisoner to the belief that she did consent.

I put the last question to the jury in consequence of what fell from Denman, J., in *Reg. v. Flattery* (2 Q. B. Div., 410-414; 13 Cox's C. C., 38).

Upon these findings I directed a verdict of guilty, but reserved the question as to whether the conviction was right, the Court of Criminal Appeal in *Reg. v. Flattery* having expressed a desire that the case of *Reg. v. Barrow* (L. Rep., 1 C. C. R., 156; 28 L. J., 20, M. C.; 11 Cox's C. C., 191), should be reconsidered. (See *Reg. v. Clarke*, Den. C. C., 397; 24 L. J., 25, M. C.; 6 Cox's C. C., 412; *Reg. v. Jackson*, R. & R. 487.)

J. W. HUDDLESTON.

No counsel appeared for the prisoner.

Lilley, for the prosecution: The conviction was right. In *Reg. v. Camplin* (1 Den. C. C., 89; 1 Cox's C. C., 220), where the prisoner made the prosecutrix, a girl aged thirteen, drunk, and whilst she was insensible violated her person, it was held that a rape was committed without the consent and against the will of the prosecutrix, although the jury found that the liquor was given to her for the purpose of exciting her and then having sexual intercourse with her, and not for the purpose of rendering her insensible. [CLEASBY, B.: In that case the girl was insensible and incapable of consenting. This case, as stated, says, "The prosecutrix at first thought it was her husband," and leads to an impression that she at first consented. In *Reg. v. Clarke* (6 Cox's C. C., 412), it was held that if a married woman consents, under the belief that the man is her husband, the man cannot be convicted of rape.] [MELLOR, J.: The jury found that the prosecutrix did not consent before, after, or at the time of the prisoner's having connection with her, that it was against her will, and

(') The words between the inverted commas were added by Huddleston, B., the argument, to clear up an ambiguity that had been suggested by the case as on being consulted by the court during previously stated.

1878

Reg. v. Young.

that the conduct of the prosecutrix did not lead the prisoner to the belief that she did consent. LUSH, J.: I will go and speak to Baron Huddleston as to this.] In *Reg. v. Mayers* (12 Cox's C. C., 311), Lush, J., held that if a man has or attempts to have connection with a woman while she is asleep, it is no defence that she did not resist.

On the return of LUSH, J.,

LORD COLERIDGE, C.J., said: We are all of opinion that the addition made by the learned Baron to the statement of this case puts an end to any doubt as to the case, under the circumstances, being clearly one of rape.

The rest of the court concurred. *Conviction affirmed.*

See 7 Eng. Rep., 323 note; 21 Eng. Rep., 192 note; *Reg. v. Mayers*, 4 Eng. Rep., 559.

The jury must be satisfied that there was no consent during any part of the act, and that there was such resistance as the woman was capable of making under the circumstances: *State v. Shields*, 45 Conn., 256.

See *McNair v. State*, 53 Ala., 453.

In order to constitute the crime of rape, it is not essential that the female shall make the utmost physical resistance of which she is capable. If in consequence of his threats and display of force she submit through fear of death or great personal injury, the crime is complete: *State v. Ruth*, 21 Kans., 583.

In a prosecution for rape, where the evidence did not show such personal violence and threats that through terror the power of volition and of resistance was wholly lost, the court charged the jury that "if the woman ultimately consented to the intercourse, such consent not being freely or voluntarily given, but being obtained through fear, duress and fraud, or partly by fear and partly by force, then the offence was rape," and it gave other instructions of like effect. Held, error. Strictly speaking, while ultimate *submission* of a woman induced by fraud or fear, or by incapacity for further resistance, may not be inconsistent with the crime of rape, her consent (which properly implies a positive act of the will) is always inconsistent with that crime: *Whittaker v. State*, 50 Wisc., 518.

To sustain a conviction for an indecent assault and battery upon young girls under twelve years of age, it is not necessary to establish positive resistance on their part. It is sufficient if their persons were indecently interfered with without their actual consent: *People v. Justices*, etc., 18 Hun, 330; *Singer v. People*, 13 id., 418, 75 N. Y., 608; *Givens v. Com.*, 29 Gratt., 830; *Lawrence v. Com.*, 29 Gratt., 845.

See *Vasser v. State*, 55 Ala., 264.

Force being a necessary element in the crime of rape, where the intercourse is had with a very weak minded woman, and her yielding to the wish of the party was obtained by gross fraud (i.e., a fictitious marriage), this will not constitute rape: *Bloodworth v. State*, 6 Baxter (Tenn.), 614.

In *Alabama*, the having connection with a woman by deception, under the impression that the party doing so is her husband, is not rape: *McNair v. State*, 53 Ala., 453; *Lewis v. State*, 30 id., 54.

So in *Arkansas*: *Pleasant v. State*, 13 Ark., 360; *Charles v. State*, 11 id. (6 Eng.), 389.

Texas: See *Williams v. State*, 1 Tex. App. R., 90.

In *Iowa* it is held that one may be convicted of rape, if the jury find she failed to resist because she was of imbecile mind: *State v. Atherton*, 50 Iowa, 189.

See 2 Bish. Cr. Law (5th ed.), § 1121.

In *Ohio*, see *Hornbeck v. State*, 35 Ohio St. R., 277.

[14 Cox's Criminal Cases, 116.]

COURT OF CRIMINAL APPEAL.

Saturday, June 29, 1878.

(Before Cockburn, C.J., Pollock, B., Field, J., Huddleston, B., and Lindley, J.)

*REG. V. PETCH (¹).

[116]

Larceny—Wild rabbits—Taking and carrying away—Possession.

The prisoner was employed to trap wild rabbits, and it was his duty to take them, when trapped, to the head keeper. Contrary to his duty he trapped from time to time rabbits, and took them to another part of the land and placed them in a bag with intention of appropriating them to his own use, which another keeper observing, went and took some of the rabbits out of the bag during the prisoner's absence and nicked them and put them into the bag. His reason for nicking them was that he might know them again. The prisoner afterwards took away the bag and the rabbits :

Held, that the act of the keeper in nicking the rabbits was no reduction of them into the possession of the master, so as to make the prisoner guilty of stealing them.

THIS was a case reserved for the opinion of this court by B. B. Hunter Rodwell, Esq., Q.C., M.P., the chairman of the second court of the West Suffolk Quarter Sessions.

The prisoner was indicted under the statute 24 & 25 Vict. c. 96, sect. 67, for larceny, as a servant to the Maharajah Dhuleep Sing, of sixty-one dead rabbits, the property of his master. There was also a count for receiving.

The prisoner was employed by the Maharajah to trap rabbits upon a part of his estate, and it was the duty of the prisoner forthwith to take daily the rabbits so trapped to the head keeper.

On the morning of the 9th day of February, about half-past eleven, an under-keeper named Howlett, also employed by the Maharajah, was out on his beat in the parish of North Stowe, where he observed the prisoner go three or four times from the places where his rabbit traps were set to a spot near a furze bush on his beat. On examining this later in the day, he found *sixty-one dead rabbits in a bag [117 hidden in a hole in the earth near the furze bush. Howlett took twenty of the rabbits out of the bag and marked them by cutting a small slit under the throat. He then placed them in the bag, and covered it up in the hole in the ground as before. In cross-examination Howlett said that his reason for marking the rabbits was that he might know them again.

Early on the following Sunday morning the prisoner was seen by Howlett and a police constable, who had been watching the spot, to take the rabbits from the hole in the

(¹) Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

1878

Reg. v. Petch.

ground and put them in his cart, and he was driving the cart away along the road in a contrary direction to the head keeper's house, where he should have deposited them, when he was stopped and taken into custody by the police.

Counsel for the prisoner contended that there was no evidence to go to the jury of the larceny charged in the indictment, and referred to *Reg. v. Townley* (L. Rep., 1 C. C. R., 315; 12 Cox's C. C., 59).

The court, however, held that there was evidence to go to the jury of larceny, and that the present case was distinguishable from that of *Reg. v. Townley*, in consequence of the continuity of the possession having been broken by Howlett, the servant of the Maharajah, he having taken twenty of the rabbits out of the bag and marked them as described.

The court agreed with the contention of counsel for the prisoner that there was no evidence of any intention on the part of the prisoner to abandon possession of the rabbits, and this point was not left to the jury.

The court left the case generally to the jury, who found the prisoner guilty of the larceny charged, and the prisoner was sentenced to three months' imprisonment with hard labor; execution of the judgment was respited until the decision of this court.

The court reserved for the opinion of this court the question whether, upon these facts, the prisoner was properly convicted of the larceny charged.

Kingsford (Malden with him): The conviction was wrong. There was no larceny here. "Theft may be committed by taking and carrying away without the consent of the owner (even if he knows and affords facilities for the commission of the offence) of anything which is not in the possession of the thief at the time when the offence is committed, whether it is in the possession of any other persons or not If the thing taken and carried away is for the first time rendered capable of being stolen by the act of taking and carrying away, and if the taking and carrying away are one continuous act, such taking and carrying away is not theft, except in the cases provided for in arts. 326, 327. It seems that the taking and carrying away are deemed to be continuous, if the intention to carry away, after a reasonable time, exists at the time of taking" (Sir J. F. Stephen's Dig. Crim. *Law, art. 296). In this case the rabbits were always in the prisoner's possession and never in that of the master, and that being so, *Reg. v. Townley* is an authority that the prisoner is not guilty of larceny.

This continuity of possession of the rabbits was not broken by the act of Howlett going and nicking the rabbits. This was done for the purpose of identifying them, not for reducing them into the possession of the master. [FIELD, J.: And with the intention that the prisoner should have possession of them.] The distinction taken by the chairman is not consistent with the facts. The judgment of Blackburn, J., in *Reg. v. Townley* was referred to, and also the case of *Reg. v. Read* (14 Cox's C. C., 17; L. Rep., 3 Q. B. Div., 131; 28 Eng. R., 123).

No counsel appeared for the prosecution.

COCKBURN, C.J.: This conviction must be quashed. The case is really governed by that of *Reg. v. Townley*, where the law on the subject is fully stated in the judgment of Blackburn, J. At common law, to constitute larceny it was necessary that there should be a taking and carrying away of the chattel. And among the instances put in the old books are those of growing trees, and lead fixed to a building, which constitute part of the freehold, where a severance was necessary to turn them into chattels, and unless there was an interval between the one act of turning them into chattels and the other act of taking them away during which there was a change in the possession from the person who severed them to that of the owner, the final act of carrying them away by the person who severed them did not form the subject-matter of larceny. So in the present case, although property in wild animals, as decided in *Blades v. Higgs* (11 H. of L. Cas., 621), becomes that of the owner by being killed on his land, it does not follow that, when a man without right goes upon the land and kills wild animals they become so reduced into the possession of the owner of the land as to render the man liable to the charge of larceny for carrying them away. In *Reg. v. Read* the principle was the same as that which governs this case. It is true that in that case the prisoner was employed to trap rabbits, and had authority to kill rabbits, and that availing himself of that authority, he trapped and killed rabbits, but that was not in fulfilment of his duty, but with the intention of taking the rabbits for his own purposes and not for his master. He reduced them into his own possession and not that of his master. In no sense did he reduce them into the possession of his master, for he took them direct from the trap to where the bag was concealed and put them into his bag. The only circumstance that appears to distinguish this case is the fact that the keeper Howlett marked some of the rabbits, but that was done, not with the intention of altering the posses-

1878

Reg. v. Hancock and Baker.

sion of them, but for the purpose of identifying them. That fact does not make any difference in the case. I am of opinion that the conviction should be quashed.

POLLOCK, B.: I am of the same opinion. This case was reserved that it might be determined whether there was any [119] distinction *between it and *Reg. v. Townley*, and whether the nicking of the rabbits by the keeper could be considered as a reducing of them into the possession of the master. There is really no distinction. It is impossible to say that all that the prisoner did was not in his conduct as a thief.

FIELD, J.: I am of the same opinion. There is no question raised as to any reduction of the rabbits into the possession of the master by the act of trapping them, but it is said that the continuity of possession by the prisoner was broken by the act of the keeper in going to the trap and nicking the rabbits. It appears to me that there is no foundation for any distinction between this case and *Reg. v. Townley*.

HUDDLESTON, B.: I am of the same opinion. There was no intention on the part of the prisoner to abandon his possession of the rabbits. I agree that the act of the keeper in nicking the rabbits was not for the purpose of reducing them into the possession of the master, but for identifying them. I do not agree in the distinction of this case from *Reg. v. Townley* drawn by the chairman of the court of quarter sessions. There was no evidence from which it might have been inferred that the rabbits had been reduced into the possession of the master.

LINDLEY, J.: I am of the same opinion.

Conviction quashed.

See *ante*, p. 126 note.

[14 Cox's Criminal Cases, 119.]

COURT OF CRIMINAL APPEAL.

Saturday, June 29, 1878.

(Before Cockburn, C.J., Pollock, B., Field, J., Huddleston, B., and Lindley, J.)

REG. V. HANCOCK AND BAKER (*).

Feloniously receiving—Restoration of stolen goods to owner—Subsequent delivery to the thief for detection of the receiver.

A lad was detained on leaving his master's premises, and a policeman sent for, who searched him and took a stolen cigar, the property of his master, from him in the master's presence. In consequence of the lad's statement, the cigar was

(*) Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

then returned to him with five others, which the lad took to the prisoner and gave to him :

**Held*, that the prisoner could not be convicted of feloniously receiving [120 the cigars knowing them to be stolen, for that they were not stolen property at the time they were received, the master and the policeman having acted in concert in supplying the lad with the six cigars, and instructing him what to do with them.

CASE reserved for the opinion of this court by W. F. Harrison, Esq., chairman of the second court at the General Quarter Sessions of the peace for the county of Surrey, held by adjournment at St. Mary, Newington, on the 3d day of June, 1878.

William Emmett Hancock and Henry Robert Baker were tried upon the following indictment :

Surrey. The jurors for our Lady the Queen, on their oath present, that William Emmett Hancock, on the 23d day of May, 1878, then being servant to James Gabriel, one cigar of the property of the said James Gabriel, his master, feloniously did steal, take, and carry away, against the form of the statute in such case made and provided.

Second count. And the jurors aforesaid, upon their oath aforesaid, do further present, that Henry Robert Baker on the same day and in the year aforesaid, one cigar (being the same property as the said William Emmett Hancock in the first count of this indictment is charged with stealing) of the property of the said James Gabriel, before then feloniously stolen, taken, and carried away, feloniously did receive and have, the said Henry Robert Baker then well knowing the same to have been feloniously stolen, taken, and carried away, against the form of the statute in such case made and provided.

The prisoner Hancock having pleaded guilty, the following evidence was adduced in support of the charge against the other prisoner Baker.

James Gabriel proved that he was a cigar manufacturer, at 320 Walworth road, in the parish of St. Mary, Newington, in this county, and that the prisoner Hancock entered his service as shop boy on the day named in the indictment.

That about seven in the evening, as the prisoner was about to leave work for the day, the witness saw him take a cigar (without permission) from the mantelshelf of the shop, and put it in his pocket.

That witness having already missed goods, sent for a detective, and obtained the services of Edmund Reid, an officer of the P Division.

That witness saw Reid take the cigar from Hancock and mark it, and then give it back to the prisoner with five others and certain instructions.

1878

Reg. v. Hancock and Baker.

This witness stated in cross-examination that he occasionally had in his possession broken cigars, which he worked up again, and was never in the habit of giving them to persons in his employ.

121] *Edmund Reid proved that he was a detective officer of the P Division, and that between seven and eight in the evening of the day in question he was called to the prosecutor's, and in his presence searched the prisoner Hancock, and found the cigar in his trousers pocket. That he questioned this prisoner, and, in consequence of what he learnt from him, marked the cigar and returned it to him, at the same time giving him five other cigars and instructions how to act. That this prisoner thereupon went, followed by Reid, to a coal store, in Smith street, Portland street, Walworth, where Reid saw the other prisoner Baker standing; that Hancock went up to Baker and handed something to him. That Reid then accosted Baker, telling him who he was, and inquired what Hancock had given him, to which inquiry Baker replied "Nothing," meaning that Hancock had given him nothing. To which Reid replied, "I saw him give you something." That Baker then said, "I know you are a constable, and here they are," at the same time handing Reid six cigars, one being the marked one. That Reid thereupon said to Baker, "You've incited this boy to rob his master, and received the cigars he has stolen." That another lad named Maunders was there at the time. That he then apprehended Baker, and took him to the police station.

The prisoner Hancock, a lad thirteen years of age, was then called for the prosecution and gave the following evidence:

"On the 23d of May last I entered the employment of the prosecutor, and about seven P.M., on leaving work for the day, I took a cigar and put it in my pocket. Shortly after I gave it up to detective Reid, who returned it to me with some others. I took it because prisoner Baker, whom I knew, had told me to get him as many as I could. He told me that day at dinner time that if I did he would give me something on the following Saturday. I took all the six cigars to the coal store in Smith street, where he works, and gave them to him. Detective Reid and William Maunders then came up, and Reid spoke to Baker, and then we all went to the police station."

In cross-examination this witness stated that before coming to prosecutor's he had been in a printing office in the city, which was his first place, and lost it through being absent from work part of a day to get fitted with some new

clothes. That he never said anything to Baker about boys being allowed damaged cigars, nor told him that prosecutor had offered him (Hancock) damaged cigars. That Baker did not say to him, "Get me some damaged cigars," but "Get me as many as you can."

William Maunders, another lad in the employ of the prosecutor, proved accompanying Hancock and detective Reid to Smith street, and seeing Hancock hand some cigars to Baker, who said, "Thank you, I'll see you by-and-by, that'll do, won't it?" And then put them in his pocket; when some one standing near said, "Look out," and Baker then took them out of his *pocket and held them in his [122 hand under his coat, and after something more was said, handed them to Reid.

This witness stated in cross-examination that he had been two years in the prosecutor's employment, and that the latter had never given him a broken cigar. That when cigars were damaged they were made up afresh.

The statement made by the prisoner Baker before the committing magistrate was then put in and read as follows:

"Yesterday at dinner time Hancock came round to the coal shed and said, 'I have started work, Harry.' I said, 'Where at?' He said, 'At Gabriel's in the Walworth road.' He said, 'Other boys have damaged cigars given them what gets chucked into the damaged bag, and Mr. Gabriel offered me two at dinner time.' He said, 'I wouldn't have them then, but Mr. Gabriel said he would give me some more to-night when I leave off work.' I said, 'I'll buy them of you.'"

This closed the case for the prosecution.

The prisoner Baker's counsel then submitted that there was no case to go to the jury, on the ground that the stolen cigar, the subject of the indictment, had been taken out of the possession of the thief by the detective officer in the presence of the owner, and was therefore not stolen goods when the prisoner Baker received it; and the case of *Reg. v. Dolan* (Dears. C. C., 436; 6 Cox's C. C., 449), was cited and relied on.

I refused, however, to stop the case, and told the jury, after the usual caution as to the prisoner's (Hancock's) evidence, that if they believed that the prisoner Baker received the marked cigar from Hancock with the knowledge and belief that the latter had stolen it, they ought to find him (Baker) guilty.

The prisoner having been convicted, his counsel applied that a case might be reserved for the opinion of this honorable court, which the court assented to, the judgment on the

1878

Reg. v. Hancock and Baker.

prisoner Baker being respited in the meantime, and the prisoner released on bail.

If the court should be of opinion that the conviction was right, it is to stand; otherwise it is to be quashed.

Baggallay, for the prisoner Baker, submitted, on the authority of *Reg. v. Dolan* (Dears: C. C., 436; 6 Cox's C. C., 449), that the conviction was wrong. At the time Baker received the cigar from Hancock it had ceased to be a stolen chattel, it having been previously restored to its owner and given back to Hancock for a specified object. The fact that five other cigars along with the one Hancock had taken were given to him to take to Baker showed that Hancock was then acting under the owner's instructions.

COCKBURN, C.J.: At the time the cigar was received by the prisoner, it had been reduced into the possession of the master, or, if you please, of the police, and Hancock was then employed as an instrument to detect Baker.

123] *HUDDLESTON, B.: The cigar was taken by the policeman, and the instructions to Hancock what to do with it were given by the policeman, but then the master was present all the time. In *Reg. v. Dolan*, Cresswell, J., said: "If it were necessary to hold that the policeman by taking the stolen goods out of the pocket of Rogers restored the possession of them to the owner, I should dissent. The goods in the policeman's hands were in the custody of the law, and the master could not have brought trover for them; but when they were given back to Rogers, and the master desired him to go and sell them, the master, I think, may be said to have employed Rogers for that purpose." That learned judge treated the thief as the agent of the master, for the purpose of detecting the receiver.

COCKBURN, C.J.: In *Reg. v. Dolan*, Lord Campbell evidently assumed that what was done in that case by the police was done in concert with the master. I should infer the same in the present case.

Lilley, for the prosecution: The conviction was right. When the cigar was taken from the prisoner Hancock by the police, it was in the custody of the law, and the policeman was not bound to restore it to the master. Here the master gave no authority to the policeman to act as he did. [COCKBURN, C.J.: Who gave the other five cigars to the policeman to give to him?]

COCKBURN, C.J.: The present case is undistinguishable in principle from *Reg. v. Dolan*, and the conviction must be quashed.

The rest of the court concurred.

Conviction quashed.

See 12 Eng. Rep., 638 note; 20 Eng. R., 372 note.

In a prosecution for receiving stolen postage stamps, the proof was that the thief deposited them in an express office, directed to the defendant, and after arrest gave a written order for the property to a postmaster, who took them, and subsequently, by order of the postoffice department, re-deposited them in the express office, and they were forwarded to the defendant, who received them. Held, that the character of the stamps as stolen property ceased in the hands of the postmaster and that there could be no conviction: *United States v. De Bare*, 6 Biss., 358.

Parnell informed the sheriff that Collins had requested him to enter a house in the night time, and steal therefrom a sum of money which he knew to be concealed there, the money to be divided between them. By advice of the sheriff, Parnell agreed to do so, for the purpose of entrapping Collins, and accordingly entered the house, secured the money, marked it so that it could be identified, and after delivering it to Collins gave a signal, when sheriff arrested Collins with the money in his possession. Held, that inasmuch as Parnell alone entered the building, and did so without felonious intent, there was no burglary committed, and therefore Collins could not have been privy to a burglary: *People v. Collins*, 53 Cal., 185.

If one pretending by way of artifice to be an accomplice, but believed by the accused to be a real accomplice, perform acts at the instance of the owner of the goods, amounting to the physical constituents of larceny, the pretended accomplice represents the owner as to such acts, and not the accused, although the accused may have concurred in the acts, and though he prompted them. Such acts of the supposed accomplice cannot be imputed to the accused as legally criminal, inasmuch as they really proceed from the joint will of the owner and the accomplice, and not from the joint will of the accused and the accomplice.

If one deemed an accomplice by another who intends to commit larceny is not really so, but has only assumed the character in order to pass with the other through the forms of the intended larceny so that detection and ar-

rest may be more certain, and such false accomplice, by direction of the owner of the goods, deliver the goods to the other, there is no taking without the consent of the owner, and the offence of larceny is not committed. Nor is it larceny by the accused if such false accomplice, not being expressly directed by the owner, make such delivery of his own motion, after being instructed by the owner to tell the accused to come and get the goods, and after the accused has come for them accordingly: *Williams v. State*, 55 Geo., 391.

Certain bankers, apprehending an attempt by one S. to rob their bank, employed detectives, who, by authority of the bankers, decoyed him into the bank: Held, that the consent of the detectives to the entry of S. was the consent of their employers, and, therefore, however guilty his intent and purpose, his conviction for burglary was not warranted by law: *Spieden v. State*, 8 Tex. App. R., 156, 30 Am. R., 126, 129 note.

The indictment charged that defendant knowingly deposited in the mail a letter giving information where, how, and of whom, the inhibited article could be obtained. This was in answer to a fictitious letter of inquiry. The letter written and mailed by defendant was addressed to a person who had no existence. On its face it did not show that it was within the prohibition of the statute. If it had been suffered to go through the mail to the place to which it was addressed, it would not have been called for but have been sent to the dead letter office, and could not have given any person the prohibited information. Held, that this was not the "giving of information" within the meaning of the statute: *United States v. Whittier*, 10 Chic. Leg. News, 229, citing many authorities, Dist. Ct. Missouri; *Dillon and Treat, JJ.*

Decoying or conniving with persons suspected of criminal designs, for the purpose of arresting them in the commission of the offence, is denounced by the Supreme Court.

A lawyer was arrested for feloniously entering a court building and removing public records. A policeman testified that the prisoner had asked him to leave the court room door unlocked so that he could get the papers, and that

after consulting with his superior officer he had consented, and afterwards lay in wait for him. Held, proper to subject this witness to very searching cross-examination, and to ask him whether he had not previously had improper dealings with the prisoner, and put in false swearing for him. The jury was entitled to all the light that would have been furnished by former transactions between them, and such a question might have tested the witness' credibility: *Saunders v. The People*, 88 Mich., 218.

Where one, to ascertain whether A., who was under injunction, was violating his patent, requested another to procure a set of teeth made upon his patent, which he did: Held, that the patentee had a right to resort to that mode of ascertaining whether A. was violating the injunction, and that it did not constitute a license to A. to make them: *Knowles v. Peck*, 42 Conn., 886.

Where one has been notified of a design to steal his goods, which he neither originated nor suggested, he may, in order to detect the thief, direct a servant or agent to encourage the design, and afford facilities for the completion of the crime; and such facilities will not affect the criminality of the thief: *State v. Duncan*, 8 Rob. (La.), 562.

It is not *consent* to the taking for the owner to obtain the aid of a detective, who, for the purpose of detection, joins the defendant in a criminal act designed by the defendant and carried into execution by actual theft: *Pigg v. State*, 43 Tex., 108, 109-110, 112.

Certain merchants had employed a detective to discover who had entered and robbed their store, and at their instance he consorted with the defendant and one H., whom the merchants suspected to be the guilty parties, and who agreed with each other and with the detective to rob the store. The merchants supplied the detective with a key to facilitate the entry, and were prepared to arrest the culprits when it was effected. Held, that the conspiracy was complete when the appellant and H. entered into the agreement, and, therefore, their amenability was not affected by the subsequent consent of the merchants and co-operation of the detective in the entry of the store, unless the merchants or the detective

suggested the offence, or originated the criminal intent or agreement: *Johnson v. State*, 8 Tex. App., 590, distinguishing *Spieden v. State*, 3 Tex. App., 156, and *Pigg v. State*, 43 Tex., 108, in that in both of those cases the detective, as the owners' agent, suggested and induced the original intent to commit the crime, and having done so, acted as one of the party throughout.

By direction of the prosecutor, thieves were informed that on a given night he would be away from home; the thieves came and were taken in the act; held, that the prosecutor did not consent to the taking, and the thieves were properly convicted: *Sanders v. State*, 3 Tenn. Leg. Reporter, 296, citing *Dodge v. Brittain*, Meigs, 86-7, and *Kemp v. State*, 11 Humph., 320, 321-2.

The detective having disclosed to the police the place of an intended burglary, the proprietor of the building, a saloon, upon the direction of the police, left the rear door, which was ordinarily fastened with a lock and bar, unlocked and unbarred, but closed, and at two o'clock at night the defendant, with the detective, entered through that door, the defendant lifting the latch and opening the door, and were arrested by the police and the proprietor, who were lying in wait.

Upon the trial the court refused to instruct that the lifting of the latch and opening of the door were, under the circumstances, a burglarious breaking, and left to the jury to say whether the proprietor consented to the entry by defendant.

Held, no error: *State v. Jansen*, 22 Kansas, 498.

Where one woman went with another to a physician's office, where the latter woman submitted, but not in presence of her companion, to an operation for abortion; held, the companion was not accomplice: *Com. v. Drake*, 124 Mass., 21.

On an indictment charging the defendants with conspiring with A. to commit a felony, the defendants admitted certain conversations had by them with A., and put in evidence by the government, tending to prove the crime charged; but testified that they had, while employed by the chief of the detective force of the Commonwealth, been instructed to associate with persons suspected to be criminals, and to

lead them along by pretending to concur with them, and, when the necessary proofs had been obtained, to arrest them, and that their conversations with A. were for this purpose; that although this officer had ceased to hold office for a year, they had been employed by him more or less since, and had pursued the same methods; and that they had no criminal intent. There was no evidence that the defendants had been informed that A. was a suspicious character, or requested to obtain evidence against him. Held, that evidence of the officer, who formerly had employed them, was inadmissible to corroborate their testimony: *Commonwealth v. Cohn*, 127 Mass., 282.

One is not responsible for a beating inflicted by another, however wrongful it may be, simply because he thinks the punishment deserved, or is pleased at it or thinks well of it. He must do some *act*, though never so slight, to encourage the beating before he is responsible for it. He is not legally responsible for the opinions he entertains, however unjust and perverted they may be, but is responsible for all his acts: *Blue v. Christ*, 4 Bradw., 851; *Reynolds's Case*, 33 Gratt., 834.

The mere mental approval by a bystander of a murder committed in his presence, does not make him an accomplice in the murder: *State v. Cox*, 65

Mo., 29; *Reynolds's Case*, 33 Gratt. (Va.), 834.

If B. and C. have had a quarrel with A., and A. approaches B. and C., when B. commands him to halt or he will shoot him, and C. shoots A., the circumstances do not necessarily import a common criminal intent between B. and C. to kill A., so as to make B. guilty: *People v. Leith*, 53 Cal., 251; *Reynolds's Case*, 32 Gratt. (Va.), 834.

See also *Lamb v. State*, 96 Ill., 73, 2 Crim. Law Mag., 472, 486 note, as to one who goes out with another to commit one crime and such other commits murder.

See also *Reg. v. Caton*, 10 Eng. Rep., 507.

One who did not know of a larceny until after it was committed, but who purchased the stolen property under the directions of an officer, with money furnished by the officer, is not an accomplice: *People v. Barrie*, 49 Cal., 842.

The fact that one has received stolen property, knowing the same to have been feloniously obtained, does not constitute him an accomplice in the burglary by which possession of the goods was acquired: *State v. Hayden*, 45 Iowa, 11.

An accessory in felony cannot be convicted on an indictment charging him as the principal felon: *State v. Wyckoff*, 31 N. J. L., 65.

[14 Cox's Criminal Cases, 179.]

WESTERN CIRCUIT.

Winter Assizes, 1879. Devizes. Monday, January 13.

(Before Mr. Justice Mellor.)

REG. V. WOODMAN ().

[179.]

Falsæ pretences—Promissory falsæ pretence—Insufficient to sustain indictment—Remote falsæ pretence.

An indictment charged one Gregory with having obtained £30 from prosecutor, Woodman, on the false pretence that he, the said Gregory, then wanted the loan of £30 to enable him to take a public house at Melksham; by means of which said false pretence the said Gregory did then unlawfully and fraudulently obtain the said sum from the said Samuel Woodman with intent to defraud. Whereas the said Gregory was not then going to take a public house at Melksham . . . as he the said Gregory well knew. And whereas the said Gregory did not then want a loan of £30 or any money to enable him to take the said house:

Held, not a false pretence as to an existing fact.

(*) Reported by H. T. TAMPLIN, Esq., Barrister-at-Law.

1879

Reg. v. Saunders.

At the close of the prosecutor's evidence,

MELLOR, J.: It seems to me that the real motive and inducement was this: the prisoner says, "I am going to take a public house; if you will let me have £30 I will do so." The inducement for all was, "I shall be able to return you the £30 while I carry on business at Melksham." It was, therefore, the expectation of being paid out of the profits of the business at Melksham. The old rule is, there must be a false representation of that being alleged to be a fact which is not a fact.

Ravenhill, for prosecution, suggested that here the existing fact was the intention of prisoner.

MELLOR, J.: How can you define a man's mind? It is a mere promissory false pretence.

Ravenhill proposed to show that prisoner was not able, at the time of making the pretence, to take a public house.

MELLOR, J.: That is too far afield. In criminal matters we must take the immediate result. This is one of those [180] cases in *which the prosecutor was too credulous. [After having conferred with Denman, J., the learned judge continued:] My brother Denman is clear that there is not enough evidence to leave to the jury of any existing false pretence. We both think that, had the whole circumstances been known earlier, something might have been made of a statement by the prisoner that he had £30 at home and that he could then take the house.

[14 Cox's Criminal Cases, 180.]

WESTERN CIRCUIT.

Winter Assizes, 1879. Devizes. Monday, January 13.

(Before Mr. Justice Denman.)

REG. v. SAUNDERS (').

Offences against the Person Act—Dangerous thing—Intent—Questions for jury.

Where one throws away an explosive machine with intent that another shall pick it up and be injured by its explosion, he is guilty of casting or throwing a dangerous thing under the English statute.

PRISONER was indicted under 24 & 25 Vict. c. 100, ss. 28 and 29. The former section renders any person guilty of a misdemeanor who "shall unlawfully and maliciously, by the explosion of gunpowder or other explosive substance, burn, maim, disfigure, disable, or do any grievous bodily harm." The latter section making it a felony to "unlawfully

(') Reported by H. T. TAMPLIN, Esq., Barrister-at-Law.

and maliciously cause any gunpowder or other explosive substance to explode, or send or deliver to, or cause to be taken or received by, any person any explosive substance or any other dangerous or noxious thing, or put or lay in any place, or cast or throw at, or upon, or otherwise apply to any person, any corrosive fluid, or any destructive or explosive substance with intent . . . to maim," &c.

It was proved in evidence that on the 7th of September, 1878, prisoner Saunders, a sailor, travelled in company with thirty others, all in uniform, by a train on the South Western Railway. The prosecutor, Hunt, swore that while at work near Tisbury *Mill he saw the prisoner, who [18] was leaning out of a compartment, throw something from the train. This afterwards turned out to be an "electric fuse detonator," i.e., the cap of a torpedo, and contains fulminate mercury, gun cotton, and meal powder. The prosecutor, not knowing the nature of the article thrown, went to it and either kicked it or pulled a wire, with the result that it exploded, inflicting thirty-five wounds on his arm, neck, and face. One of the witnesses stated that probably the detonator had already been partially exploded, or otherwise more severe injuries must have been inflicted on the prosecutor.

At the close of the case for the prosecution,

Murch asked his Lordship's opinion whether this was a dangerous thing within the meaning of the statute.

DENMAN, J.: Whether this is a dangerous thing or not does not alter the case.

Murch: Is there here any evidence of any wounding?

DENMAN, J.: If the jury think there is evidence that he threw it at this man they would convict.

Murch: The question is, is it not too remote? The evidence is that this thing was thrown down, and then the man picked it up and was injured.

DENMAN, J.: The evidence is that probably these things would not go off of themselves. I doubt whether there is any evidence of a wounding. I think a wounding should be a direct, not an indirect, wounding. If one laid a torpedo in a road and a cart wheel exploded it, there would be a question for the jury.

Murch: Is there any evidence of intent?

DENMAN, J.: That is for the jury. There is evidence that the man really intended that the prosecutor should take it up and explode it so as to bring it about his person, which is for the jury.

1879

Reg. v. Carey.

Murch: What evidence is there that this man could possibly know what the prosecutor would do with it?

DENMAN, J.: That also is a question for the jury.

Kingle for the prosecution.

Murch for the defence.

[14 Cox's Criminal Cases, 214.]

NORTHERN CIRCUIT.

Liverpool Winter Assizes, 1879. Thursday, February 13, 1879.

(Before Mr. Justice Lindley.)

214]

*REG. V. HUGH CAREY (').

Apprehension by a police constable without having warrant in his possession—Murder reduced to Manslaughter—Galliard v. Laxton (2 B. & S., 363); Cod v. Caba (45 L. J., M. C., 101); Reay v. Cox (12 Cox's C. C., 4) referred to.

One who murders a police officer, who is attempting to arrest him without warrant, may be convicted of manslaughter.

THE prisoner was indicted for the murder of Sewell, a police serjeant at St. Helen's. It appeared that on the 31st day of October, 1878, one Pickavance, the foreman at the manufactory at which the prisoner had worked, obtained a warrant from the justices for the apprehension of the prisoner on a charge of threatening to shoot him. This warrant lay upon the desk at the police station at St. Helen's, and a man who was not the prisoner had been apprehended, and subsequently discharged, owing to a mistake in his identity.

Early in the morning of the 1st day of November, the prisoner, while passing along a street with something evidently buttoned up in his coat, was stopped by the deceased, at that time in uniform and on duty, who seized him by the collar and demanded to know what he had in his coat. Some angry conversation and scuffling ensued, whereupon the prisoner drew a revolver from his trousers pocket and shot Sewell, the police constable, dead.

By the St. Helen's Improvement Act, 1869, sect. 257, power is given to constables to stop, search, and detain persons reasonably suspected of knowingly having or conveying anything stolen or unlawfully obtained.

Higgin, Q.C., and *Shand*, for the prosecution.

Commings and *Lumb*, for the prisoner.

At the close of the case for the prosecution, Commings, for

(¹) Reported by R. T. TIDSWELL, Esq., Barrister-at-Law.

the defence, submitted that there was no case of murder to go to the jury.

LINDLEY, J.: The arrest by Sewell was illegal. Cases may be imagined where the absence of a warrant might be no defence, as *where the murder was premeditated. [215] It is abundantly clear that if the deceased was arresting the prisoner on Pickavance's charge, he was exceeding his duty by acting without a warrant; if he was arresting him under the powers given by the local act, there is no evidence from which the jury could infer that the deceased reasonably suspected the prisoner of the possession of stolen goods, and it lay on the prosecution to give such evidence.

Prisoner convicted of manslaughter, and sentenced to twenty-five years penal servitude.

[14 Cox's Criminal Cases, 215.]

NORTHERN CIRCUIT.

Manchester Winter Assizes, 1878.

(Before Mr. Justice Manisty.)

Liverpool Spring Assizes, 1879.

(Before Mr. Justice Lindley.)

REG. V. ADAMS (').

Indictment framed in two counts; in the second count one assignment was that the prisoner swore that she had not had connection with a "man." Held, by Manisty, J., that the evidence of only one man could be received; by Lindley, J., after consulting with Lord Justice Thesiger, that the evidence of several men, alleging that they had had connection with prisoner, was admissible.

THE prisoner was indicted for perjury arising out of the evidence she gave at the May Salford Sessions, 1878, before W. H. Higgin, Q.C., chairman, in a charge of indecent assault against a fellow railway passenger.

Leresche and Nash, for prosecution.

Addison, for prisoner.

The prisoner, Annie Adams, had given evidence at the May Salford Sessions, 1878, to the effect that she had been indecently assaulted in a railway carriage between Reddish and Manchester, *by a man who was convicted and [216] sentenced to two years' hard labor.

At the trial for perjury at Manchester Winter Assizes, 1878, before Manisty, J., it was objected, and the objection held good, that under the indictment the evidence of only

(') Reported by R. T. TIDSWELL, Esq., Barrister-at-Law.

1878

Reg. v. Brownlow.

one man that he had had criminal connection with the prisoner previous to May last could be received.

After two days' trial the jury did not agree and the prisoner was discharged on bail.

At the second trial, at Liverpool Spring Assizes, 1879, the same objection was taken but overruled, Mr. Justice Lindley, after consulting Lord Justice Thesiger, states that, without an amendment, he would receive the evidence of more than one man, but would grant a case for the Court of Criminal Appeal if necessary.

After a second two days' trial, and the jury had been locked up for several hours, they were discharged and the prisoner again admitted to bail.

[14 Cox's Criminal Cases, 216.]

COURT OF CRIMINAL APPEAL

Friday, Dec. 6, 1878.

(Before Kelly, C.B., Mellor, J., Denman, J., Lindley, J., and Hawkins, J.)

REG. V. WALTER BROWNLOW (¹).

Larceny Act (24 & 25 Vict. c. 96), s. 75—Agent receiving moneys—Direction in writing to apply the same—Embezzlement.

The prisoner was an agent employed to sell goods on commission, and as soon as he received moneys from customers he was to remit them to his employers. During the employment, the prosecutor wrote to the prisoner, "We will send H., B., and P. their bills at the end of the month, and the same day that you receive the money from the customers you must remit it to us. We will attend to your order, as our arrangements were to remit as soon as you received it, as you said they would not pay much before the 20th of each month."

217] *Held, that this letter was not a direction in writing as to the application or disposition of moneys received by the prisoner within the meaning of sect. 75 of 24 & 25 Vict. c. 96.

CASE reserved for the opinion of this court by Fry, J.

The indictment contained three counts:

The first charged the prisoner with having received £12 12s. on the 7th day of February, 1878, from one Edward Wood, and with having converted the same to his own use.

The second count charged the prisoner with having received a sum of £8 14s. 9d. on the 2d day of March, 1878, from one Birkhamshaw, and having in like manner converted the same to his own use.

The third count charged the prisoner with the receipt of a sum of £11 on the 18th day of February, 1878, from one Hilton, and having converted the same to his own use.

(¹) Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

The questions for decision arise under the 75th section of the 24 and 25 Vict. c. 96.

It appeared from the evidence that Edward Thorneycroft carried on business in partnership with his brother at Chester-ton in Staffordshire, as a brickmaker. That he engaged the prisoner to act as an agent in Derby in October, 1877. That the duties of the prisoner were to sell goods on commission at 5 per cent. That as he received the moneys from the customers, he was to remit them to his principals.

It appeared further, that in the course of business he sent orders to his principals, who accordingly supplied the goods to the customers.

It was proved that the three sums mentioned in the indictment had been received by the prisoner in respect of goods supplied by his principals, and that the same had not been paid or accounted for to his principals, but had been converted by him to his own use.

On the 26th day of November, 1877, Thorneycroft wrote to the prisoner a letter, the material parts of which are as follows:

“We will send Mr. Hand, Mr. Blood, and Mr. Pember-ton, their bills at the end of the month, and the same day that you receive the money from the customers you must remit it to us. We will attend to your order, as our arrangements were to remit as soon as you received it, as you said they would not pay much before the 20th of each month.”

Upon this state of facts two questions arose: First, whether the prisoner had been intrusted with the three sums of money mentioned in the indictment or any of them within the meaning of the 75th section of the 24 & 25 Vict. c. 96; secondly, whether the letter of the 26th day of November, 1877, was, within the meaning of the same section, a direction in writing to apply, pay, or deliver the said three sums or any of them.

The prisoner was found guilty subject to this case.

I submit the questions for the decision of the Court for Crown Cases Reserved.

*Fry, J., appended to the case the following memo- [218
randum:

“The questions turn upon the construction of the 75th section of the 24 & 25 Vict. c. 96. It seems to me open to question whether the prisoner can be considered to have been intrusted with the money.

“1. The general drift of the 75th section seems to show

1878

Reg. v. Brownlow.

that it is intended to apply rather to agents to pay than to agents to receive money.

"2. The direction in the present case to pay to the principal shows that the principal did not treat himself as having received the money. Can a man who has not been in possession of money trust another with it?

"3. If the direction had been to receive from 'A.' and to pay to 'B.' the case might have been different; because there the transaction may be deemed to be of a twofold character, viz., first, a constructive receipt of the money by the principal; secondly, an intrusting of the same money to the agent to pay. But here the direction being simply to pay to the principal, the second part of the transaction which would have brought it within the scope of the section is wanting.

"4. The language of this section with regard to the agent being intrusted must be contrasted with the language of the 68th section, where money in the position of that now in question is described as having been delivered to, or received, or taken into possession by the person receiving it.

"5. It appears to me doubtful whether the Legislature were minded to make the misapplication of all moneys received by one person to the use of another, in respect of which a written direction had been given, criminal.

"See *Reg. v. Tatlock* (2 Q. B. Div., 157; 13 Cox's C. C., 328), particularly the judgment of Amphlett, B."

Horace Smith, for the prisoner: The conviction cannot be sustained. The indictment against the prisoner was not for embezzlement, but for converting moneys which had been intrusted to him with a direction in writing to apply the same, under the 24 & 25 Vict. c. 96, s. 75. The learned counsel, having read Fry, J.'s observations on the memorandum to the case, was stopped by the court.

Vesey Fitzgerald, for the prosecution: The conviction was right. The case finds that the prisoner was an agent to the prosecutors, and the letter of the 26th day of November, 1877, from the prosecutors was a written direction to him as to the application of all moneys he might receive for them. Sect. 75 says: "Whosoever having been intrusted," it does not say "by the employer," but leaves it generally, "an agent having been intrusted;" and here the prisoner was intrusted with the money by the prosecutor's customers. Then the letter supplies the direction what he was to do with it, viz., to remit the money the same day that he received it to his employers. [DENMAN, J.: The letter amounts to no more than an intimation that as soon as he

*has received any moneys he is to remit them on the [219 same day.] The direction in this letter is quite as specific as that in *Reg. v. Christian* (L. Rep., 2 C. C. R., 94; 12 Cox's C. C., 502). [MELLOR, J.: No; there the prisoner received a specific sum of £336, to apply in payment of certain shares. This was embezzlement if a criminal offence at all.]

KELLY, C.B.: I am of opinion that this conviction must be quashed. In the cases cited the prisoners were intrusted by the prosecutors with moneys, with specific directions how to apply them; but in the present case there was no written direction at all which specifically applies to the moneys mentioned in this indictment.

MELLOR, J.: I am of the same opinion. This is not a case within the 24 & 25 Vict. c. 96, s. 75. The reasons given by Fry, J., show very satisfactorily that the prisoner ought to have been acquitted.

DENMAN, J.: I am of the same opinion. The only question is whether the letter was a direction in writing within the meaning of sect. 75 of the 24 & 25 Vict. c. 96? I think it is very doubtful whether the letter was ever intended to apply to any other than the three named persons' accounts. At all events it is ambiguous, and, in the absence of any finding by the jury to that effect, I do not feel justified in holding that it did so apply. The arrangements referred to in the latter part of the letter may have been by parol for all we know.

LINDLEY, J.: I am of the same opinion. Two questions are reserved for us: (1) Whether the prisoner had been intrusted with any of the sums of money mentioned in the indictment within the meaning of the 75th section. Upon that question I am of opinion that he was not. (2) Whether the letter was a direction in writing to apply, pay, or deliver any of them within sect. 75. I think it was not; it is too ambiguous, and I am disposed to think that it referred to the three customers previously mentioned in the letter.

HAWKINS, J.: I am of the same opinion. The letter is ambiguous in its terms, but, assuming that it does apply to all sums of money received by the prisoner on the prosecutor's account, the case is not within sect. 75, which only applies in my judgment where the agent has been intrusted by his employer with money accompanied by a direction in writing how to apply it, and not where the agent receives the money from a third person on behalf of his master as in this case.

Conviction quashed.

1878

Reg. v. Treadgold.

[14 Cox's Criminal Cases, 220.]

COURT OF CRIMINAL APPEAL.

Saturday, Nov. 16, 1878.

(Before Kelly, C.B., Denman, J., Lindley, J., Manisty, J., and Hawkins, J.)

220]

*REG. V. TREADGOLD⁽¹⁾.*Jurisdiction—Venus—Embezzlement.*

It was the duty of the prisoner, a commercial traveller, to remit daily to his employers, who resided in London, the moneys which he collected, without reduction. The prisoner, on the 1st and 2d of March, 1878, collected at Newark two sums of money which he did not remit or account for till the first week in April, when one of his employers went to Grantham, where the prisoner resided, saw him, and taxed him with receiving moneys and not accounting for them. The prisoner then and there handed to his employer a list of moneys he had collected and not accounted for, including the above two sums. There was no evidence that the prisoner returned from Newark (which is within easy access of Grantham) to Grantham on either of the days or at what times of the days he received the two sums of money. He was indicted and convicted at the borough of Grantham Quarter Sessions for embezzling the above two sums of money:

Held, that the conviction was bad, as there was no evidence of any embezzlement within the borough of Grantham.

CASE reserved for the opinion of this court by the Recorder of the borough of Grantham, Notts.

The prisoner was tried before me at the sessions held for the borough of Grantham, on the 23d day of July, 1878, on an indictment charging him with having in the borough of Grantham embezzled the several sums of £2 5s. and £6 11s. 6d. respectively, the property of Nathan Defries and another, his masters.

The prisoner was employed by the prosecutors as a commercial traveller, under a written agreement, by which he was bound to remit daily, without any reduction whatsoever, any moneys collected by him on their account.

221] *On the 1st and 2d day of March, 1878, the prisoner being then at Newark, in the course of his occupation as commercial traveller, received on account of his masters the sum of £2 5s. from one H. Slater, and the sum of £6 11s. 6d. from Thomas Edwards respectively. He never accounted to them for the money, or informed them that he had received it except as hereafter stated.

It was proved that the prisoner resided at Grantham, but there was no evidence to show that he returned to Grantham on either of the days, or at what time on the respective days he received the said several sums of money.

It was within the knowledge of the jury that Newark was fourteen and three-quarter miles from Grantham, and within

⁽¹⁾ Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

easy access of it by train, although no formal proof was given of the fact.

In the first week in April, 1878, Nathan Defries, one of the prisoner's employers, proceeded to Grantham and had an interview with the prisoner there; and, on taxing him with receiving money on account of his employers which he had not accounted for to them, the prisoner handed to the said Nathan Defries a list of amounts he had received and not accounted for, in which list the two items of £2 5s. and £6 11s. 6d. appeared.

Upon the above facts it was contended, on behalf of the prisoner, that the indictment failed of proof, the embezzlement, if embezzlement there was, having been committed at Newark in the county of Nottingham, where the money was received and appropriated by him, and not at Grantham in the county of Lincoln.

On the part of the prosecution it was contended that the venue was well laid at Grantham, the offence having been commenced at Newark and completed at Grantham; and that, by virtue of the statute 7 & 8 Geo. 4, c. 64, s. 12, a person may be tried either in the county in which he began, or that in which he completed the offence.

I overruled the objection, holding that, as the prisoner lived at Grantham, but a short distance from Newark, there was evidence from which the jury might infer that the prisoner would return home from Newark on the day he received the money; and that, as it was his duty to remit daily the money he collected, the failure to do so was sufficient evidence of embezzlement, and I declined to withdraw the case from the jury.

The prisoner was found guilty, and I passed sentence upon him, reserving the point as to the venue, and admitting him to bail pending the decision of it by the court.

The question reserved is whether, under the circumstances above disclosed, the venue was well laid in Grantham. If the court should be of opinion that it was, the conviction to stand; or, if of the contrary opinion, to be quashed.

WM. JOHN EWINS BENNETT.

W. J. Smith, for the prisoner: There was no evidence that the *prisoner returned to Grantham before the [222 first week in April, and the receipt of the moneys was a month previously at Newark. The alleged embezzlement consisted in the fact of non-accounting, but at Grantham he did account for the receipt of the moneys. It is true that it was his duty to have remitted daily the moneys he had col-

1878

Reg. v. Treadgold.

lected without any reduction, and it does not appear that he was ever at Grantham between the time of receiving the money and the first week in April. [HAWKINS, J.: The only statement in the case bearing on this is, that the prisoner lived at Grantham. DENMAN, J.: Where did the prisoner feloniously appropriate the moneys to his own use?] From the case it is impossible to say, but it does not appear that he did so appropriate them at Grantham. [KELLY, C.B.: It lies on the prosecution to show that the embezzlement took place at Grantham.] The cases of *Reg. v. Rogers* (14 Cox's C. C., 22; 47 L. J., 11, M. C.), and *Reg. v. Murdoch* (2 Den. C. C., 298; 5 Cox's C. C., 360), were then cited. In the present case the evidence pointed to an embezzlement at Newark, if there was any embezzlement at all, but there was no evidence of any embezzlement at Grantham.

No counsel appeared to argue for the prosecution.

KELLY, C.B.: This conviction must be quashed. There was no evidence at all which showed the completion of the offence of embezzlement at Grantham. It is quite consistent with the facts stated in the case that there was probably an act of embezzlement at Newark, but even that is not clear. The case states that the prisoner resided at Grantham, and that there was no evidence to show that he returned to Grantham on either of the days he received the several sums of money. It further states that in the first week of April one of the prisoner's employers proceeded to Grantham and had an interview with the prisoner, and taxed him with receiving moneys which he had not accounted for to them, and that the prisoner handed to him a list of amounts he had received and not accounted for, in which list the two items charged in the indictment appeared, and there the evidence stops. It is impossible to say upon these facts that there was any evidence of embezzlement at Grantham, and therefore under the circumstances the conviction must be quashed.

DENMAN, LINDLEY, MANISTY, and HAWKINS, JJ., concurred.

Conviction quashed.

See note, *ante*, p. 28.

[14 Cox's Criminal Cases, 223.]

COURT OF CRIMINAL APPEAL.

Saturday, Nov. 16, 1878.

(Before Kelly, C.B., Denman, J., Lindley, J., Manisty, J., and Hawkins, J.)

*REG. V. THOMAS HUGHES ⁽¹⁾. [223]*Larceny—Recent possession—Evidence for the jury.*

A bag was left by the owner on a Saturday night near to a place where the prisoner and two other persons were at the time. The prisoner passed by the place on his way home, and shortly afterwards one of the other two persons followed in the same direction. That person and the prosecutor then met the prisoner coming back to his home from the opposite direction, and being questioned he denied all knowledge of the bag, and said that he had been in the neighboring wood for firewood. The wood, the prisoner's cottage, and some disused farm buildings near it were then searched, without success. On the Monday morning, the bag was found in a hayloft in one of the disused farm buildings near to the highway. There was no door to it and passers-by had easy access to it. The prisoner was then taken into custody for stealing the bag, and said to the constable, after previously denying he had taken the bag, "I suppose I shall get a month for this," and made use of some other words of no more definite meaning.

The chairman left all the facts to the jury as evidence from which they might infer that the prisoner had had possession of the bag, and directed them, if they found so, to treat the case as one of recent possession:

Held, that the chairman's ruling was wrong, and that he ought to have directed an acquittal.

At the General Quarter Sessions of the peace for the county of Denbigh, holden at Denbigh on the 11th day of April, 1878, the prisoner was indicted for stealing a bag containing a number of articles, the property of one David Vaughan.

It was proved at the trial that a few minutes before the bag was missed, which was about 10 P.M., on Saturday, the 12th day of January, 1878, the prisoner and two other men, named Thomas Bagnall and William Bagnall, were near a wall by the roadside on which it had been placed by the prosecutor's wife while she went into a shop close by, but none of the three men were seen in possession of the bag at that or any other time.

The prisoner passed the wall, where the bag was placed, on his way home, and shortly afterwards William Bagnall followed him in the same direction.

After passing the prisoner's cottage, William Bagnall, and the prosecutor, David Vaughan, met the prisoner coming back to his cottage from the opposite direction. When questioned, the prisoner denied all knowledge of the bag,

(1) Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

1878

Reg. v. Hughes.

and stated that he had been into a neighboring wood to fetch firewood.

It was proved on cross-examination that the owner of this wood allowed his work people to collect firewood for their own use there, and also that the prisoner had formerly worked for him, but was not doing so at the time in question.

William Bagnall and the prosecutor, David Vaughan, in company with the prisoner, searched the wood, the prisoner's cottage, and some disused farm buildings at the back of his cottage for the bag, which could not be found.

On the Monday following the bag was, however, found by the police constable in an old hayloft, in one of the disused farm buildings mentioned above.

These disused buildings, including the hayloft, belonged to an adjoining farm in the occupation of a person of the name of Griffith, and were not connected with the prisoner's cottage or garden otherwise than that he, as well as others, had access to them. The hayloft had no door, and was near the high road.

The prisoner was a farm laborer, and had worked in the neighborhood all his life, but there was no evidence of his having worked for the aforesaid Griffith or on his farm.

When the bag was found, the constable took the prisoner to the police station at Ruabon, a distance of between four and five miles. On their way there the prisoner, having previously denied to the constable that he had committed the robbery, said, "Well, it's no use, I suppose. I suppose I shall get a month for this. What do you think?" He added, "Some people get more than others," and afterwards said, "It's very odd; people get transported, and when they come back they begin the same things again."

I told the jury that in a case of larceny, after proving that the goods were stolen, proof that they were found in the possession, or under the control of the prisoner shortly afterwards, and that he did not give a satisfactory account of the manner in which he came by them, is good presumptive evidence of the prisoner having stolen them. I directed the jury to apply this rule to the present case, and to take the evidence and the whole of the circumstances, together with 225] the prisoner's statements *into their consideration, and say whether he was guilty or not guilty of the offence charged against him.

The counsel for the prisoner took exception to this direction on the ground that there was no evidence to go to the jury to show that the bag was ever in the possession or un-

der the control of the prisoner, so as to raise a presumption of his guilt from his not giving any account of it.

I declined to alter my direction to the jury, being of opinion that, under all the circumstances, there was evidence sufficient to justify my direction, and the application of the above rule so as to raise a presumption of the prisoner's guilt.

The jury found him guilty, and he was admitted to bail to appear to receive judgment at the quarter sessions of the peace to be holden for the county of Denbigh when called upon.

The opinion of the Court for the Consideration of Crown Cases Reserved is requested whether there was any evidence which ought to have been left to the jury that the bag had been in the possession or under the control of the prisoner, so as to make the aforesaid rule applicable to this case.

If the court should be of opinion that there was any such evidence for the jury, the conviction to stand; if of a contrary opinion, to be quashed.

THOMAS HUGHES, Chairman.

No counsel appeared to argue on either side.

KELLY, C.B.: The question reserved for our decision is whether there was any evidence which ought to have been left to the jury that the bag had been in the possession of the prisoner, or under the control of the prisoner, so as to make the rule alluded to applicable to this case. We can find no evidence that the bag had been in the possession of the prisoner or under his control; and therefore the conviction must be quashed.

DENMAN, J.: I am of the same opinion. If the case had been left in a different way to the jury there might have been something for them to consider, viz., the statements made by the prisoner to the police constable. But with respect to the direction of the chairman, that the jury might proceed to consider the case on the basis of the doctrine of recent possession, there was no evidence at all of any possession by the prisoner. The jury must, therefore, have been misled, and the conviction cannot be sustained.

MANISTY, LINDLEY, and HAWKINS, JJ., concurred.

Conviction quashed.

1878

Reg. v. Orton.

[14 Cox's Criminal Cases, 226.]

COURT OF CRIMINAL APPEAL

Saturday, Nov. 16, 1878.

(Before Kelly, C.B., Denman, J., Lindley, J., Manisty, J., and Hawkins, J.)

226]

*REG. v. ORTON and Others⁽¹⁾.*Prize fight—Combatants with gloves on—Sparring match.*

Divers persons assembled in a room, entrance money being paid, to witness a fight between two persons. The combatants fought in a ring with gloves, each being attended by a second, who acted in the same way as a second at prize fights. The combatants fought for about forty minutes with great ferocity, and severely punished each other. The police interfered and arrested the defendants, who were among the spectators.

Upon the trial of an indictment against them for unlawfully assembling together for the purpose of a prize fight, the chairman directed the jury that, if it was a mere exhibition of skill in sparring, it was not illegal; but, if the parties met intending to fight till one gave in from exhaustion or injury received, it was a breach of the law and a prize fight, whether the combatants fought in gloves or not, and left it to the jury to say whether it was a prize fight or not:

Held, that the jury were properly directed.

THE following case was reserved by Sir Frederick Thomas Fowke, Bart., chairman of the general quarter sessions of the peace for the county of Leicester:

John Orton, William Burrows, Alfred Greenfield, Henry Wilkinson, Charles Orton, George Orton, James Westerman, Edward Bodycott, William Cave, Thomas Hall, George Hardy, Henry Stokes, Joseph Collins (*alias* Tug Wilson), and William Henry Neale were tried before me at the general quarter sessions of the peace for the county of Leicester, held on the 15th day of October, 1878, for assembling together for the purpose of a prize fight.

The indictment contained six other counts, three of them 227] for *assaulting police constables in the execution of their duty, and three other counts for common assaults on the same constables.

It was given in evidence that the defendants had assembled, together with others to the number of a hundred and upwards, in a room in a vacant building which they had taken possession of without the consent of the owner; that one shilling entrance was charged to each person; that then the door was barricaded to prevent access by the police or any other person; that the two defendants Orton and Burrows were the combatants. Each was stripped to the waist, a space roped in for a ring, and each combatant was attended by his second, on whose knee he sat in the intervals

⁽¹⁾ Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

during the fight, and was sponged and fanned by him after the usual custom in prize fights.

It was proved by an eyewitness that the men fought with great ferocity, in the words of this witness, "like bulldogs;" that each was severely punished, and that the fight had lasted for nearly forty minutes when the police came up, brought there by information of what was going on, and by a large and disorderly crowd who had assembled on the road outside the building attracted by what was going forward.

The police, after great resistance, during which the assaults before mentioned were committed, forced an entrance into the room through the windows, when those present attempted to escape in any way they could; by door or window. The two combatants and the other twelve defendants, were, however, arrested.

It was found that each combatant was severely punished, and one of them had his ear bitten through. They were highly exasperated with each other, each calling the other a coward, and taunting each other with unfair fighting so much that, even after they were arrested and in the custody of the police, they were with difficulty prevented from closing with each other and renewing the fight.

The fight was for money, and one of the defendants told the policeman who had him in charge, "You have done me out of £7."

The learned counsel for the defence contended that this was a sparring match fought in gloves, according to well-known rules, and, on the authority of the case of *Reg. v. Young* (10 Cox's C. C., 371) (1), was no offence at law.

I directed the jury that this was a correct definition of the law, if it were a mere exhibition of skill in sparring; but that, if the parties met intending to fight till one gave in from exhaustion or injury received, it was a breach of the law, and a prize fight, whether the combatants fought in gloves or not, and I left this *question to the jury: [228 "Was this a sparring match or a prize fight?"

The jury had the gloves used in the fight before them, and retired to consider their verdict, and on their return they found that it was a prize fight, and that the prisoners were guilty.

They also found the defendants, Collins, Westerman, and

(1) *Reg. v. Young* was tried before Bramwell, B., at the Central Criminal Court, and the marginal note is this: "There is nothing unlawful in a sparring exhibition unless the men fight on until they are so weak that a dangerous

fall is likely to be the result of the continuance of the game. Therefore, except in the latter case, death caused by an injury received during a sparring match does not amount to manslaughter."

1879

Reg. v. Goodfellow.

Bodycott guilty of assaulting the police in the execution of their duty.

The learned counsel contended that I was wrong in leaving the question to the jury whether or not it was a prize fight; that, as the men fought in gloves, I ought to have directed the jury that it was therefore a mere sparring match, and no indictable offence.

I respite the sentence, releasing the defendants on bail for their appearance to receive and abide by the sentence of the court at the next Epiphany Sessions if the court be of opinion that I was right in thus leaving the case to the jury.

The case is, whether the question "Was this a prize fight or not?" was rightly left to the jury; or was the fact that the fight was with gloves sufficient to prevent the same being an indictable offence? FREDK. THOS. FOWKE, Chairman.

No counsel appeared to argue on either side.

KELLY, C.B.: The question in this case is, whether the prisoners were guilty of the offence of unlawfully assembling together for the purpose of prize fighting. The jury found that this was a prize fight. No doubt the combatants wore gloves; but that did not prevent them from severely punishing each other. There can be no doubt that, upon the facts, the conviction ought to be affirmed.

DENMAN, J.: I am of the same opinion. The jury examined the gloves in their private room, and, having the fact proved that the combatants severely mauled each other, they found rightly that this was a prize fight. The question was entirely one for the jury.

LINDLEY, J., MANISTY, J., and HAWKINS, J., concurred.

Conviction affirmed.

[14 Cox's Criminal Cases, 326.]

NORTHERN CIRCUIT.

Carlisle Summer Assizes. Monday, July 7, 1879.

(Before Mr. Justice Bowen.)

326]

*REG. V. GOODFELLOW (').

Evidence—Depositions—Illness of witness.

Pregnancy alone may be ground for the admission of a deposition.

THE prisoner was indicted for the wilful murder of her illegitimate female child, at Wetherall, on or about the 13th day of April, 1879.

(¹) Reported by E. T. BALDWIN, Esq., Barrister-at-Law.

Hon. A. D. Elliot, for the prosecution.

Shee, for prisoner.

Hon. A. D. Elliot applied to the court for permission to read the deposition of a witness, who was pregnant, before the grand jury, quoting *Reg. v. Wellings* (L. Rep., 3 Q. B. Div., 426), in support of his application.

A medical man gave evidence to the effect that he had examined the witness that morning; she was very near her confinement, and it would have been dangerous to expose her to the excitement of attending a criminal trial. That two days previously there were symptoms of approaching labor and her confinement might take place at any moment. At the same time he could not say that her case differed in any way from any ordinary case of confinement.

BOWEN, J. (after consulting with Lush, J.), admitted the deposition.

The prisoner was acquitted of the graver charge, but was found guilty of concealment of birth.

See *ante*, 356, 358 note.

[14 Cox's Criminal Cases, 327.]

WESTERN CIRCUIT.

Exeter. Saturday, July 19, 1879.

(Before Mr. Justice Lopes.)

REG. V. TWOSE ().

[327

Criminality—Mens rea.

The belief, although erroneous, of prisoner in the existence of a right to do the act complained of excludes criminality.

PRISONER was indicted for having set fire to some furze growing on a common at Culmstock.

C. W. Matthews prosecuted.

Bullen defended.

It appeared from the evidence that persons living near the common had occasionally burnt the furze to improve the growth of the grass, although the existence of any right to do this was denied.

But the prisoner in this case denied having set the furze on fire at all.

Bullen, for the defence, contended that, even if it were proved that the prisoner set the furze on fire, she could not be found guilty if it appeared that she *bona fide* believed she had a right to do so, whether the right were a good one or not.

(*) Reported by H. T. TAMPLIN, Esq., Barrister-at-Law.

1879

Reg. v. Twose.

LOPES, J.: If she set fire to the furze thinking she had a right to do so, that would not be a criminal offence. I shall leave two questions to the jury—1. Did she set fire to the furze? 2. If yes, did she do it wilfully and maliciously?

Where one takes property under an honest belief that he has a right to do so under claim of title thereto, or interest therein, he is not guilty of larceny:

Alabama: *Moringstar v. State*, 55 Ala., 148; *Randle v. State*, 49 id., 14. Arkansas: *Brown v. State*, 28 Ark., 126.

Canada, Upper: *Regina v. Davidson*, 45 U. C. Q. B., 91.

English: *Reg. v. Wade*, 11 Cox's Cr. Cas., 549.

Florida: *Baker v. State*, 17 Fla., 406. Illinois: *Phelps v. People*, 55 Ills., 334.

Iowa: *State v. Barrackmore*, 47 Iowa, 684; *State v. Waltz*, 52 Iowa, 227.

Massachusetts: *Commonwealth v. Weld*, Thacher's Crim. Cas., 157; *Com. v. Robinson*, Id., 230; *Com. v. Stebbins*, 8 Gray, 492.

Missouri: *State v. Homes*, 17 Mo., 379; *State v. Matthews*, 20 id., 55.

See *State v. Gresser*, 19 Mo., 247.

New Hampshire: *Severance v. Carr*, 43 N. H., 65.

New York: *People v. Hall*, 6 Park., 642.

Rhode Island: *State v. Luther*, 8 R. I., 151.

Texas: *Kay v. State*, 40 Tex., 29; *Bray v. State*, 41 id., 203; *Varas v. State*, Id., 527; *Johnson v. State*, Id., 608; *Darnell v. State*, 43 id., 147; *Smith v. State*, 42 id., 444; *Miles v. State*, 1 Tex. App., 510.

See *Dunham v. State*, 3 Tex. App. R., 465.

To constitute larceny, there must be an intention to convert the property to the use of the felon. Where property to an inconsiderable value was taken, either for the purpose of retaliating for a real or supposed injury, or through wanton mischief, held, not to be larceny: *Kemble's Case*, 1 City Hall Rec., 177.

In Massachusetts it has been held that where one takes property, or money, with intent to appropriate it to the payment of a debt due to the taker from the party from whom it is taken, such taking is sufficient evidence of a conversion to the taker's own use, to constitute larceny; the court adding the

qualification, that defendant was not guilty if the jury were satisfied that defendant took the money under an honest belief that she had a legal right to take the specific money in the way, and under the circumstances that she did take it, although in fact she may have had no such legal right: *Com. v. Stebbins*, 8 Gray, 492.

In Iowa it is held not to be robbery to compel the payment of a debt by threats of violence; that the taking must be *animo furandi*: *State v. Hollyway*, 41 Iowa, 200.

Upon an indictment for larceny, it appeared that the prisoner had been intrusted by the wife of the prosecutor to repair an umbrella. After the repairs were finished and it had been returned to the prosecutor's wife, a dispute arose as to the bargain made. The prisoner thereupon carried away the umbrella as a security for the amount alleged by him to be due for repairing it. Held, that if the jury were of the opinion that the taking by the prisoner was an honest assertion of his right, they were to find him not guilty; but if it was only a colorable pretence to obtain possession, then to convict him: *Reg. v. Wade*, 11 Cox's Crim. Cas., 549.

By the 24 & 25 Vict. c. 97, s. 11, it is enacted that if any persons riotously and tumultuously assembled shall unlawfully and with force demolish or pull down any house, every such offender shall be guilty of felony: the prisoners were convicted upon an indictment which averred that they "unlawfully, riotously, and routously did assemble, and unlawfully, riotously, and with force, demolish and pull down the house of W. W., and pull down and scatter a rick of hay of W. W., *contra pacem*: Held (*Fitzgerald*, B. diss.; *Barry*, J., dub.), that upon the hypothesis that the prisoners had demolished the house, not feloniously but in the assertion of a supposed right, the indictment could be sustained as for a misdemeanor at common law; that is (per *Lawson*, J.), for a riot with a statement of the demolition of the house as matter of aggravation: The

Queen v. Casey, 8 Irish Rep., C. L., 408; Regina v. Langford, C. & Mar., 603, considered.

Merely taking a horse to ride and turning him loose, with the expectation that he would return to his owner, is not larceny: Umfrey v. State, 63 Ind., 223; 9 Carr. & P., 552; 2 Whart. Cr. L. (7th ed.), §§ 1789, 1841; 1 Whart. Cr. L. (8th ed.), §§ 883 *et seq.*; 2 Bish. Cr. L. (6th ed.), §§ 796, 841-8.

So prisoner may prove an arrangement, before the taking, with a third person to return the horse: State v. Shermer, 55 Mo., 88.

The defence to a charge of stealing, that the prisoner pledged the property, intending to redeem and restore it, is a defence not to be generally encouraged; though if clearly made out in proof, it may be allowed to prevail. The rule for the jury's guidance in such a case seems to be that, if it clearly appear that the prisoner only intended to raise money upon the property for a temporary purpose, and at the time of pledging the article had a reasonable and fair expectation of being enabled shortly, by the receipt of money, to take it out and restore it, he ought to be acquitted; but otherwise not: Reg. v. Phetheon, 9 C. & P., 552.

Otherwise, if instead of pledging, the wrongdoer sell the property absolutely: Regina v. Hall, 1 Denison's Cr. Cas., 381; Reg. v. Manning, Dearsley's Cr. Cas., 21.

See cases cited *arguendo*: Phelps v. People, 72 N. Y., 847, 6 Hun, 420.

A servant, whose duty it is to pay his master's workmen, and for this purpose, to obtain the necessary money from his master's cashier, fraudulently represented to the cashier that the wages due to one of the workmen were larger than they really were, and so obtained from him a larger sum than was in fact necessary to pay the workmen. He did this, intending at the time to appropriate the balance to his own use. Out of the sum so received he paid the workmen the wages really due to them, and appropriated the balance to his own use.

Held, that whether the obtaining the money in the first instance was larceny or obtaining money by false pretences, the money while it remained in the prisoner's custody was the property of and in the possession of the master, and

therefore the misappropriation of it was larceny: Regina v. Cooke, L. R., 1 Crown Cas. Res., 895, 12 Cox's Cr. Cas., 10.

Larceny may be committed though the owner be present if he dissent, provided the property be taken with an intent to deprive the owner of his property: Com. v. Dimond, 3 Cush., 235; State v. Deal, 64 N. C., 270.

Where the evidence against a defendant, indicted for the larceny of a horse, shows that what he did was done openly, in the presence of other persons known to the party having the horse in his possession, but not under circumstances that would warrant the belief it was larceny, such evidence tends to prove that the offence was nothing graver than an aggravated trespass: Stuart v. People, 73 Ills., 20; McMullen v. State, 53 Ala., 581; Umfrey v. State, 63 Ind., 223.

Where a special intent, beyond the natural consequences of the thing done, is essential to the crime charged, such special intent must be pleaded, proved and found: State v. Bloedow, 45 Wisc., 279.

Where it is doubtful whether or not a certain transaction amounts to a crime, it is possible the advice of counsel that it was not, would be a defence if the party honestly believed and acted upon such advice. The general rule however is, that every man is bound to know the law, and ignorance thereof is no defence, and that on the trial of an indictment the accused cannot be allowed to show, in his defence, an absence of intent to commit the offence charged, by proving that he acted under the advice of counsel and others: Hamilton v. People, 57 Barb., 625; U. S. v. Anthony, 11 Blatchf., 200; Whart. on Crim. Ev. (8th ed.), § 723; 1 Whart. Cr. L. (8th ed.), § 84; State v. Goode-now, 65 Maine, 30; Com. v. Emmons, 98 Mass., 6; Com. v. Bagley, 7 Met., 279, 281; Halsted v. State, 41 N. J. Law, 552; Dobson v. State, 62 Ala., 141; Grant v. State, Id., 233.

See Hamilton v. Smith, 39 Mich., 222, 232-3; Moak's Underhill on Torts, 169-170, 228; People v. Powell, 63 N. Y., 88; 20 Eng. Rep., 892 note; 19 Alb. L. J., 84, 2 Southern L. J., 175.

A sale and delivery of intoxicating liquor to a minor, who has authority from his parent to buy for him, and

1879

Reg. v. French.

who states at the time that he is so buying, but in fact buys it for his own use, will support a complaint under the statute of 1875, chap. 99, § 6, clause 4, although the seller believes and relies on the statement of the minor: *Com. v. Finnegan*, 124 Mass., 324.

One who obstructs a highway in defiance of the order of the proper officers in charge thereof, is liable to the penalty of a wilful obstruction, although he may honestly believe the *locus* not to be a public highway, and although he may have been permitted, by previous officers of the same kind, to close the highway, upon their belief that it

had been lawfully discontinued: *State v. Castle*, 44 Wisc., 670, distinguishing *State v. Preston*, 34 id., 675.

Though upon the trial of one indicted for perjury, in falsely swearing respecting the existence of a partnership, where the existence of the partnership was a mixed question of law and of fact, it was held that the attorney whom he had consulted respecting the partnership might be asked what advice he gave the defendant in the matter about which he was charged to have sworn falsely: *State v. McKinney*, 42 Iowa, 205.

[14 Cox's Criminal Cases, 328.]

WESTERN CIRCUIT.

Exeter. Saturday, July 19, 1879.

(Before Mr. Justice Lopes.)

328]

*REG. v. FRENCH⁽¹⁾.

Murder—Manslaughter.

On an indictment for murder, the power of the jury to return a verdict of manslaughter for criminal negligence by the accused depends upon the circumstances of the particular case.

PRISONER was indicted for the wilful murder of her illegitimate child.

Pitt-Lewis prosecuted.

Henry Clark defended.

The prisoner had delivered herself of the child, the subject of the charge, which was in such a condition from injuries received during, or immediately after, its birth that it only survived an hour or two.

Pitt-Lewis, in opening the case to the jury, observed that they might find the prisoner guilty of murder; or, if they negatived the charge of murder, of manslaughter, as the prisoner had neglected to provide medical assistance in her confinement and had thus caused the death of the child. Some learned judges had held such neglect to be manslaughter, while others had been of a different opinion.

LOPES, J.: There can be no general ruling as to criminal negligence. In one case there might be a question for the jury of criminal negligence; each case must depend upon its own circumstances.

(¹) Reported by H. T. TAMPLIN, Esq., Barrister-at-Law.

At the close of the case for the prosecution the learned judge ruled that the evidence disclosed nothing on which a verdict of manslaughter could be returned. The prisoner must be found guilty of murder or nothing.

[14 Cox's Criminal Cases, 387.]

Kent Lent Assizes, 1875.

Maldstone. March 11.

(Before Mr. Justice Denman.)

REG. V. MORGAN ().

[337

Murder—Dying declaration made when actually dying—Admissibility of, from nature of the wound, in absence of express evidence as to cause of death.

On a trial for murder, the death having been caused by cutting the throat, all the vessels and arteries having been severed, and death therefore certain to ensue, and in fact ensuing almost immediately afterwards, a declaration having been made by deceased in writing (he having no power to speak), about five minutes before death, when he was actually dying, it was held by Denman, J., after consulting Cockburn, C.J., that the declaration might be admissible, and that they were not prepared to hold that it was not so; but that with reference to some decisions, and especially *Reg. v. Cleary* (2 F. & F., 850), it would be proper, if it was admitted, to grant a case for the Court for Crown Cases Reserved.

THE prisoner was indicted for the murder of one Joseph Foulstone, at Shorncliffe (*).

Biron and *Dering*, for the prosecution.

Norman and *Grubbe*, for the prisoner.

The prisoner and the deceased were soldiers, in the same hut. About nine o'clock at night, there being no one else in the hut but another soldier, dead drunk in bed, and two boys, both of whom the prisoner sent away on different pretexts, so that he *was virtually alone with the de- [338] ceased, who almost immediately afterwards was seen coming out with his throat cut quite to the back of the neck, so that he could not speak while in that state. He only a few minutes before death, and while he was dying, wrote a statement as to who had done the act.

Biron, in stating the case for the prosecution, referred to this statement, but being aware that its admissibility would be disputed, he did not state what it was.

The first witness, the man who saw the deceased coming

(*) Reported by W. F. FINLASON, Esq., Barrister-at-Law.

(†) This case is now reported, in consequence of its bearing on the case of *Reg. v. Beddingfield*, which excited a great deal of discussion; and also by

reason of its reference to *Reg. v. Cleary* (2 F. & F., 850), which in both cases appears to have been quite misunderstood, and is here stated correctly; and lastly, because it shows the correct course to be taken in such cases.

1875

Reg. v. Morgan.

staggering out of the hut with his throat cut, stated that while sitting down he wrote a paper—produced.

The learned judge said, before it was offered in evidence it would be proper to receive all the evidence as to the circumstances of the case, for, in determining whether it was admissible, he should have to consider all the circumstances, one of which would be the time when the man died (').

The witness stated that the deceased had to be held up, that he could not speak, nor even hold his hand up steadily, and that though, when the prisoner was brought in, the deceased pointed with his hand to him, and held up his arm as well as he could, "it shook so that he could not hold it steadily, and had to let it fall." He was "very much exhausted," and "was bleeding fearfully from the throat." A man had to hold his arm "round him to keep him up." "He motioned for paper, and wrote on it." Almost immediately afterwards, in three or four minutes, the doctor came, and the deceased died about five or six minutes after he came; so that, according to the evidence, the deceased died within ten minutes after he wrote the paper.

The surgeon stated that he was called to the hut "a few minutes after nine o'clock," and found the deceased sitting, supported by two men, bleeding profusely from the throat, his whole dress covered with blood. He found it, he said, impossible to stop the flow of blood, the wound was so extensive, severing all the chief blood vessels of the neck on the right side. "Nothing," he said, "could save him; he was dying—indeed, when I saw him, his eyes were already assuming a glassy stare, and he was becoming unconscious—the immediate precursors of death." He lived only a few minutes—from five to six minutes—after the doctor came, and he came "almost immediately" after the paper was written. "The windpipe was quite severed; the bones of the neck were exposed." In short, it appeared that the man's head was all but off, and was held on chiefly by the vertebræ of the neck.

On this evidence,

Biron, tendered the paper in evidence.

339] **Norman*, for the prisoner, objected that it did not appear that the deceased knew that he was dying. He cited *Reg. v. Jenkins* (1 C. C. R., 187; 11 Cox's C. C., 250), in

(') It is conceived that this, which was the course taken by Erle, C.J., in *Reg. v. Cleary* (3 F. & F., 850), was the proper course to be taken in such cases; and further, that, in the absence of express evidence as to whether the de-

ceased knew he was dying, the surgical evidence as to the nature of the wound, and what must have been his state and feelings at the time, ought to be (as it was here) taken into consideration.

which (in a case of drowning) the statement was made some hours before death, and in which the deceased said she had "no hope of life at present," and it was held that her statement was inadmissible, but

DENMAN, J., said that there the decision turned on the effect of the woman's statement as to expectation of death (¹), and that the court thought it was materially qualified.

Norman then cited *Reg. v. Cleary* (2 F. & F., 853), as showing that the nature of the wound was not in itself sufficient to show that the party must have known he was dying (²). He urged that in the present case there was nothing but the nature of the wound from which to draw the inference that the deceased must have felt that he was dying, and that it was not sufficient.

DENMAN, J., said that he himself had not any doubt, but that he should, as the point was important, consult Cockburn, C.J., his colleague in the commission, which he accordingly proceeded to do, and on his return said that neither Cockburn, C.J., nor himself was prepared to say that the statement might not be admissible; but that, after consulting Cockburn, C.J., he could not admit it without reserving a case for the Court for Crown Cases Reserved; for there was no case (³) in which the judge had admitted

(¹) So in almost all the cases in which the Court for Crown Cases has held a declaration not admissible—the decisions have turned on the terms of the statement with reference to the expectation of death; and on their insufficiency to exclude the idea of hope of recovery. There is no case in which it has been held that, in the absence of such express evidence, the nature of the wound may not show that the person must have felt he was dying.

(²) This case was much misunderstood, and not only does not show this, but shows clearly the contrary. There the man was shot in the chest, and lay for some time, and when found was removed to a house and there was tended, and died soon afterwards. He had said something, and not only said nothing to show that he thought he was dying, but, according to the evidence, did not appear to think so. The report states that Erle, C.J., asked the policeman, "At the time did it appear to you that he was under the expectation of immediate death?" The policeman said he did not. Erle, C.J., upon that held the statement inadmissible. It

was then pressed that the nature of the wound itself was such as to show that the deceased must have been under the expectation of impending death; but Erle, C.J., said "he could not in the absence of evidence presume that a man who had been shot through the body must necessarily feel that he was about to die." That is, that he could not, without any surgical evidence on the point, and against positive evidence the other way—the man only being shot through the body—a kind of wound from which myriads have recovered—presume, contrary to the express evidence, that the man must have felt that he was dying. This plainly implies that in a different kind of case, one of such a class as the present, where, according to the surgical evidence, the man was dying, and could not be saved, and must have felt that he was dying, it might be presumed, in the absence of any express evidence, that the party must have felt he was dying.

(³) That is, none reported; probably because it was never doubted.

1875

Reg. v. Morgan.

the statement entirely upon an inference drawn from the nature of the wound itself, and from giving the deceased credit for ordinary intelligence as to its natural results. On the contrary there was a case ⁽¹⁾ in which an eminent judge had held that the nature of the wound itself was not sufficient ground on *which to draw such an inference as to the party having known himself to be in a dying state ⁽²⁾. In the face of that decision the evidence, therefore, could not be admitted without reserving a case, and under those circumstances it was for the counsel for the prosecution to consider whether he would press the admissibility of the statement, or proceed with the case without it ⁽³⁾.

The latter course was pursued; and the case was carried through without the statement. There was, indeed, a difficulty; the defence set up being suicide, and there being no direct evidence to rebut it; but in the result, the learned judge carefully pointing out the circumstances under which the deceased had run out and pointed to the prisoner—the jury, though not without hesitation, then delivered a verdict of

Guilty. Sentenced to death ⁽⁴⁾.

⁽¹⁾ It is presumed that this was *Reg. v. Cleary*, cited *ante*.

⁽²⁾ That is, in that particular case (*vide supra*), but it is conceived that the decision plainly implied that the inference might be drawn where from the nature of the wound the party could not doubt that he was dying.

⁽³⁾ It appears, therefore, that if it had been pressed it would have been admitted.

⁽⁴⁾ The prisoner was executed, and there could be no doubt as to his guilt; but the hesitation shown by the jury indicated the risk which is run in such cases by the exclusion of the statements of the deceased, while those of the prisoner are necessarily admitted—not, indeed, as evidence, but as entitled to consideration and credence in the absence of evidence to the contrary. It is remarkable how recent in its origin is the notion that such declarations by the deceased are only admissible as dying declarations, and upon proof that they were made under the sense of impending and imminent death. They would clearly be admissible as part of the matter in hand, for whether the act be suicide or murder, it is clearly homicide; as the person who inflicted such a wound must have intended death,

and as the act is not immediately effective, it is inchoate and incomplete until consummated by death. This probably was the ground on which, after the revolution, such statements by the wounded persons at any time before death, and without requiring any evidence that they were made under the sense of immediately impending death, were admitted without hesitation (*Reg. v. Reason and Tranter*, 1 Strange's Reports, 499). The notion that such statements were only admissible if made under the sense of immediately impending death was of later origin, and may have arisen from misconception as to the effect of that decision, in which there was no allusion as to that as a necessary and precedent condition. Even when that notion had begun to be introduced, it was still recognized as law that it was sufficient to show apprehension of danger, and that this might be inferred either from the express declaration of the deceased or from the nature of the wound, and other circumstances (*Reg. v. John*, 1 East's Pleas of the Crown, 357); and it was only by degrees it was held to be necessary to show that the party believed he would not recover (*Reg. v. Tinkler*, 1 East's P. C., 354). It was

Reg. v. Bedingfield.

1879

only in the present century it was held that it was necessary to exclude all hope of recovery, and this was held only by single judges on circuit, who had no power to overrule previous decisions, or to alter the old law. Even then, too, it is to be observed that the old doctrine still was so far adhered to that it was held that statements by the deceased after a mortal wound may be received, though he did not express any apprehension as to approaching death (*Reg. v. Woodcock*, 1 Leach's C. C., 500). It is obvious that such statements are regarded as exceptions to the general rule, for it was said they are not admissible except on trials for murder, and when relating to the death (*Reg. v. Mead*, 2 B. & C., 605).

But in the older books and cases, as in East's Pleas of the Crown, such cases are spoken of only as instances and illustrations of a great general principle, that in any case the best evidence which in the nature of the case is obtainable is admissible, when the fact proved, as a statement of a party to the matter in hand is in the nature of original evidence, and that these statements are admissible on the ground of necessity. And that evidence should be required that the statement, even when made by a person in the very article of death, and unable to speak, was made under the sense of impending death, is a requirement only introduced into our criminal trials within the lives of living judges.

See next case and note.

[14 Cox's Criminal Cases, 341.]

CROWN COURT.

Norwich Winter Assizes, 1879.

(Before Cockburn, C.J.)

*REG. V. BEDINGFIELD (¹).

[341

Murder or suicide—Evidence—Statement of deceased—Dying declaration—Res gestæ.

On an indictment for murder, it appearing that the deceased, with her throat cut through, came suddenly out of a room, in which she left the prisoner, who also had his throat cut, and was speechless, and that she said something immediately after coming out of the room, and a few minutes before she died—the question being, murder or suicide.

Held, that her statement was not admissible, either as a dying declaration or as part of the *res gestæ*. *Sed quare*, whether in such a case the act is complete until death takes place, and whether, as to a dying declaration, it is not a question of fact, upon the surgical evidence, whether, from the nature of the wound, the person must not have been conscious of almost immediate death.

THE prisoner, Henry Bedingfield, was indicted for the murder of a woman at Ipswich.

Carlos Cooper and *Blofeld*, for the prosecution.

Simms Reeve, for the prisoner.

It appeared that the prisoner had relations with the deceased woman, and had conceived a violent resentment against her on account of her refusing him something he very much desired, and also as appearing to wish to put an end to these relations; he had uttered violent threats against her, and had distinctly threatened to kill her by cutting her throat. She carried on the business of a laundress, with two women as assistants, the prisoner living a little distance

(¹) Reported by W. A. FINLASON, Esq., Barrister-at-Law.

1879

Reg. v. Bedingfield.

from her. On the night before the day on which the act in question occurred, the deceased, from something that had 342] been said, entertained apprehensions about *him, and desired a policeman to keep his eye on her house, and he being near at ten at night heard the voice of a man in great anger. Early next morning, earlier than he had ever been there before, he came to her house, and they were together in a room some time. He went out, and she was found by one of the assistants lying senseless on the floor, her head resting on a footstool. He went to a spirit shop and bought some spirits, which he took to the house, and went again into the room where she was, both the assistants being at that time in the yard. In a minute or two the deceased came suddenly out of the house towards the women with her throat cut, and on meeting one of them she said something, pointing backwards to the house. In a few minutes she was dead. In the course of the opening speech on the part of the prosecution it was proposed to state what she said. It was objected on the part of the prisoner that it was not admissible, and

COCKBURN, C.J., said he had carefully considered the question and was clear that it could not be admitted (1), and therefore ought not to be stated, as it might have a fatal effect. I regret, he said, that according to the law of England, any statement made by the deceased should not be admissible. Then could it be admissible (2) having been made in the absence of the prisoner, as part of the *res gestæ*, but it is not so admissible, for it was not part of anything done, or something said while something was being done, but something said after something done. It was not as if, while being in the room, and while the act was being done, she had said something which was heard.

Counsel for the prosecution consequently did not state what the deceased said, but said they should tender it in evidence, and accordingly, when the witness was called—one of the assistants who heard the statement—she was first asked as to the circumstances, and stated that “the deceased came out of the house bleeding very much at the

(1) *Quære*, whether it could be properly admitted, except upon the evidence especially as to the nature of the wound, the time of death, and other circumstances showing whether she must not have been conscious of death—circumstances probably not appearing on the depositions.

(2) Apparently the Lord Chief Jus-

tice had not in his mind the possible admissibility of the statement as a dying declaration, which would depend (in the absence of express evidence) on the evidence of the surgeon as to the nature of the wound and the probable state of the deceased (See *Reg. v. Morgan, ante*).

throat, and seeming very much frightened," and then said something, and died in ten minutes⁽¹⁾.

It was then proposed to prove what she said, but

COCKBURN, C.J., said it was not admissible. Anything, he said, uttered by the deceased at the time the act was being done would be admissible, as, for instance, if she had been heard to say something, as "Don't, Harry!" But here it was something stated by *her after it was all [343 over, whatever it was, and after the act was completed.

It was submitted, on the part of the prosecution, that the statement was admissible as a dying declaration, the case to be proved being that the woman's throat was cut completely and the artery severed, so that she was dying, and was actually dead in a few minutes; but

COCKBURN, C.J., said the statement was not admissible as a dying declaration, because it did not appear that the woman was aware that she was dying⁽²⁾.

(1) The question whether these circumstances were not sufficient, at all events coupled with the evidence subsequently given by the surgeon as to the nature of the wound and its probable effect on the system, and her actual death in a few minutes, to show that she must have been under the sense of impending death—was not much argued—the Lord Chief Justice having already intimated that his mind was made up.

(2) At the era of the Revolution it was not doubted that the declarations of the deceased, made after the fatal stroke, were admissible in evidence, apparently without requiring any other evidence that the person must have known he was dying beyond the fact that he was dying and was speedily dead. Thus on a trial for murder, where the deceased had received nine wounds with a sword, and was dying, the counsel for the prosecution offered to give in evidence several declarations made by the deceased on his death bed, whereby he charged the prisoners with having barbarously murdered him; and the court, without hesitation, let in the evidence; upon which they called the clergyman who attended the deceased, and who swore that being desired by some friends to press the deceased to say what provocation he had given them to use him in that manner (with repeatedly stabbing him), he declared, as a dying man, that he gave no provocation, but that they bar-

barously murdered him (1 Strange, 449), subsequently, however, admitting that he had struck one of them with a small cane, which, of course, would be too slight a provocation to excuse not merely a single wound with a deadly weapon, but repeated, barbarous, and murderous wounds, repeated not less than nine times, running him through the body over and over again, evidently with murderous intent. The mere fact that the party said he was dying or described himself as dying, would, of course, be immaterial if, in fact, he was not dying and did not die for some time; and on the other hand if from the event it appears that he was dying, and from the nature of the wounds it was manifest that he must have felt himself dying, the statement is to be regarded rightly as a dying declaration, whether or not the person described himself as dying; and there are probably no modes of violent death in which a few minutes before death the party does not feel that he is dying, and certainly it is difficult to conceive a person dying a violent death from some mode of murder who must not so feel within a few minutes of death. Hence the doctrine on the subject, settled in the middle of the last century, was, that it may depend on the nature of the wound or cause of death, and that from this alone it may be inferred, without further or express evidence, that the party making the dec-

1879

Reg. v. Bedingfield.

344] *It was urged that the woman must have known it, as she was actually dying at the time, but

COCKBURN, C.J., said that though she might have known it if she had had time for reflection, here that was not so, for at the time she made the statement she had no time to consider and reflect that she was dying; there is no evidence to show that she knew it, and I cannot presume it (¹). There is nothing to show that she was under the sense of impending death, so the statement is not admissible as a dying declaration.

The surgeon being called stated that the wound was from three to four inches in length, completely severing the trachea or windpipe, severing the jugular vein and the thyroid arteries. It could not be said to have been suicide, for the strength would wholly fail after the trachea was severed, which was about the centre of the wound, and the wound deepened from the trachea towards the right, the deepest part of it being beyond the trachea, so that the woman's throat must have been cut right through.

The statement of the deceased, however, having been twice rejected, though it was offered and rejected before the surgeon was examined, who thus described the nature of the wound, necessarily mortal in a few minutes, and the woman in fact dying in about ten minutes, not speaking again; the statement was not tendered again upon this evidence as

laration must have known that he was dying (East's Pleas of the Crown, vol. 1, p. 357). The apprehension of danger may appear either from the express declaration of the deceased at the time, or may be inferred from the nature of the wound, the state of the deceased, or other circumstances indicating it. (*Ibid.*) And though, as a learned judge once said, some of the recent decisions on the question have gone to the extent not only of over-scrupulousness but of superstition, their general scope and effect is in accordance with the old doctrine. Thus, per Patteson, J.: "It is not necessary to prove by expressions of the deceased that he was in apprehension of almost immediate death; but the judge will consider from all the circumstances whether the deceased had or had not any hope of recovery (*R. v. Bonner*, 6 C. & P., 386). Any decisions apparently contrary are in cases in which statements of the deceased themselves raised doubts from their ambiguity as to whether the deceased thought he was

dying or had a hope of recovery. But the old doctrine that the nature of the wound may be sufficient without any express evidence was laid down by Erle, C.J., in a case of a mortal wound by shooting (*R. v. Cleary*, 2 Fos. & Fin., 853). In a case exactly like the present, tried before Denman, J., at Maidstone Lent Assizes, 1875 (*ante*, p. 337), the case of a soldier whose throat had been cut by a comrade, and who could not speak, and had just strength to write his name before he died, the learned judge after consulting Cockburn, C.J., did not doubt the statement was admissible, though, from a misconception of the effect of the ruling of Erle, C.J., in *Reg. v. Cleary*, he said he should, if the evidence was given, reserve the point, and, as there was abundant evidence without it, it was not pressed, and the prisoner was convicted and executed.

(¹) The question whether on such evidence the woman must not have known she was dying was not discussed and considered.

a dying declaration, nor was the surgeon asked, as a matter of skill and science, whether from the nature of the wound and the sense of approaching death, the woman must not have felt and known that she was dying (').

The defence set up by the prisoner being that the woman had first cut his throat and then her own with a razor she had borrowed from him professedly for another purpose, a curious question of circumstantial evidence arose as to whether this was the truth of the case, or the converse view set up by the prosecution that the prisoner had first cut the woman's throat and then his own. The statement made by him would, therefore, have been very material, and its rejection, as it turned out, nearly caused a miscarriage of justice. The doubt of the prisoner's guilt was indeed removed by the fact that the deceased ran out to make complaint or outcry, and the fact that the razor was found under his body, and under his hand,—almost in his hand—for the marks of his fingers were upon it, and it was evident that he had *held it in his hand, and that his [345 hand had only just relaxed its grasp with the weakness caused by loss of blood.

COCKBURN, C.J., in summing up the case to the jury, pressed both these facts upon their attention, especially the first, pointing out that it was the deceased woman, not the prisoner, who ran out, as though to make outcry or complaint (*).

Verdict, Guilty; Sentence, Death ().*

(1) In the case of *R. v. Cleary* (2 Fos. & Fin., 853) Erle, C.J., asked as to what the deceased said, and finding that what he said showed that he did not think he should die, he then said he could not, in the face of that evidence, presume from the nature of the wound (a shot wound through the chest) that he knew he was dying. But here, there being nothing to the contrary, the sense of impending death might be inferred from the nature of the wound itself as showing that the woman must have felt she was dying; at all events, the surgeon might have been of that opinion, and it is a question of fact, and to some extent one for skill and experience.

(2) Thus, curiously enough, making indirect use of the very piece of evidence formally rejected, but which could not virtually be excluded; for it was of course necessarily in evidence that the woman ran out and said some-

thing, pointing to the house where the prisoner was, and no one could doubt that she came out to make complaint or outcry.

(3) There was a strong movement in favor of the prisoner, on the ground that the woman's statement had been rejected, and that it might have been in his favor, or that its falsehood might have been shown; and if the circumstances had been less conclusive it is possible the movement might have been successful. The prisoner, however, was executed; but there was considerable discussion on account of the rejection of the evidence, and it must not be presumed that the question should be discussed upon the supposition that the statement is inimical to the accused, for, supposing it to be in his favor, the objection, if valid, would equally apply. In the present case the words sworn to on the depositions were, "See what Harry has done!"

which, as the Lord Chief Justice said, would probably have been fatal to the prisoner; but suppose they had been, "See what he has driven me to!" they would have been sufficient, probably, to secure an acquittal. And it was impossible to say what on cross-examination the words might have appeared to be. Mr. Pitt Taylor, the author of the well known Treatise on the Law of Evidence, publicly impugned this ruling, and published a letter in the *Times*, pointing out that it was contrary to the doctrine laid down in decided cases, and that what was said by a person on the instant, and in consequence of something first done to her might partly be considered as part of the *res gesta*, as much so as if uttered an instant before, while it was being done. And a barrister present at the trial also wrote, pointing out that according to the doctrine laid down nearly a century ago, and not at all impugned in *Reg. v. Cleary*, the statement was clearly ad-

missible as a dying declaration, as the natural and irresistible inference was that the woman must have felt and known she was dying. Cockburn, C.J. published a pamphlet in answer, in which he contended that as to a dying declaration it was for him to decide whether it was made under the sense of impending death, and that as to *res gesta* the "transaction" was completed. Mr. Pitt Taylor replied in a pamphlet upholding his original opinion. In fairness to the Lord Chief Justice, it should be stated that certainly the ruling of Erle, C.J., in *Reg. v. Cleary*, had been understood, or misunderstood, as adverse to the reception of such a statement, and he was, as he said, apprehensive of the risk of a failure of justice if the evidence was admitted, and held admissible. But that was a very different case, and in that case Erle, C.J., *heard the evidence*, and so did Denman, J., in *Reg. v. Morgan*, *ante*, p. 387.

See last case; *Reg. v. Steele*, 2 Eng. Rep., 221; *Reg. v. Thompson*, 14 id., 685; Arch. Cr. Pl. and Pr. (17th Eng. ed.), 221-3; 1 id. (8th Am. ed.), 428 *et seq.*; Best on Ev. (5th Eng. ed.), 637 *et seq.*; 3 Burn's Just. (80th ed.), tit. Ev., p. 42; 1 East's Pl. Cr., 354; 1 Gabb. Cr. L., 508; Roscoe's Cr. Ev. (7th Am. ed.), 32; Whart. Cr. Ev., § 276 *et seq.*; Whart. on Hom. (2d ed.), § 742 *et seq.*; Forum, vol. 1, p. xiv; 1 Greenl. Ev., § 156 *et seq.*; 8 Russ. Cr. (9th Am. ed.), 250 *et seq.*; 3 id. (5th Eng. ed.), 354 *et seq.*; 1 Taylor Ev. (7th ed.), § 716 *et seq.*; 1 Month. West. Jur., 12 *et seq.*; 2 Bennett & Heard's Lead. Cr. Cas. (2d ed.), 397 *et seq.*

The dying declarations of a person who when he makes them expects to die, respecting the circumstances under which he received an injury, are admissible in prosecutions for killing the person making the declarations, in murder or manslaughter, under the following conditions:

1. They must have been made by the deceased under the sense of impending dissolution; it must be satisfactorily proved that the deceased, at the time of making them, was conscious of the danger, and had given up all hope of recovery.

In the following cases such declarations were held to be admissible:

Alabama: *Johnson v. State*, 47 Ala., 9; *Faire v. State*, 58 id., 74.

California: *People v. Lee*, 17 Cal., 79; *People v. Sow*, 51 id., 597.

Canada, Upper: *Reg. v. Smith*, 23 U. C. Com. Pl., 312; *Reg. v. Sparham*, 25 id., 143.

English: *Reg. v. Forester*, 10 Cox's Cr. Cas., 368, 4 Post. & Finl., 857; *Reg. v. Bernadotti*, 11 Cox's Cr. Cas., 316.

Georgia: *Jackson v. State*, 56 Geo., 235.

Illinois: *Barnett v. People*, 54 Ill., 325.

Indiana: *Watson v. State*, 63 Ind., 548.

Iowa: *State v. Elliott*, 45 Iowa, 486.

Ireland: *Rex v. Campbell*, 1 Crawf. & Dix., 150.

Kansas: *State v. Wilson*, 24 Kans., 189.

Louisiana: *State v. Spencer*, 30 La. Ann., 362; *State v. Hannah*, 10 id., 121.

Massachusetts: *Com. v. Haney*, 127 Mass., 455.

Mississippi: *McDaniel v. State*, 1 Morris's St. Cas., 336.

Missouri: *State v. Draper*, 65 Mo., 335; *State v. Kilgore*, 70 id., 546.

Nebraska: *Rakes v. People*, 2 Neb., 157.

New York: *Brotherton v. People*, 75 N. Y., 159; *Hackett v. People*, 54

Barb., 370; *People v. Green*, 1 Park., 11; *People v. Grunzie*, Id., 299; *People v. Anderson*, 2 Wheeler's Cr. Cas., 390; *Wilson v. Borein*, 15 Johns., 286.

North Carolina: *State v. Blackburn*, 80 N. C., 474.

Oregon: *State v. Garrand*, 5 Oregon, 216.

Pennsylvania: *Com. v. Britton*, 1 Leg. Gaz. Rep., 513; *Small v. Com.*, 91 Penn. St., 304, 21 Alb. L. J., 216.

Tennessee: *Stewart v. State*, 2 Lea, 598.

Texas: *Roberts v. State*, 5 Tex. App., 141.

Vermont: *State v. Patterson*, 45 Verm., 308, 12 Am. R., 200, 212 note.

Virginia: *Swisher v. Com.*, 26 Gratt., 963.

In the following not to be:

Alabama: *Walker v. State*, 52 Ala., 192; *May v. State*, 55 Ala., 89; *Matter of Nettles*, 58 Ala., 268.

California: *People v. Ah Dat*, 49 Cal., 652; *People v. Hogdon*, 55 Cal., 72, 5 Pacific Coast L. J., 501.

Delaware: *State v. Buchanan*, 1 Houst. Cr. Cas., 79.

English: *Reg. v. Reany*, 7 Cox's Cr. Cas., 209; *Reg. v. Smith*, 10 id., 82, Leigh & Cave, 607; *Reg. v. Jenkins*, 11 Cox's C. C., 250, L. R., 1 C. C. Res., 187; *Reg. v. Mackay*, 11 Cox's Cr. Cas., 148.

Illinois: *Tracy v. People*, 97 Ills., 102.

Indiana: *Morgan v. State*, 31 Ind., 194.

Kansas: *State v. Medlicott*, 9 Kans., 257, 282 *et seq.*; *State v. Bohan*, 15 id., 407.

Kentucky: *Lieber v. Com.*, 9 Bush, 11.

Massachusetts: *Com. v. Roberts*, 108 Mass., 296; *Com. v. Dunan*, 128 id., 423.

Missouri: *State v. McCannon*, 51 Mo., 160.

New York: *People v. Williams*, 3 Abb. Dec., 596; *People v. Perry*, 8 Abb. (N.S.), 28.

See *McFarland's Case*, 8 Abb. (N.S.), 58.

Texas: *Edmonson v. State*, 41 Tex., 496.

If dying declarations are made at a time when deceased was conscious of impending death, and had no hopes of recovery, a hope subsequently entertained will not affect their admissibility: *State v. Kilgore*, 70 Mo., 546.

28 ENG. REP.

The declarations are admissible though deceased apparently desired to say more: *State v. Giroux*, 26 La. Ann., 582.

Dying declarations of the deceased cannot be excluded as evidence because deceased refused to answer further questions, saying he was "a dying man:" *People v. Sow*, 51 Cal., 597.

At common law, dying declarations are not admissible in an indictment for abortion: *People v. Davis*, 56 N. Y., 95; *Reg. v. Hind*, 8 Cox's Cr. Cas., 300, Bell's Cr. Cases, 253.

See *Com. v. Grempert*, 6 Luz. Leg. Reg., 187; *State v. Dickinson*, 41 Wisc., 299; *Reg. v. Sparham*, 25 U. C. Com. Pl., 143.

Otherwise, by statute in New York, Laws 1875, chap. 352, p. 337.

Such declarations by the person whose name is claimed to have been forged, have been held to be admissible in behalf of a defendant on his trial for forgery: *People v. Blakely*, 4 Park. Cr. R., 176.

On an indictment against a prisoner for the murder of A. by poison, which was also taken by B., who died in consequence, it has been held in England, Louisiana and in South Carolina that B.'s declarations were admissible: *Rex v. Baker*, 2 Moody & Rob., 53; *State v. Terrill*, 12 Richardson (S.C.), 321; *State v. Wilson*, 23 La. Ann., 558.

Contra, and we think the better doctrine: *State v. Bohan*, 15 Kans., 407, 417-9; *State v. Westfall*, 49 Iowa, 328.

So when husband and wife were killed by beating, held that on a trial for murdering the husband, declarations of the wife were inadmissible: *Brown v. Com.*, 78 Penn. St. Rep., 321, 328.

See *Brown v. Com.*, 76 Penn. St. R., 319, 337.

The state of the deceased's mind may be judged from the circumstances:

Alabama: *Johnson v. State*, 47 Ala., 9; *May v. State*, 55 id., 39.

English: *Rex v. Spilsbury*, 7 Car. & P., 187.

Georgia: *Jackson v. State*, 56 Geo., 235.

Indiana: *Morgan v. State*, 31 Ind., 194.

Kansas: *State v. Wilson*, 24 Kans., 189.

75

Mississippi: *McDaniel v. State*, 1 Morris's St. Cas., 386.

Nebraska: *Rakes v. People*, 2 Neb., 157.

Pennsylvania: *Com. v. Britton*, 1 Leg. Gaz. R., 513.

The length of time which elapses between the declaration and death furnishes no rule for the rejection or the admission of the testimony:

English: *Reg. v. Bernadotti*, 11 Cox's Cr. Cas., 316.

Georgia: *Jackson v. State*, 56 Ga., 235.

Indiana: *Jones v. State*, 71 Ind., 66.

Nebraska: *Rakes v. People*, 2 Neb., 157.

Declarations, in order to be admissible, must be of *facts*, and not of conclusions or opinions of the party making them:

Georgia: *Rattree v. State*, 53 Geo., 570.

Kentucky: *Collins v. Com.*, 12 Bush, 271.

Missouri: *State v. Draper*, 65 Mo., 335.

New York: *Shaw v. People*, 3 Hun, 272, 5 T. & C., 439.

North Carolina: *State v. Williams*, 77 N. C., 12.

Ohio: *Moe v. State*, 20 Ohio St. R., 460.

Texas: *Roberts v. State*, 5 Tex. App. R., 141.

It seems that, upon the trial of an indictment for murder, declarations of the deceased made while *in extremis*, which are not statements of fact which a living witness would not have been permitted to testify to, but are merely expressions of belief and suspicions, are not competent evidence: *People v. Shaw*, 63 N. Y., 87, 40 (But see S. C., below, 8 Hun, 272, 5 T. & C., 439); *State v. Draper*, 65 Mo., 335; *Roberts v. State*, 5 Tex. App., 141; *State v. Williams*, 77 N. C., 12.

See also *Field v. State*, 57 Miss., 474; *Brotherton v. People*, 75 N. Y., 159.

Declarations as to past events are not admissible. They must relate to the immediate transactions which led to the death:

Illinois: *Weyrich v. People*, 89 Ills., 90.

Indiana: *Jones v. State*, 71 Ind., 66.

Kentucky: *Lieber v. Com.*, 9 Bush, 11.

New York: *Hackett v. People*, 54 Barb., 370.

The circumstances of the death must be the subject of the declarations, and are restricted to the circumstances immediately attending the act and forming a part of the *res gesta*: *Johnson v. State*, 47 Ala., 9; *Walker v. State*, 52 id., 192; *Rattree v. State*, 53 Geo., 570; *Luby v. Com.*, 12 Bush (Ky.), 1; *Collins v. Com.*, id., 271; *State v. Draper*, 65 Mo., 335; *Weyrich v. People*, 89 Ills., 90; *Jones v. State*, 71 Ind., 66; *Faire v. State*, 58 Ala., 74; *West v. State*, 7 Tex. App., 150.

It is hard to die by the hand of another, not admissible: *Crookham v. State*, 5 West. Va., 510.

Nor as to who fired shot when question is which of two persons did it: *Wright v. State*, 41 Tex., 246.

Nor as to the state of feeling between defendant and deceased: *Ben v. State*, 37 Ala., 103, *Shepherd's Sel. Cas.*, 9.

So, "Oh, Aleck, what have we done; I shall die": *People v. Olmsted*, 30 Mich., 431.

So that defendant was not to blame, and the injuries were the result of an accident: *Com. v. Dunan*, 128 Mass., 422.

So it was E. W. who shot me, though I did not see him: *State v. Williams*, 77 N. C., 12.

"L. R. killed me for nothing," has been held to be the statement of a fact beyond opinion, and to be admissible: *Roberts v. State*, 5 Tex. App., 141.

Dying declarations are only admitted on the ground of necessity, and to prevent the effect of a party destroying, by an act of violence, the only one who could testify against him and thus escape punishment; but in this class of cases it must appear that the deceased was the only witness of the transaction. Where disinterested and unsuspected witnesses are present, the rule does not apply: *Stewart v. State*, 2 Lea, 598.

Though dying declarations are admissible an *ante mortem* statement written down by another person and not read over to the deceased, is not, *per se*, admissible as a dying declaration, though it may be used by the writer to refresh his recollection as a witness: *State v. Fraunburg*, 40 Iowa, 555.

Where deceased makes dying declarations by signs and writing, they are admissible.

Where dying declarations are communicated by signs to one and reduced to writing by another, but afterwards read over to and signed by the deceased, who said they were correct, such written statement is competent evidence to go to a jury: *Jones v. State*, 71 Ind., 68.

At the trial of an indictment for murder, certain declarations of the deceased, which were reduced to writing by a trial justice, and signed and sworn to by the deceased about one hour after the fatal wound was given, and which, the next day, within about an hour of death when he was conscious of his hopeless condition, in speaking to his physician, said that he intended these to be considered as his dying declarations, were properly received in evidence: *State v. McEvoy*, 9 S. C. (N.S.), 208.

The degree of weight which shall be given to dying declarations is solely for the jury: *Walker v. State*, 37 Tex., 386; *Walker v. State*, 42 id., 360.

Where dying declarations are admitted, a statement of the deceased made at another time, which is neither a dying declaration nor a part of the *res gesta*, is not admissible to impeach such declarations: *Moe v. State*, 20 Ohio St. Rep., 460; *Weyrich v. People*, 69 Ill., 90.

Dying declarations of a deceased person cannot be rejected as evidence on account of his religious belief: *People v. Sow*, 51 Cal., 597; *State v. Elliott*, 45 Iowa, 486.

Evidence of the prevailing religious belief of the district where deceased was born, is inadmissible: *People v. Sow*, 51 Cal., 597.

Proof that deceased was a materialist, is admissible for the purpose of assailing the credibility of the statement of deceased and lessening the weight of his dying declarations: *State v. Elliott*, 45 Iowa, 486.

Defendant may show that the deceased, in making the statements, was in a reckless, irreverent state of mind, and entertained feelings of malice and hostility towards the accused, and proof of indulgence in profane language at or about the time of making the statement is clearly competent for that purpose: *Tracy v. People*, 97 Ill., 102.

It has been held in North Carolina, but we doubt the soundness of the case, that where there is evidence tending to destroy the effect of such declarations, it is competent for the state to corroborate them by showing that deceased made similar declarations a few minutes after the fight, though it did not appear that he was then under the apprehension of immediate death: *State v. Blackburn*, 80 N. C., 474.

[14 Cox's Criminal Cases, 346.]

CROWN COURT.

Maidstone Winter Assizes, 1879.

(Before Cockburn, C.J.)

*REG. V. WESTON (').

[346]

Murder or manslaughter—Death caused by shot from firearm—Evidence of self-defence—Admissibility of prisoner's statement by counsel—Justification—Danger of violence, or reasonable apprehension of it.

On an indictment for murder, the death having been caused by shot from a gun in the hands of the prisoner, evidence of former threats by deceased of deadly violence, with words and circumstances on the occasion in question likely to provoke similar threats, received as evidence of danger to life, or serious violence or reasonable apprehension of it, on the occasion, such as might excuse or justify recourse to a loaded firearm in self-defence.

(¹) Reported by W. F. FINLASON, Esq., Barrister-at-Law.

1879

Reg. v. Weston.

Prisoner's counsel allowed to make a statement on the part of the prisoner to show that the trigger of the gun was pulled without the intention of firing it.

The use of such a weapon, even against an unarmed man, may be excused or justified not only by necessity for defence against death or serious injury, but the reasonable apprehension of it.

But in the absence of such necessity, if it is resorted to, and is fired even accidentally, it is manslaughter; and the jury having found that there was no such necessity, but that the gun, being levelled at the deceased with no intention of discharging it, went off by accident:

Held, that the prisoner was guilty of manslaughter.

THE prisoner was indicted for the murder of one Drewry, at Maidstone, on the 2d day of September last.

Prentice, Q.C., and *Croft*, for the prosecution.

Kingsford and *Slade Butler*, for the prisoner.

The prisoner, who was a volunteer, had, five years before the occasion in question, lodged with the deceased, who was married, and had several children. Four years before, the [347] deceased had *to be removed to an asylum, being affected by a form of melancholy monomania called "syphilitic mania," arising, as the medical man stated, from a delusion that he was suffering from syphilis, and not leading to violence, but producing an impression that he was not fit to cohabit with his wife. On his liberation from the asylum, after the lapse of four months, he resumed cohabitation; but his delusion returned, and he was confined again for eleven months. During this period the prisoner had become criminally intimate with the wife, who had a child by him; and when her husband was released he did not cohabit with her, and expressed great anger about the child, and uttered threats against them. He again relapsed into his monomania, and was again sent to the asylum, where he remained eight months, coming out in August. At this time his wife was living in a house in Woollett street, Maidstone, which had been taken during his confinement in the name of Weston, the prisoner, who contributed to her support, he himself, however, ostensibly living at another place in Maidstone, and the deceased having his meals at the house where his wife lived, though he slept elsewhere, not far off. It appeared that there had been an agreement or understanding between the two men that neither of them should cohabit with the wife of deceased; for the prisoner had insisted on his observing an agreement not to molest her, and the deceased had expressed anger on finding the prisoner at the house. The prisoner had written to the wife a letter dated at the other house, where he was supposed to reside, in these terms:

"It appears Drewry keeps paying you visits at Woollett

street, the premises being near. You must know that I cannot think of allowing you any more money unless they are discontinued altogether. You must therefore see to it. That was the agreement; that he would leave you without molesting you in any way whatever. You will please let me know what you intend doing at your earliest convenience."

It appeared that this letter was written to be shown to the deceased, as the wife said he could not read, and she did in fact show it to him, and he told her to take no notice of it, and continued to have his meals at her house as before. Being asked if there was any agreement that she should live with Weston, she said she was not aware of any, and it will be noticed that the prisoner wrote from another house. On the Friday before the occasion in question (she stated) her husband, the deceased, coming to her house, found Weston, the prisoner, sitting there, and was angry, and uttered threats against him, and against them both, threatening to take their lives; and on a previous occasion he had, finding Weston there, used, she said, similar language, threatening to lie in wait for him and kill him, and there had been other similar threats on such occasions, but no actual violence was used. It appeared that on one occasion she had warned the prisoner, in consequence of something, not to use his weapon, for it was stated, it will be seen, by one of the witnesses that, on finding her husband shot, she said to the *prisoner, "I told you not to do it!" and, though [348 she did not, she said, recollect this, she did not deny it, and she said the prisoner had said, "I will not be the first to lift my hand, but if Drewry should strike me, I must take my own part." It appeared that on the day in question the prisoner's rifle was in the front room of the house where the wife of deceased, Mrs. Drewry, lived, and that it was loaded; and she stated it was kept there, and it appeared that the box of service cartridges was upstairs locked. She stated that she did not know whether he was in the habit of keeping the rifle loaded, and she also stated that she had seen him practising loading and unloading with a cartridge. She did not state that she had seen him doing so that day, nor when she saw him doing so last, nor was there any evidence beyond the prisoner's statement that he had been practising at the butts that day, but he so stated. She, however, stated that she had seen the rifle in the front room when she went out in the afternoon on the day in question. She stated her husband had been at the house as usual having

1879

Reg. v. Weston.

his meals, and she had gone out and returned; and about eight o'clock in the evening of the 2d day of September she was standing at her door, the prisoner having just left her to go to the public house a few doors higher up in the street, when her husband, the deceased, came up to her and spoke to her, asking her where she had been, &c. She at once moved to the door of her next-door neighbor, and, saying she wanted to speak to her, went in there, her husband saying angrily, "Oh, yes, you have some plan!" While she was talking with her neighbor, she heard, she said, some one in her house, who probably was the prisoner, returning with the beer; and it appeared that he must have locked the street door, for a minute later she said she found it locked, and it was opened to her by him from the inside. It appeared that he went through the house and out of the back door, probably—not finding Mrs. Drewry—in search of her; and it also appeared that the deceased had gone round by the side passage, by the side of the neighbor's house, and was round at the back door, by which way his wife could have got back into her house, for a few moments later the neighbor heard her back doorlatch raised, and heard the loud voices of two men in anger, and the neighbor, going to her back door, saw Weston, the prisoner, and Drewry, the deceased, standing there, close to each other, in the passage at the backs of the houses. She heard Drewry say to Weston, holding up his finger, "Continue to live with my wife," which may have been, "I find you continue to live with my wife," or, as the prisoner's counsel suggested, may have been a threat of violence, "If you continue to live with my wife," in which latter view, however, the threat would be future and conditional. The precise words, however, she did not hear, but it will be seen that the prisoner did not at the time suggest any violence, or threat of violence; and it was consistent with the evidence, as the voices of both were heard raised, that he might have said to Drewry, 349] *in accordance with the terms of his letter, that Drewry had no business there, and that Drewry might have answered, "I have a right to come if, or as, you continue to live with my wife," but the prisoner's counsel suggested that some threat of violence preceded the words, "continue to live with my wife." The witness stated that Weston ran quickly into Mrs. Drewry's house; he went so quickly, however, she said, that she did not actually see him enter the house, and the deceased followed her. She went back into her own house, and went through to her front door, and as she got to it, in a few seconds, she heard the report

of a gun, and, looking out, saw Mrs. Drewry, who had run out, trying to get in at her front door, which, however, was fastened from the inside; but being opened by the prisoner she went in and found in the back room her husband lying dead, his feet towards the front room, where the rifle was kept, his head backwards towards the cellar, the rifle leaning against the door between the two rooms. A witness stated that she said to the prisoner, "What have you done? I told you not to do it," and this she did not deny, although she said she "did not recollect it." When the police came they found the clothes of the deceased burning, showing that the weapon had been held close to his person, and the surgeon stated that, from the wound, he must have died on the instant. The prisoner said, "I did it; I had had some drink." He did not say anything of threat or violence, and the police saw no trace of a struggle; and as already stated, only a few seconds elapsed between the moment when the two men entered the house together, and the sound of the report, and the deceased appeared to have been shot in the back room, the rifle being kept in the front. The police stated that when the prisoner said he did it, she said to him, "Why did you do it? I know he had threatened you, but you had better have let him knock your head off than do it." The cartridge case found in the rifle was not one which could have been served out during the last year. When the prisoner was charged with shooting at and killing the deceased he made no answer at first; but then—according to the evidence of the police—said he had been at the rifle butts that day, and had expended all his service ammunition, and was allowed to purchase private ammunition; that he had the rifle in his hand and put a cap upon it, and the gun went off; but this, it was suggested by his counsel could not have meant a percussion cap, as it was not a percussion rifle, and that what he must have said was that as there was a snap-cap on he thought it would not go off, even when the trigger was pulled, and pulled the trigger under that notion, which was the defence now set up.

Evidence was given for the prosecution that though the prisoner, being a volunteer, was allowed to take his rifle home, he had no right to have ball cartridge there, and it did not appear that he was at drill that day. The gunsmith proved that the rifle seemed to have been used more than once since last cleaned.

Prentice, for the prosecution, pointed out that there was no *evidence of any struggle or violence, or even of [350 any menace of violence on the occasion; and that on the

contrary all the evidence tended to disprove it, for the police saw no signs of a struggle, and the prisoner did not suggest it at the time, and indeed there was no time for it, as the witness stated that only a few seconds intervened between her seeing the two men go into the house and her hearing the report of the gun; and he suggested that the prisoner, angry at seeing the deceased there, had gone quickly into his house into the front room, where his loaded rifle was, in order to use it against the deceased, and had met him in the back room and shot him dead with it.

COCKBURN, C.J., said he saw no evidence of it.

Prentice suggested that the fact that only a few seconds intervened between the men going into the house and the report of the gun, and the fact that the gun was kept in the front room, and that the deceased was shot in the back room, and that the gun was held so close to him as to set his clothes on fire, and that he must have fallen dead instantly on the spot, went to prove that the prisoner must have gone at once to the rifle, brought it into the back room, and there met the deceased and shot him dead without any struggle or violence; and even had there been any threat of violence, of which he said there was no evidence, and which therefore was never suggested, still, as the deceased was unarmed there was nothing to excuse the use of a deadly weapon, or to reduce the crime to manslaughter.

Kingsford, for the defence, regretted that he could not give the prisoner's account of the matter, upon which

COCKBURN, C.J., said he might do so, as the prisoner's counsel were in place of the prisoner, and entitled to say anything which he might say, for which he would be entitled to consideration and credence if consistent with the rest of the evidence. Upon this

Kingsford stated to the jury that the prisoner had been in the habit of practising loading and unloading his rifle with a cartridge, and had left the cartridge in it; that on this occasion the deceased had threatened him, that he had fled from apprehended violence, and that, forgetting that the rifle was loaded, he raised it against him, not intending to fire, but only to frighten him—the snap-cap being on—by the noise of uncocking the gun; that the deceased laid hold of the end of the frame, that in the struggle the “snap-cap” fell off, and that, pulling the trigger to snap the hammer again, the weapon went off.

COCKBURN, C.J., in summing up the case to the jury, adopted the view of the evidence which the prisoner's counsel had suggested, and enforced it strongly upon the jury,

reminding them of the previous threats of the deceased to kill the prisoner, and to lie in wait for him in order to do it, and telling them that he had no doubt the deceased had, on the occasion in question, entertained very violent feelings against the prisoner, who might naturally dread his violence, and he represented the prisoner as "flying from a man *enraged, infuriated, and mad," who had previously [351] threatened his life, and in all probability had done so on this occasion; and he told the jury that if, under such circumstances, the prisoner resorted to the gun in order to defend himself from serious violence, or under a reasonable apprehension of it, and so used it in necessary self-defence he would be justified. If, he said, the prisoner fired the gun at the deceased really in anger, or intending to take the opportunity to be rid of him on account of his wife, it would be murder; but if the prisoner resorted to the gun in self-defence, against serious violence or in the reasonable dread of it, it would be justifiable, and that even if there was not such violence, or ground for the reasonable apprehension of it, yet that if the conduct of the deceased naturally led him to apprehend it and deprived him of his self-control, or if an assault, though short of serious injury, was committed on the prisoner, then it would be manslaughter; and in conclusion he left to the jury these questions in writing:—

1. Was the discharge of the gun intentional or accidental?
- (a). If intentional, was it from ill-feeling to Drewry, or desire to get rid of him on account of his wife? in which case it would be murder.
- (b). If it was not so done, was it done by the prisoner in self-defence, and to protect himself from death or serious bodily injury intended towards him by the deceased; or (c), from the reasonable apprehension of it induced by the words and conduct of the deceased, though the latter may not, in fact, have intended death or serious injury?
- (d). If not so, was it done after an assault made by the deceased on the prisoner, though short of an assault calculated to kill or cause serious bodily injury? or (e), Was it done under such a degree of alarm and bewilderment of mind, caused by the conduct of the deceased, as to deprive the prisoner for the time of his reason and power of self-control? or (f), Was the effect of the language and conduct of the deceased such as to provoke the angry passions of the prisoner so as to deprive him of his reason and power of self-control?
2. If the discharge of the gun was accidental—in which case the prisoner cannot be convicted of murder, but may be of manslaughter—(a), was the gun levelled by the prisoner at the deceased in self-defence

against an attack of the deceased, endangering life or limb, or reasonably apprehended by the prisoner as likely to do so, in either of which cases the prisoner would be entitled to acquittal? or (b), was the gun levelled by the prisoner at the deceased unnecessarily under the circumstances, but without the intention of discharging it, in which case it would be manslaughter.

The jury found the prisoner guilty of manslaughter; and being asked on what view of the case they found the verdict, they said, on account of the deceased following the prisoner to his house, and the gun being fired so shortly afterwards that it might have been done in self-defence, or might have gone off accidentally.

COCKBURN, C.J., explained to them that this was indeterminate, *for that if it was fired in self-defence against serious violence intended by the deceased (1), he would be entitled to an absolute acquittal; and, repeating his direction, he desired them to reconsider their verdict, which they did.

The jury eventually returned this written finding: That the gun was levelled at the deceased unnecessarily under the circumstances, but without any intention of discharging it, and that it went off accidentally.

COCKBURN, C.J.: That would amount to a verdict of manslaughter. Do you intend that?

The jury: Yes.

COCKBURN, C.J.: On the ground that though the prisoner had no intention of discharging the gun, yet that his levelling it at the deceased was, under the circumstances, unnecessary?

The jury: Yes.

Verdict—Guilty of manslaughter. Sentence—Six months' imprisonment with hard labor.

(1) The direction was in writing, and, as here given, was copied from the writing. It was, therefore, carefully considered, and, on account of the experience of the Lord Chief Justice, is of importance. It must, however, be carefully understood as to the latter part of it with reference to such a state of facts as he supposed to exist, only a state of such extreme alarm arising from a sense of imminent danger to life, as quite deprived the prisoner of the power of reflection, and irresistibly—almost unconsciously—impelled him to pull the trigger. It must not be supposed that the Lord Chief Justice

intended to lay down anything contrary to the law laid down in many cases—that even a blow in self-defence will not excuse or even reduce to manslaughter the instant recourse to deadly murderous violence causing death. Thus Parke, B.: "If a person receives a blow and immediately revenges it with any instrument that he may happen to have in his hand, the offence will only be manslaughter, provided the blow is to be attributed to the passion of anger arising from that provocation. But the law requires two things: that there should be that provocation, and that the fatal blow

should be clearly traced to the influence of passion arising from that provocation. If you see that a person denotes by the manner in which he avenges a previous blow that he is not excited by a sudden transport of anger, but under the influence of that wicked disposition, that bad spirit which the law terms malice, in the definition of wilful murder, then the offence would not be manslaughter. And so if you find that before the stroke is given there is a determination to punish any man who gives a blow with such an instrument as the one which the prisoner used; because, if you are satisfied that before the blow was given the prisoner meant to give a wound with such an instrument, it is impossible to attribute

the giving such a wound to the passion of anger excited by the blow, and no man who was under proper feelings, none but a bad man of a wicked and cruel disposition, would really determine beforehand to resent a blow with such an instrument" (*Reg. v. Thomas*, 7 C. & P., 818-19). This, no doubt, was intended to be conveyed and implied in the direction with the present case, that if the prisoner intentionally fired the gun not from such alarm as suggested, but on account of ill-will, then the act was murder. The jury in their verdict negatived the state of alarm suggested, but also negatived intention, and found that the gun went off by accident.

[14 Cox's Criminal Cases, 856.]

NORTH EASTERN CIRCUIT.

Durham Autumn Assizes, 1879. Saturday, Nov. 1, 1879.

(Before Mr. Justice Bowen.)

*REG. V. MILLER and Others⁽¹⁾.

[356]

Unlawfully wounding—Conviction for misdemeanor on trial for felony—14 & 15 Vict. c. 19, s. 5.

The statute 14 & 15 Vict. c. 19, s. 5, only applies where the indictment alleges a felonious cutting, stabbing, or wounding.

Upon an indictment charging a felonious shooting with intent to do grievous bodily harm, and doing grievous bodily harm with intent to do grievous bodily harm, it is not competent for the jury to convict of unlawfully wounding.

JOHN MILLER, shooting gallery proprietor, Thomas Fordy, Michael Handley, and John Kelly, were charged with feloniously shooting at William Hogarth with intent to do him grievous bodily harm. The indictment further charged them with doing grievous bodily harm to the said William Hogarth with intent to do grievous bodily harm.

**T. C. Granger* prosecuted.

[357]

J. L. Walton defended Miller.

According to the case for the prosecution, late on Saturday night, after the public houses had been closed, a large crowd was assembled outside Miller's shooting gallery. The police dispersed the crowd, and the prosecutor and his brother, who were in company with a man called Graham, went away. Graham remained behind, and became engaged in a fight with one of the prisoners. Miller urged him to go away. Graham still refused, and one of the prisoners threatened to

⁽¹⁾ Reported by RICHARD LUCK, Esq., Barrister-at-Law.

1879

Reg. v. Miller.

shoot him if he did not go away. Graham dared him to do so, and made a snatch at the rifle which was pointed at him. The rifle (which apparently was not loaded with ball) was discharged, and the powder scorched him on the forehead. Miller then closed with him, and he was thrown to the ground. The prosecutor and his brother returned to the rescue, and were taking him away, when first the brother, and then the prosecutor, were shot down in quick succession at a distance of eight or nine yards from the van. They were carried home, and their wounds dressed, and the prosecutor was found to be suffering from two bullet wounds in the back, neither of which, however, were dangerous.

The prisoners were apprehended next morning, and upon being charged, Miller said, "We were bound to shoot to frighten the men, or they would have killed us, and broken the van in with stones. I did not expect that there was anything but powder in the rifles."

Fordy said, "I shot in self-defence. The men were throwing stones at the van."

Handley said, "I fired, but I did not expect there was anything but powder in the rifles."

Kelly said, "Yes, sir, I fired also."

For the defence a witness was called, who stated that the crowd attacked Miller and his van with stones; that Miller besought them to go away; and that the rifles were discharged in the air, simply to frighten away the crowd.

BOWEN, J., directed the jury that, if the prisoners knew the rifles were loaded, and fired with the intention of hitting, they would be guilty of the felony; if they fired recklessly, knowing the rifles were loaded, but without the intention of hitting, then they would be guilty of unlawfully wounding; and if they fired in the air, not knowing the rifles were loaded, simply to frighten away the crowd, then they must be acquitted altogether.

The jury found the prisoners guilty of unlawfully wounding under great provocation.

J. L. Walton submitted that upon the indictment presented to the jury it was not competent for them to find a verdict of unlawfully wounding. There was no charge of cutting, stabbing, or wounding alleged in the indictment, and the statute of 14 & 15 Vict. c. 19, s. 5, which, in certain cases, enabled a jury to convict for misdemeanor on a trial 358] for felony, did not apply. *The words of the statute were as follows: "If, upon the trial of any indictment for any felony, except murder or manslaughter, where the indictment shall allege that the defendant did cut, stab, or

wound any person, the jury shall be satisfied that the defendant is guilty of the cutting, stabbing, or wounding charged in such indictment, but are not satisfied that the defendant is guilty of the felony charged in such indictment, then and in every such case the jury may acquit the defendant of such felony, and find him guilty of unlawfully cutting, stabbing, or wounding, and thereupon such defendant shall be liable to be punished in the same manner as if he had been convicted upon an indictment for the misdemeanor of cutting, stabbing, or wounding." The defendants were simply charged with the felonious shooting, and with doing grievous bodily harm with intent to do grievous bodily harm, and nowhere was it alleged in the indictment that they had cut, stabbed, or wounded any person. The jury had found the prisoners not guilty of the felony with which they were charged in the indictment, and they must be acquitted.

BOWEN, J. (after looking at the indictment), observed that it appeared to him to be so framed as to omit the real charge of which, in his opinion, the prisoners were guilty; he would take time to consider.

Nov. 3. BOWEN, J., addressing the prisoners, said: The jury have found you not guilty of the offence with which you were charged in the indictment, but have found you guilty of unlawfully wounding. It has been submitted to me by your counsel that, upon this indictment, it is not competent for the jury to find you guilty of unlawfully wounding, since it is not alleged in the indictment preferred against you, that you did cut, stab, or wound the prosecutor. I have carefully considered the point, and I think that it is so, and you must all be discharged.

Discharged accordingly.

[14 Cox's Criminal Cases, 370.]

CROWN CASES RESERVED.

Saturday, November 22, 1879.

(Before Cockburn, C.J., Huddleston, B., Lindley, Manisty, and Hawkins, JJ.)

*REG. V. FULLAGAR (').

[370

Larceny Act—Fraudulent appropriation of trust money by solicitor—Direction in writing to apply money—Intrusted with "property" for safe custody—24 & 25 Vict. c. 95, ss. 75, 76.

Trust money had been invested on mortgage. The mortgage was paid off, and the money left in the hands of the family solicitor, who wrote to the person beneficially

(¹) Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

1879

Reg. v. Fullagar.

interested: "R.'s money was paid on Saturday, the 6th day of April—£2,500 and interest. . . . Let me know how you would like to have the £2,500 invested, whether in the funds or on mortgage. I can get you 4 per cent. on a good security, but not 371] more. More than 4 per cent. is not to be obtained upon such securities as trustees would be justified in investing." The answer was dated the 9th day of April: "Will consult G. at once about the money, and let you know. I do not wish it placed in the funds. I am very glad it is paid over, and hope it will be well secured this time." At or very near the date of these letters it was clear that the money had been fraudulently appropriated to his own use by the solicitor.

Held, that this was a fraudulent conversion to his own use of property intrusted to the solicitor for safe custody within sect. 76 of 24 & 25 Vict. c. 95.

Quære, whether the above letters amounted to a direction in writing to apply the money within sect. 75.

CASE reserved for the opinion of this court by Cockburn, C.J.

Lewis Greene Fullagar, a solicitor, was tried before me at the late assizes for the Winter Assize County No. 10, as appointed under an Order in Council of the 14th day of August, 1879, on an indictment framed under 24 & 25 Vict. c. 96, ss. 75 & 76, which charged, in a variety of forms, that, being the attorney and agent, and, having been by her intrusted with a sum of £2,500 to be invested on mortgage and for safe custody for the benefit of the persons interested in the same, he had fraudulently converted the money to his own use.

It is unnecessary to set out the indictment, which was of great length and prolixity. It may be taken that it set out the offence in every form. The only counts that need now be referred to are the 22d and 23d counts.

22d count: And the jurors aforesaid upon their oath aforesaid do further present that the said Lewis Greene Fullagar heretofore, to wit, on the 6th day of April, 1872, being an attorney and agent of the said Mary Mockett, and being solely intrusted by her with certain property, to wit, the sum of £2,500 of the moneys of the said Mary Mockett, for safe custody, did afterwards, to wit, on the said 6th day of April, A.D. 1872, at the parish aforesaid, in the county and winter assize county aforesaid, unlawfully, and with intent to defraud, convert, and appropriate the said sum of money to his own use and benefit, then being money of the said Mary Mockett, against the form of the statute in such case made and provided, and against the peace of our said Lady the Queen, her crown and dignity.

23d count: And the jurors aforesaid upon their oath aforesaid do further present that the said Lewis Greene Fullagar heretofore, to wit, on the 6th day of April, 1872, being an attorney and agent of the said Mary Mockett, James Walker Body, and Stephen Goldsmith, and being intrusted by them with certain of their property, to wit, the sum of £2,500 of

the moneys of the said Mary Mockett, James Walker Body, and Stephen Goldsmith, for safe custody, afterwards, to wit, on the said 6th day of April, in the year aforesaid, at the parish aforesaid, in the county and winter assize county *aforesaid, unlawfully, and with intent to defraud, [372 did convert and appropriate to his own use and benefit the said last mentioned sum of money, then being the property of the said Mary Mockett, James Walker Body, and Stephen Goldsmith, against the form of the statute in such case made and provided, and against the peace of our said Lady the Queen, her crown and dignity.

The only question to be considered is whether, upon the facts, the case came within the statute.

That the defendant had been intrusted with the money, and that he had fraudulently converted it to his own use, having, on his own admission, speculated with it, and lost it, was undoubted. But it becomes necessary to call attention to the manner in which the money first came into the hands of the defendant, and under what circumstances he disposed of it.

The money in question being part of the residuary estate of one William Martin, the father of the prosecutrix, had been bequeathed by him to trustees, and had been invested on mortgage; but the mortgage having been paid off by the mortgagor, the money had come into the hands of the defendant as the family solicitor and solicitor to the trust.

On receipt of the money, defendant wrote to the prosecutrix as follows:

“Lewes, 8th April, 1872.

“Dear Madam,—Mr. Ridge’s money was paid on Saturday last, 6th April—£2,500 and interest. I inclose a check for £97 18s. 4d., thus:

“One year’s interest due 6th April . . .	£100 0 0
less income tax . . .	2 10 0

97 10 0

“Error in former payments . . .	0 8 4
---------------------------------	-------

£97 18 4

“Let me know how you would like to have the £2,500 invested. Whether in the funds or on mortgage. I can get you 4 per cent. on a good security, but not more. More than 4 per cent. is not to be obtained upon such securities as trustees would be justified in investing.

“Yours faithfully, LEWIS G. FULLAGAR.

“Mrs. Mockett, Arlington.”

1879

Reg. v. Fullagar.

To which letter Mrs. Mockett sent the following reply :

“Grelhill’s Farm, Arlington, 9th April, 1872.

“L. G. Fullagar, Esq.

“Sir,—The check £97 18s. 4d. came safe to hand this morning, for which I am obliged. Will consult Mr. Goldsmith at once about the money, and let you know. I do not wish it placed in the funds. I am very glad it is paid over, and hope it will be well secured this time.

“Yours respectfully, MARY MOCKETT.”

The Mr. Goldsmith here referred to was till his death a trustee under the will, and a confidential friend of the prosecutrix, who had a beneficial interest, that is to say, a life estate, in the fund.

About a week or two later Mrs. Mockett saw the defendant at his office at Lewes, when he told her that he had placed the money on mortgage on a large estate at Worth, on a first mortgage; representing, in answer to a question put by her, that a deed which was lying on the table, but which she did not further look at, was the mortgage deed. All this was 373] wholly untrue; and the *money, as has already been stated, was applied by the defendant to his own purposes.

He paid the interest regularly from April, 1872, when the money came into his hands, till October, 1878, making from time to time excuses for not producing the mortgage deed, which was repeatedly asked for, till at last, another solicitor having been employed, and an order of a court of equity obtained for the delivery of the deeds, the defendant confessed the real state of the facts, and acknowledged that he had made away with the money.

Of the moral guilt of the defendant there could be no doubt; and I therefore directed a verdict of guilty, and sentenced the defendant to five years’ penal servitude; but, as I doubted whether, upon these facts, the case came within the first enactment of the statute (sect. 75) by reason of the absence of any affirmative written direction as to the application of the money, or within the second (sect. 76), by reason of the latter being, as I thought, applicable to securities alone and not to money, I respited execution of the sentence in order to take the opinion of this court as to whether the defendant could be held guilty under the statute in question.

A. E. COCKBURN, Nov. 6, 1879.

E. Clarke (Fulton with him), for the defendant: The 76th section of the 24 & 25 Vict. c. 76, enacts that: “Who-

soever being a banker, merchant, broker, attorney, or agent, and being instructed either solely or jointly with any other person, with the property of any other person for safe custody shall, with intent to defraud, sell, &c., or in any manner convert or appropriate the same, or any part thereof, to or for his own use or benefit, &c., shall be guilty of a misdemeanor." That section is not applicable to this case, for the evidence does not show that the defendant was intrusted with property for safe custody. It rather shows that he was intrusted with it for investment.

HUDDLESTON, B.: By sect. 1 the term "property shall include every description of real and personal property, money, debts," &c.

HAWKINS, J.: If you say the letters show that the defendant was intrusted with the money to invest on mortgage, then they amount to a direction in writing within sect. 75, and if they do not, then the money was intrusted to the defendant for safe custody within sect. 76, until Mrs. Mockett gave further instructions how it was to be dealt with.

Clarke: The indictment charges the defendant with having committed the offence on the 6th day of April, 1872, and Mrs. Mockett's letter is on the 9th day of April. The defendant may have had sufficient money to satisfy the claim at that date.

HUDDLESTON, B.: Does it make any difference when he committed the offence? The only two questions that arise under sect. 76 are, was the defendant intrusted with the money as an *attorney for safe custody, and did he [374 convert it to his own use, and the jury have found both questions in the affirmative.

Clarke: No doubt the jury must be taken to have found what they properly could find upon the facts to support the conviction, but the facts did not warrant the verdict. The facts were not sufficient according to *Reg. v. Tatlock* (2 Q. B. Div., 157; 13 Cox's C. C., 378). In his judgment in that case Cockburn, C.J., pointed out the kind of evidence necessary. He said: "Assuming such a case to be within the statute, it would be a question for the jury whether the defendant at the time the money was received intended to embezzle it. Possibly proof that a party receiving money under such circumstances was, and knew himself to be, hopelessly insolvent, and being aware that his account at his bankers' was heavily overdrawn, paid the money into the credit of his account, knowing that the effect of his so doing would be that it would be totally lost to the party entitled to it, might be sufficient evidence of an intention to

1880

Reg. v. Orman and Barber.

convert the proceeds to his own use, although under other circumstances the payment of the money into his bankers might have been perfectly legitimate. But the only evidence of insolvency in the present case was that two months after the receipt of the money the defendant filed a petition for liquidation. At the time he received it he may have been solvent."

H. Ivory, for the prosecution.

COCKBURN, C.J.: That case was upon sect. 75. In the present the evidence was clear, for within a week or a fortnight of her letter Mrs. Mockett called on the defendant, when he told her two lies, that he had invested the money on mortgage, and that the deed was lying on the table, and she in her evidence said she did not look at it, as she had not got her spectacles with her. Within a week of receiving the money he begins to concoct the fraud to conceal the fact of his having appropriated it to his own use. There can be no question that the case is within sect. 76.

HUDDLESTON, B.: I might have had doubts as to whether there was a sufficient direction in writing within sect. 75, but I have none as to the case being within section 76.

LINDLEY, J.: The case is clearly within sect. 76.

MANISTY and HAWKINS, JJ., concurred.

Conviction affirmed.

[14 Cox's Criminal Cases, 381.]

SUFFOLK ASSIZES.

Friday, February 13, 1880.

(Before Bramwell, L.J.)

381]

*REG. V. ORMAN AND BARBER.

Conspiracy—Purchase of goods without intention of paying for them—Agreement to do an act not in itself criminal—Conspiracy to do an "unlawful" act.

A. obtained goods on credit at B.'s suggestion, in order that A. might sell them to B. below their value, B. aiding A. as a referee, and giving him a character. The evidence was such that B. must have known that A. was getting the goods without any intention of paying for them:

Held, that B. was guilty of conspiring with A. to defraud.

MARIA ORMAN and Maria Barber, her mother, were indicted for that they did, together with one Edwin Thos. Groom, conspire together by divers false pretences and indirect means, and by fraudulent and artful devices, to obtain jewelry, clothes, and other goods from divers tradesmen carrying on business in the borough of Ipswich. (There

were twelve counts in the indictment, each naming a different tradesman from whom goods had been obtained.)

Poyser, for the prosecution.

Blofeld and *Frere*, for Orman.

Reeve and *Frere*, for Barber.

Poyser: The acts complained of would not amount to a crime in an individual, but an indictment would lie for conspiracy when they were the result of an agreement between two or more *persons. The evidence would show [382 that Groom obtained goods from the tradesmen with no intention to pay for them. The defendants were aware of this and were parties to his doing so. They arranged with him before he purchased, and suggested what articles he should get. This was an agreement to cheat. It was "a defrauding or endeavoring to defraud another of his known right by means of some artful device, contrary to the plain rules of common honesty," which was the definition of cheating in *Hawkins' Pleas of the Crown*. Cheating had ceased to be a crime in itself, but a combination to cheat is still indictable. "There can be no doubt that all conspiracies whatsoever wrongfully to prejudice a third person are highly criminal at common law" (1 *Hawkins' Pleas of the Crown*, cap. 72, s. 2). The act need not be criminal in itself, for the conspiracy was the gist of the offence. This was so held in the case of a knock-out at an auction (*Levi v. Levi*, 6 C. & P., 239), and in the case of a mock auction (*Reg. v. Lewis*, 11 Cox's C. C., 404). An agreement to misrepresent the solvency of a bank has been held to be criminal (*Reg. v. Brown and others*, 7 Cox's C. C., 442; 1 F. & F., 213); and in one of the latest cases (*Reg. v. Warburton*, L. Rep., 1 C. C., 274; 11 Cox's C. C., 584; 40 L. J., 22, M. C.), where one of two partners was charged with conspiring with a third person to defraud the other partner, Cockburn, C. J., says: "It is sufficient to constitute a conspiracy if two or more persons combine by fraud and false pretences to injure another. It is not necessary, in order to constitute a conspiracy, that the acts agreed to be done should be acts which, if done, would be criminal. It is enough if the acts agreed to be done, although not criminal, are wrongful, i.e., amount to a civil wrong." [BRAMWELL, L.J.: There is also the Tailors' case, which referred to "picketing," which might be cited (*Reg. v. Druitt*, 10 Cox's C. C., 592; 16 L. T. Rep. (N.S.), 855).]

The facts of the case were then dealt with at length, and evidence was called for the prosecution.

Edwin Thomas Groom, in answer to questions, stated that

he had known the prisoners sixteen years, and had first met them at another public house in Ipswich, where he used to send beef, bacon, and grocery. They afterwards, he said, went to the Cardinal's Hat, which was kept by the older prisoner, the other, her daughter, living there. He used to live there from morning to night, and used to order goods, which, at Barber's suggestion, were on printed forms, they suggesting the articles to be ordered, and he then sent for them by his little boy to their house. Shown the order for the rings, he said it was written at the suggestion of the prisoners. First he got a pair of gold earrings, valued at £1, one of which he sold to Barber, and the other to Orman. Then he got from the same jeweller, at their suggestion, a gold necklet, with locket attached. His little boy brought it back, the price being £2 15s., for which he said the prisoners would only give 15s., and recommended him to take 383] it to some one else. *Then he got a tea service by a similar order, written in the presence of the prisoners, and, at the suggestion of Orman, a gold and white service, price £1, which Orman, he said, had for 6s. 6d.; and another order was for fifteen yards of alpaca, &c., the price of which was £1 12s. 7d. Similar orders were sent for "a large printed Bible and Church Service," price 24s. The elder prisoner observed that she had now almost everything she wanted except a Bible in large print, as she was getting into years. The order was particularly for a large printed Bible and a Church Service to correspond. The prisoners, the witness said, always saw the bills of the articles sent, and the orders were mostly written in their presence. The prisoner Barber gave him only 8s. for the Bible and Church Service, the price of which was 24s. Then he wrote, at her desire, to another bookseller for another Bible and Church Service—10s.—for which she gave him 3s. 6d. Then, in the same way, he got a revolver, giving Mrs. Orman as a reference, and she, in the presence of the witness, gave him a good character for solvency to the tradesman, who thereupon sent the revolver and cartridges, price £1 13s. 9d., for which the prisoner gave him 14s. The revolver was for a son, she said, of hers in Zululand. And so in other similar cases. The orders were written on printed forms, headed "Frederick E. Groom, Plumber, &c., 56 Station street, Ipswich—To (blank for the names of the tradesmen)." Then the order would be written, "Please let my little boy have a lady's gold chain at a moderate price," &c. The price was always to be paid at once in cash, but none of the goods were ever paid for.

Pallant, a police constable, stated that when he went to the Cardinal's Hat to make inquiries for goods obtained by Groom, defendants said they had had no goods at all of Groom, and that he was a "scamp." Then being asked as to the tea service, the prisoner Orman admitted it. Then being asked as to the revolver, she said it was bought for a son of hers at the Cape; and so as to some clothes. Then as to the Bible and Church Service, Barber said that she had not had them, but Orman said, "Yes, mother, you had the Bible and Church Service." Then as to some other clothing, she admitted it; and being asked as to jewelry, they both denied having any. The policeman told them to take care what they said, or he should bring a very near relation to prove that they had had some, and on that Orman admitted giving Groom 5s. for a pair of earrings. He went again and asked for the goods they had of Groom, and Orman said, "You shall not have them, for I bought and paid for them, and I saw the bills, didn't I, mother?" to which Barber replied, "Yes." They were then taken into custody, and at their house the china tea service and some clothing, and the Church Service and Bible were taken.

Other evidence having been called at the suggestion of the learned judge, the case against Barber was withdrawn.

**Frere* then addressed the jury on behalf of Or- [384 man, relying on the absence of any evidence of concurrence in any preconceived scheme to cheat the tradesmen. He suggested that the prisoner, his client, might very likely have been imposed upon by some specious story told by Groom; and as to the evidence given by the police, the answers she gave may have been prompted by alarm and apprehension, as they then could see that Groom was charged or suspected. He dwelt also upon the fact that Groom's evidence was wholly uncorroborated.

BRAMWELL, L.J., in summing up to the jury, said: As far as my experience goes this case is a novelty. Groom has not stolen the goods; if he had, possibly the prisoner might have been indicted for receiving them knowing them to be stolen. So the prisoner is indicted for conspiring with Groom that he should get the goods without paying for them. That is, I believe, a novelty, and requires careful attention; and the question I shall leave to you, and which I have reduced into writing, is this: Did she and Groom agree that he should purchase and that she should aid him in purchasing goods on credit, and apparently as an ordinary purchaser, to resell to her? The evidence of Groom, of course, is not reliable unless corroborated, and if there

1880

Reg. v. Orman and Barber.

had only been one or two cases it might not have been a reliable case, but here there are a great many cases. There could not be any doubt that these goods were got fraudulently, and that the defendant had many of them. It is difficult to suppose that she could have thought that Groom's dealings were honest. And the little boy corroborated Groom's evidence, and so does Groom's wife; and though she says her husband is not to be believed on his oath, there is no reason to say so of her evidence, which is confirmatory of the case for the prosecution, as is that of the police. It is manifest that Groom was getting these goods without paying for them, and as though they were for himself, when, in fact, he meant to resell them to raise money, and that is fraudulent. Clearly, then, she knew he was getting the goods dishonestly and fraudulently. Did she aid him in getting them? She was his referee and gave him a character, and she told falsehoods to the police about the matter; though, on the other hand, the goods were not destroyed; but she did not know she was within the reach of the law, nor was she, unless she was guilty of a conspiracy to obtain these goods on credit, with a view to immediate resale to raise money. And the question is whether you are satisfied that she was so guilty. I repeat that the charge is a novelty—that is not in principle, but in its particular character; a charge of conspiring to obtain goods by means not *per se* criminal as false pretences would be, and, therefore, it should be carefully considered.

The jury found the prisoner guilty.

Blotfeld asked that the point might be reserved.

On the following morning

BRAMWELL, L.J., who had taken time to consider and 385] consult *with Mr. Justice Denman, as to whether he should reserve the question of law, now announced his opinion to be that he ought not to reserve the question. If, he said, the prisoner had only received the goods obtained by Groom, he should not have thought there was evidence of a criminal conspiracy between them; or if there had only been an isolated case, and she had given him an untrue character, he should have doubted whether the jury ought to have found her guilty of a fraudulent and dishonest conspiracy. But here was a man who was getting goods on credit without the means, or hope, or intention of paying for them—getting them in the way in which people ordinarily bought goods. It was necessary for him to have a character, and it was given to him by the prisoner—a character which must have been false to her knowledge. He assumed these facts,

because it was to be presumed that the jury had found them; and why was not that evidence of criminal conspiracy? So the case presented itself to his mind; but he was willing to hear any arguments the prisoner's counsel could address to him to raise any doubt in his mind upon it.

Blofeld, on behalf of the prisoner, urged that there was no unlawful—that is, criminal—act on the part of the prisoner, for, as to the false character, it merely came to this: that she said he was “good for the price of the revolver”—i.e., 29s.; and so he might have been for anything she knew.

BRAMWELL, L.J., said the effect of her statement was that he might safely be trusted; and she knew he was not such a man as might be safely trusted to pay. Did any one suppose that if the tradesman had known of him what she knew, he would have trusted him.

Blofeld urged that this was a new case and was stretching the law of conspiracy, and he urged that obtaining goods on credit without the present means of paying for them was not unlawful, and so the combination to do that was not unlawful.

BRAMWELL, L.J.: The getting goods on credit without meaning to pay for them may not be unlawful in the sense of being criminal or punishable; but it is not lawful, and it is fraudulent at common law; and, at all events, for several to combine together to enable a person to get goods by means of a false character, knowing that he did not intend ever to pay for them, is surely criminal. A contract by the prisoner to give the man a character in such circumstances for that object would not be enforceable, being in that sense unlawful (which the prisoner's counsel admitted). On the whole, therefore, after much consideration, and conferring more than once with Mr. Justice Denman, who entertained no doubt on the question, he had come to the conclusion that he ought not to reserve the point; and, whether he did so or not, he should certainly sentence the prisoner, as he now did, to six months' imprisonment, with hard labor.

Solicitor for prosecution: *F. B. Jennings*, Ipswich.

Solicitor for the defence: *J. Mills*, Ipswich.

[14 Cox's Criminal Cases, 390.]

KENT WINTER ASSIZE.

Maidstone Crown Court. Thursday, January 15, 1880.

(Before Denman, J.)

390]

*REG. V. CRAMP (').

On an indictment under 24 & 25 Vict. c. 100, s. 58, for causing to be administered to a woman "a noxious thing," described in one count as an excessive dose of oil of juniper, which was the drug administered (first in a small and then in a large quantity) with intent to cause miscarriage—it not having *per se* any direct tendency to produce miscarriage, but even in a small quantity producing vomiting, and so having an indirect tendency if taken in excess, to cause miscarriage by reason of violent vomiting or purging:

Held, that if there was an administration of such an excessive dose caused by the prisoner with the intent alleged, it would be a "noxious thing" within the act; and, *semble*, that as the statute does not require that the drug should have any tendency to produce miscarriage, it is enough if it is "noxious," and is given with the intent charged, if it is in itself hurtful. There being no other evidence but the woman's that the prisoner incited her to take the excessive doses except that her father accused him of giving his daughter such things "to produce abortion," and that he did not deny it.

391] **Held*, that this was some corroborative evidence, even assuming the woman to be in the position of an accomplice requiring corroboration.

THE prisoner was indicted under 24 & 25 Vict. c. 100, s. 58, for feloniously causing one Ellen Verrall to take certain noxious things with intent to procure her miscarriage, at Tonbridge, on the 23d day of June, 1879. The first count charged that he feloniously caused her to take an excessive quantity of oil of juniper with that intent, the same being a noxious thing within the statute. A second count charged that he feloniously caused her to take an excessive quantity of Epsom salts, with the same intent. A third count charged that he caused her to take a noxious thing unknown, &c.

A. B. Kelly, and *Lewis Coward*, for the prosecutor.

D. Kingsford, and *Gill*, for the prisoner.

The prisoner had become intimate with the young woman, and, as she said, intercourse had taken place on one occasion early in June. About three weeks afterwards she told him she saw that she was not unwell (i.e., not menstruating) as usual, which it was suggested was a mode of intimating that she suspected she was likely to be with child. He suggested some gin and water, and as that had no effect took her to a chemist, from whom he obtained a half ounce bottle of oil of juniper, of which he gave her a few drops on

(¹) Reported by W. F. FINLASON, Esq., Barrister-at-Law.

a lump of sugar, giving her the bottle, first destroying the label, and telling her to take the rest, as she said, half the bottle at a time. Having taken it she was sick, but it had no other effect, and on her telling him so, he first got the bottle and threw it away, and then took her, she said, to another chemist, and got her another ounce bottle of oil of juniper, removing the label, then giving her the bottle and telling her (as she said) to take it, half a bottle at a time. She, however, only took a small portion of it, and, finding that it only made her sick, she took no more, and the bottle was produced in court about three-quarters full. He then, she said, gave her two ounces of Epsom salts, telling her to take them which she did, and afterwards some pills, produced, and admitted to be innoxious, and intended to promote menstruation. Two months later, she, then being clearly pregnant, told her father, and gave him the bottle and the box of pills, and he had an interview with the prisoner, and pressed him to marry her, and on his hesitating, said to him, "I have here those things which you gave my daughter to produce abortion," which the prisoner, he said, did not deny.

It was proved that the contents of the bottle were essential oil of juniper, and that the half-ounce bottle would contain about 500 drops, so that half the bottle would be at least 240 drops. It was proved by the medical witnesses for the prosecution that if given medicinally as a diuretic from five to ten drops would be an adequate dose, and that any such quantities as 240 drops, or *even half that quantity, [392] would act as a powerful irritant and operate as a cathartic and emetic, producing violent purging or vomiting, or both, which, from its action on the general system, would, in a case of pregnancy, tend to promote miscarriage. And so as to a dose of two ounces of Epsom salts said to have been given, it would, though it might produce no other ill effects, yet it was stated that miscarriage so produced must more or less be injurious to the woman.

At the close of the case for the prosecution it was submitted on the part of the prisoner that the evidence of the young woman, assuming it to be true, showed that she was an accomplice, and that her evidence therefore required corroboration, and a ruling of Thesiger, L.J., at the Summer Assizes, 1878, was cited to that effect. It was submitted also that as it did not appear that either of the substances mentioned was actually directly calculated (like savin and some other substances) to produce miscarriage, and they would be injurious only in excess, and by effects tending

1880

Reg. v. Cramp.

only indirectly to that result, the case for the prosecution rested entirely on the suggestion that the prisoner had caused the woman to take the excessive quantity (¹), of which it was argued there was no evidence whatever but her own statement, and therefore it was submitted that there was no case to go to the jury, and that the case for the prosecution failed.

Kelly, for the prosecution, submitted that the evidence of the girl's father afforded ample corroboration, as he stated that he had accused the prisoner of giving his daughter things "to produce abortion," and he had not denied it.

DENMAN, J., however, without calling upon the counsel for the prosecution to argue the question, said that he could not stop the case. Whether, he said, the girl was an accomplice or not depended on whether the prisoner had the intent alleged, and whether she was privy to it, and so the question could hardly be determined by him then without entering into the very question on which the jury would have to give their decision whether the person had that intent, and on which he did not now desire to give any opinion. Assuming, however, that the woman was an accomplice and required corroboration, he was not prepared to say that there was no corroboration, and his impression was that it was a case which ought to go to the jury.

The case for the defence was that the oil of juniper was given by the prisoner only to promote menstruation, and that it was often taken by people in the country with that object; that he had not suggested the excessive dose, and that it was a mistake of the girl to think so; that even an excessive dose would have no direct tendency to promote 393] miscarriage, but only at the *worst some indirect effect by reason of vomiting or purging, but that in an early stage of pregnancy these operations would have no such effect, and that though 240 drops might be an excessive quantity at a time, doses of sixty or 120 drops might be and had been taken without any seriously ill effect, and even repeated. And so as to the Epsom salts, it was said it would only in excess cause a vomiting. But even the medical witnesses for the defence admitted that 240 drops would be an excessive dose of oil of juniper, and two ounces an excessive dose of Epsom salts, and that neither of them

(¹) This, it is conceived, was a fallacy, as the statute does not require that the thing given shall tend to promote miscarriage, but only that it shall be "noxious," and be given with that

object. And it was proved that even the smaller quantity of oil of juniper caused vomiting, which when not excited medicinally must surely be injurious.

were things fit to be given in such doses to a pregnant woman, and might and probably would lead to great irritation, vomiting, &c., which would be in some degree injurious, and that so in that way they would be noxious; and the principal medical witness for the prosecution, being recalled, stated that the purging or vomiting so caused would cause a straining likely to be injurious to a pregnant woman and tending to produce miscarriage. It was not denied that, assuming a woman to be pregnant, giving her things of a stimulating character, such as are used to promote menstruation, would be injurious. Upon this evidence,

DENMAN, J., left the case to the jury. There are, he said, three questions for you to consider. First, whether the prisoner caused these things to be administered and taken by the woman. Secondly, whether they were, in the quantities in which he caused them to be taken, "noxious" things. Thirdly, whether he caused them to be administered with the intent alleged, i.e., to produce miscarriage. If he caused her to take such an excessive quantity of these things as would produce the effects described, they would in such quantities be "noxious things" within the meaning of the statute. The prisoner could hardly have failed to understand that the girl was apprehensive of pregnancy, and if in this state, things given to promote menstruation would, it is admitted, be injurious; and this is material to consider with reference to the intent. With reference to the evidence, however, it is alleged that the woman was an accomplice, and that her evidence requires corroboration. But she would not be an accomplice unless he had the intent alleged, and she was privy to it. No doubt, if she were an accomplice the evidence of an accomplice requires corroboration, and on a material point. And it is said here that the point of evidence on which everything turns is, that the prisoner intended and suggested that these things should be taken in excessive quantities, and that of this there is no evidence but the woman's, and that of that there was no corroboration. But is that so? Taking the evidence altogether, does it or does it not afford corroboration of her evidence, on that part of the case as well as on the rest? The part of the evidence on which the counsel for the prosecution rely for that purpose is the evidence of the father, who states that he accused the prisoner of giving his daughter things to produce abortion, and that he did not deny it. I cannot say that this is *not evidence in corroboration, especially coupled with the other evidence, as the evidence of the chemists called to show that he went to one [394

1880

Reg. v. Brannon.

chemist after another and got this oil of juniper in two bottles about the same time, I cannot say that there is not corroborative evidence.

Verdict, guilty. Sentence, fifteen months' imprisonment.

NOTE.—The learned judge refused to reserve the question whether there was sufficient corroborative proof, not deeming that a question of law fit to be reserved; but he reserved the point whether oil of juniper was, as administered, a "noxious thing" within the act, and on argument it was held that it was (see report *Reg. v. Cramp*, *post*, p. 616) as, in the quantity administered, it had an indirect tendency to cause miscarriage, and that anything which in the quantity administered might have such effect would be a noxious thing within the act. But that point hardly arose, for it appeared that even the smaller quantity first given caused vomiting, and anything which causes vomiting (not being given as a medicine with that object) is hurtful and noxious; and the statute does not require that the thing should tend to produce miscarriage, but only that it should be noxious, and be administered with that intent. The case was fought at the trial, however, on the false issue that the drug must be such as, either in its nature or quantity, tends to produce miscarriage, and hence the point reserved was whether anything which in the quantity given tends to produce miscarriage is a "noxious thing" though not in itself noxious. But a thing which in any quantity causes vomiting, when it is not desirable to cause it, may surely be deemed noxious; and, if so, then the point reserved perhaps hardly arose.

[14 Cox's Criminal Cases, 394.]

WARWICK ASSIZES.

Tuesday, February 17, 1880.

(Before Cockburn, L.C.J.)

REG. V. BRANNON, GIBBONS, HARTLETT AND CONOLLY⁽¹⁾.

Indictment—Joinder of felonies—Principal and accessory—Election.

Where an indictment contains two counts, the first charging the accused person as principal in a felony, the second charging him as accessory after the fact to the same felony, the prosecution must elect upon which count they will proceed.

PATRICK BRANNON, Harriet Gibbons, Ann Hartlett, and Lavinia Conolly, were charged for that they, at the borough of Birmingham, on Wednesday, the 15th day of October, 1879, feloniously robbed John Hall Williams of one watch, 395] one chain, *and the sum of £15, his goods and moneys, and did at the time of and immediately before such robbery, use personal violence to the said John Hall Williams.

In a second count of the indictment, Harriet Gibbons, Ann Hartlett, and Lavinia Conolly were charged for that they, well knowing the said Patrick Brannon to have done and committed the said felony in form aforesaid, afterwards, to wit, on the day and year aforesaid, him the said Patrick Brannon did feloniously receive, harbor, and maintain.

⁽¹⁾ Reported by GILBERT G. KENNEDY, Esq., Barrister-at-Law.

The prisoners pleaded not guilty.

Ewins Bennett, appeared for the prosecution.

Daly, for the prisoner Brannon.

Bittleston, for the prisoners Hartlett and Conolly.

Before the prisoners were given in charge,

Bittleston called attention to the form of the indictment: The joinder of these two charges relating to very different degrees of offence, and requiring perfectly different evidence to support each of them, was embarrassing. There was no statutory provision authorizing the joinder of these two counts, and no precedent for such a form of indictment could be found in the books. He submitted that the prosecution must elect upon which count they would proceed.

Ewins Bennett, for the prosecution, cited 24 & 25 Vict. c. 94, s. 3: "Whosoever shall become an accessory after the fact to any felony, whether the same be a felony at common law or by virtue of any act passed or to be passed, may be indicted and convicted either as an accessory after the fact to the principal felony, together with the principal felon, or after the conviction of the principal felon; or may be indicted and convicted of a substantive felony whether the principal felon shall or shall not have been previously convicted, or shall or shall not be amenable to justice, and may thereupon be punished in like manner as any accessory after the fact to the same felony, if convicted as an accessory, may be punished;" and submitted that that section authorized the joinder of these two counts. He also cited *R. v. Blackson* (8 C. & P., 43).

Bittleston referred to *R. v. Fallon* (1 L. & C., 217; 9 Cox's C. C., 242; 32 L. J., 66, M. C.).

COCKBURN, L.C.J.: The prosecution must certainly elect upon which count they will proceed.

Bennett elected to proceed upon the second count.

At the close of the case, there being no evidence against the female prisoners on the second count,

COCKBURN, C.J., addressing the jury, said: "It is clear that there is no evidence to convict these women of being accessories after the fact, the only offence with which they are now charged. You must therefore return a verdict of not guilty as regards them.

Brannon was ultimately convicted, and sentenced to fifteen years penal servitude.

1880

Reg. v. Flatman.

[14 Cox's Criminal Cases, 396.]

COURT FOR CROWN CASES RESERVED.

Saturday, Feb. 23, 1880.

(Before Lord Coleridge, C.J., Denman, J., Pollock, B., Field and Fitzjames Stephen, JJ.)

396]

*REG. V. FLATMAN (').

Larceny by adulterer.

The prisoner, who was previously on familiar terms with prosecutor's wife, hired a cart, and told the owner to send it to the prosecutor's house to convey furniture for the woman whom he would find there to another address which he gave to the carter, and where the wife had previously engaged rooms without her husband's knowledge. The cart was sent as directed, and furniture loaded, the wife being present, and the husband absent, and the prisoner not being at the loading. The wife accompanied the cart to the lodgings. The prisoner did not appear at the lodgings until the next night, which he passed with her there, and then lived there in adultery with the wife for some days afterwards, using the furniture.

The jury having convicted the prisoner of stealing the furniture, this court affirmed the conviction.

CASE reserved for the opinion of the court by the Recorder of Liverpool.

The prisoner was convicted before me at the Liverpool Borough Sessions, held on the 16th day of December, 1879, of stealing a quantity of furniture, the property of Henry Goucher.

The prisoner was a soldier, on special duty, and living in private lodgings.

The prosecutor, Henry Goucher, was a Liverpool policeman, who lived with his wife in a house in the same street in Liverpool in which the lodgings of the prisoner were situated, and within a hundred yards of such lodgings.

The prosecutor had upon two occasions shortly before the alleged stealing observed his wife in the street very near his 397] house *in conversation with the prisoner. He had remonstrated with her on both occasions, but did not remonstrate with or speak to prisoner.

On the evening before the alleged stealing, being the second of those occasions, the prosecutor from his house window observed his wife in the street with the prisoner. This led to a violent altercation between the prosecutor and his wife.

On the following day the prisoner hired a cart and directed the owner to send it to the house of the prosecutor, telling the cart owner that the cart was to convey some furniture for the woman whom he would find there to another house

(') Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

in another street, the address of which he gave to the cart owner. On the arrival of the cart at the prosecutor's house the furniture was loaded upon it in the presence of the prosecutor's wife, the prisoner not being present. The prosecutor was absent on his duty as policeman, as he always was at that time of day. The furniture was removed to the house to which the prisoner had directed the carter to take it, and there placed in lodging rooms which the prosecutor's wife had previously engaged without the knowledge of the prosecutor. The prosecutor's wife accompanied the cart.

The prisoner was not present on the arrival of the furniture, nor did he appear at the lodgings on that day, but he came there the next day and spent the night with the prosecutor's wife, and lived with her in adultery in the lodgings furnished with the furniture in question for some days afterwards. This was the case for the prosecution.

The counsel for the prisoner submitted that there was no case, first, because he said there was no evidence that the prisoner knew that the female was a married woman, or that the furniture was the property of her husband; secondly, because he said that even if the prisoner did know these things, the part taken by him did not amount to a stealing, being only accessory to the act of the wife, which act itself could not be a stealing.

I held that there was evidence for the jury, but told the learned counsel that in the event of a conviction I would give him a case.

The learned counsel then called as a witness on behalf of the prisoner the wife of the prosecutor. She swore that she had frequently talked to the prisoner in the street, and also that he had once or twice visited her in her husband's house, but in her husband's absence, before she went away as above stated. She denied that any adultery had taken place before she left her home. She swore that she had never told the prisoner that she was married, and told him the furniture was hers, and that she was leaving in consequence of some unpleasantness, and she said that so far as she knew, the prisoner believed the furniture to be her own property. She admitted that she had lived with the prisoner as his wife at the lodgings to which the furniture was taken, and also that the lodgings were taken by her for the purpose of such adultery, with the knowledge of the prisoner. *I told the jury that if they thought that the pris- [398
oner knew that the furniture belonged to the prosecutor, and that the wife had no authority to remove it, and if they

1880

Reg. v. Smith.

also thought that with such knowledge he had assisted the wife to remove it with the intention of depriving the prosecutor of it, and of appropriating it to his own use jointly with the wife while living with her in adultery, they might convict him of stealing it, which they did.

I thereupon stated this case for the opinion of the Court of Criminal Appeal.

I discharged the prisoner upon his giving bail to appear for judgment if the court should affirm the conviction.

JOHN B. ASPINALL, Recorder of Liverpool.

Leofric Temple, Q.C., for the prisoner.

Potter, for the prosecution.

BY THE COURT :

Conviction affirmed.

See 2 Eng. Rep., 176 note.

In a prosecution for the larceny of the property of S., the court instructed the jury that "if the defendant, * * * acting conjointly with the wife of S., pursuant to an agreement previously made between them to take the property of S. or of others in S.'s possession, took possession of the property, removing it from where S. had left it, and carried it away with the intention of defrauding the owner, whether S. or another, and of converting the property to the use of the defendant * * and the wife, then the defendant is guilty of larceny." Held, that the instruction was erroneous: *Lamphier v. State*, 70 Ind., 318.

One who commits larceny upon a

vessel at sea may be convicted. It is sufficient to charge the larceny upon a vessel at sea without averring it to have been upon the *high sea*: *Reg. v. Sprungli*, 4 Quebec L. R., 110.

The statute of Missouri, authorizing the conviction of one who brings into the State property stolen in another state, is not unconstitutional because of the constitutional provision guaranteeing to the accused compulsory process for his witnesses. That provision has reference only to such process as the State can execute within her own borders. The fact that the witnesses may be beyond the reach of her process, can be no obstacle in the way of conviction: *State v. Butler*, 67 Mo., 59.

[14 Cox's Criminal Cases, 398.]

COURT FOR CROWN CASES RESERVED.

Saturday, Feb. 28, 1880.

(Before Lord Coleridge, C.J., Denman, J., Pollock, B., Field and Fitzjames Stephen, JJ.)

REG. V. F. SMITH AND T. SMITH (').

Lunatic—Ill-treatment of—Brother having the charge of—16 & 17 Vict. c. 96, s. 9.

The two prisoners, brothers of the lunatic, took a house, and their mother and a lunatic sister lived with them. They supported the household, but received no payment for or on account of any special charge of their lunatic sister. The ill-treatment of the lunatic was fully proved.

Held, that the two prisoners were persons having the care, or charge, or concerned, or taking part in the custody, care, or treatment of a lunatic within the 16 & 17 Vict. c. 96, s. 9.

(') Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

*CASE stated for the opinion of this court by the [399 Vice-Chairman of Quarter Sessions for the parts of Lindsey, in the county of Lincoln.

The prisoners were convicted at the sessions holden on the 17th day of October, 1879, on the following indictment, which is framed upon the latter part of the 9th section of the statute 16 & 17 Vict. c. 96.

County of Lincoln, parts of Lindsey, to wit: The jurors for our Lady the Queen, upon their oath present that Frederick Smith and Thomas Smith, on the 28th day of July, in the year of our Lord 1879, then having the care, or charge, or concerned, or taking part in the custody, care, or treatment of a certain lunatic, or alleged to be lunatic person called Emma Smith, did then abuse, ill-treat, and wilfully neglect such lunatic, or alleged lunatic, against the form of the statute in such case made and provided, and against the peace of our Lady the Queen, her crown and dignity.

The evidence was that in April, 1879, the two prisoners took a house in Gainsborough, as joint tenants; their mother and also their sister Emma, the lunatic, lived with them.

The prisoners worked at different occupations and supported the household, but they received no payment for or on account of any special charge of the lunatic about whom no proceedings had been taken in respect of the lunacy. The sister had not always been a lunatic, but there was no evidence to show when the lunacy commenced. The medical witnesses could not say how long she had been a lunatic, one stating "she had been so for some time," another that "he could not say the exact period, but certainly two months," although there was no doubt she was a lunatic at the time of the ill-treatment, which was fully proved.

She was removed to a lunatic asylum on the 29th day of July, 1879.

At the close of the evidence for the Crown it was objected by the counsel for the prisoners that the case was not within the above-mentioned section, inasmuch as the care and charge was by a brother of a sister, and came within the ruling of *Reg. v. Rundle* (6 Cox's C. C., 549; 24 L. J., 126, M. C.), and, further, was to be distinguished from *Reg. v. Porter* (9 Cox's C. C., 449; L. J., 126, M. C. (')), inasmuch

(') In *Reg. v. Porter*, the facts were that the care and charge of the lunatic were first taken by his father and mother, and at their death a sister took the care and charge of him. She went abroad, and then a brother took the care and charge of him, and for so do-

ing received by a family arrangement 6s. or 7s. per week from rents of houses belonging to the lunatic, and it was held that the brother who took the care and charge of the lunatic came within the 16 & 17 Vict. c. 96, s. 9.

1880

Reg. v. Smith.

as the two prisoners did not "voluntarily" take upon themselves the charge of a lunatic within the ruling there laid down.

The court was of opinion and decided that there was no legal obligation on the defendants to continue the care and charge of their sister after she became a lunatic, and that 400] there was therefore *a voluntary taking within the meaning of the act, but reserved the point.

I request the opinion of the court whether upon the evidence the prisoners were indictable under the above section of the statute, as "persons having the care or charge of a lunatic" within the latter part of the section.

WESTON CARCROFT AMCOTTS, Vice-Chairman.

The 16 & 17 Vict. c. 96, s. 9, enacts that if any superintendent, officer, nurse, attendant, servant, or other person employed in any registered hospital or licensed house, or any person having the care or charge of any single patient, or any attendant of any single patient, in any way abuse, or ill-treat, or wilfully neglect any patient in such hospital, or house, or such single patient, or if any person detaining or taking or having the care or charge, or concerned or taking part in the custody, care, or treatment of any lunatic, or person alleged to be a lunatic, in any way abuse, ill-treat, or wilfully neglect such lunatic, or alleged lunatic, he shall be guilty of a misdemeanor, and shall be subject to indictment for every such offence, or to forfeit for every such offence on a summary conviction thereof before two justices any sum not exceeding £20.

No counsel appeared on either side.

The Judges retired to consider, and on their return

LORD COLERIDGE, C.J., said that they were of opinion that the conviction should be affirmed. The case seemed to the court to come within the direct words of the enactment (16 & 17 Vict. c. 96, s. 9), and that if any doubt could arise upon the question it was removed by the decision of this court in *Reg. v. Potter (ubi sup.)*.

Conviction affirmed.

[14 Cox's Criminal Cases, 463.]

COURT OF CRIMINAL APPEAL.

Saturday, May 1, 1880.

(Before Kelly, C.B., Lush, Denman, Lopes, and Bowen, JJ.)

*REG. V. ROADLEY ('1).

[463]

Indecent assault—Child of tender years—Consent—Direction to jury—Practice.

On the trial of an indictment for an indecent assault upon a little girl only seven years of age, the child was examined as a witness. The prisoner's counsel proposed to address the jury on the consent of the child to the assault. The chairman refused to allow him to do so, ruling that a child of seven years old might submit, but could not give consent to the assault. The prisoner was convicted.

Held, that the conviction must be quashed.

At the Easter General Quarter Sessions of the Peace for the county of Leicester held on the 6th day of April, 1880, in the castle of Leicester, in and for the said county, the following case *was reserved for the opinion of the High [464] Court of Justice by Sir Henry St. John Halford, Bart., deputy-chairman of the said county.

Edward Roadley (aged twenty) was indicted for assaulting Sarah Ann Burton, a child of seven years old.

According to the evidence given at the trial, the mother of the child noticing that she had a discharge from her private parts, took her to a surgeon for advice, who treated the case as one of gonorrhœa.

In consequence of this, inquiries were made, and the child stated at the trial that she and another child of a like age had been accustomed to ride with the prisoner in his milk cart, and that on one occasion she and the prisoner got out of the cart and went into a yard, that there the prisoner undid his trousers, and lifted up her clothes, putting his private parts against her own.

The prisoner, on being examined by a surgeon, was found to be diseased, and in such a state that contact with his person might have infected the child in the manner described by the surgeon. There was no sign of penetration or of violence.

The prisoner was defended by counsel, who proposed to address the jury on the question of the child's consent to the prisoner's act.

The chairman, however, refused to allow the question of consent to be put to the jury, ruling that a child of seven years old might submit, but is incapable of giving consent in such a case.

(1) Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

1880

Reg. v. Roadley.

The prisoner was convicted, and sentenced to twelve months' imprisonment, with hard labor. He is now undergoing his sentence.

The question reserved for the court is the correctness or otherwise of the chairman's ruling in the case.

H. ST. JOHN HALFORD.

Hensman appeared for the prisoner.

Prosser for the prosecution.

DENMAN, J.: Is not this case concluded by the decision of this court in *Reg. v. Read and others* (1 Den. C. Cas., 377; 3 Cox's C. Cas., 266)!

LUSH, J.: The ruling of the chairman cannot be supported.

BY THE COURT:

Conviction quashed (').

(') In *Reg. v. Read and others* the assault was upon a girl nine years old, and the jury found a verdict of "Guilty, the child being an assenting party, but that from her tender years she did not know what she was about." This was obviously an imperfect verdict, and upon the argument of the case there was much interlocutory discussion as to the meaning of the verdict. Alderson, B. said: "The jury mean that she was an actual consenting party, but that she could not by law consent because of her tender years." Coleridge, J. said: "Here it is stated that there was a connection, and that the girl consented. They say that she gave all the consent to it that so young a person could give." Lord Denman, C.J.: "The jury have found that the girl gave her assent; we cannot tell whether this were 465] really so or not, but* we must take the verdict as we find it. Very possibly the jury would have been warranted in finding the prisoners guilty generally. But it has been solemnly decided that, if the girl assents, the act is not an assault. The case is not stated satisfactorily. We are asked to determine whether this girl 'actually did give such assent as to invalidate the conviction.' How can we determine that? It was one of the questions for the jury." In *Reg. v. Johnson* (L. & C., 692; 10 Cox's Cr. Cas., 114), where the jury returned a verdict of guilty, but stated that the girl consented to the indecent assault, the conviction was quashed. But in *Reg. v. Lock* (L. Rep., 2 Cr. Cas. Res., 10; 12 Cox's Cr. Cas.,

244), where the prisoner was indicted for indecently assaulting two boys, the jury returned a verdict of guilty, stating that they did so being of opinion that the boys merely submitted to the act of the defendant not knowing the nature of such act. The verdict of guilty was upheld by this court. Kelly, C.B., said: "The question is whether such an act as that of the prisoner done to a person who does not actively consent, but merely submits to the act under circumstances in which he cannot exercise his will either one way or the other does not, even in the absence of fraud, amount to an assault. I think it does. . . . Though there was submission on the part of the children, I do not think there was any consent, for they were so wholly ignorant of the nature of the act done as to be incapable of exercising their will one way or the other." Brett, J., said: "Still, if they had in fact consented to what was done, their ignorance of its immorality would not make it an assault. . . . The question left to the jury was in substance a direction that if the boys merely submitted to what was done (and if they merely did this, the prisoner must have known that it was so), it was an assault; but if there was consent, it was no assault. Now, if a child does merely submit to what is done to it by an adult, and the adult know this, that is an assault. The direction of the learned judge and the finding of the jury were therefore both right."

There does not seem to be any reported case in which the girl assaulted

was so young, viz., seven years old, as in the present case (*Reg. v. Roadley*). The assault must be proved in every case to have been against the will of the child, and though in point of fact the child may be incapable of giving

her consent, the presiding judge cannot withdraw the question of consent from the jury if raised; but if the jury consider the child incapable of giving consent, they may, as in *Reg. v. Lock*, find the prisoner guilty.

[14 Cox's Criminal Cases, 486.]

COURT FOR THE CONSIDERATION OF CROWN CASES RESERVED.

Saturday, November 20, 1880.

(Before Cockburn, C.J., Denman, Manisty, Stephen, and Watkin Williams, JJ.)

*REG. V. DOWNER (').

[486

Evidence—Solicitor and client—Privileged communication.

A letter written by a solicitor for a client making a claim for a lost parcel alleged to contain valuable articles, is not inadmissible on the ground of privilege in a criminal case.

In order to make a client criminally responsible for a letter written by his solicitor it must be shown that the letter was written in pursuance of the instructions of the client.

A letter by a solicitor written "in consequence" of an interview with his client is not equivalent to a letter written by the instructions of his client, and is not admissible in a criminal case against the client.

CASE reserved by the Chairman of the second court at the Hampshire Quarter Sessions.

The prisoner was tried before me upon an indictment for false pretences, containing two counts.

First count charged her with endeavoring to obtain by false pretences (which were duly set out) from Herbert Simmons, the manager of the Newport and Cowes Railway Company, the sum of £19 14s. 6d.

Second count charged the endeavor to be to obtain certain goods from the same person.

The facts proved were as follows:—

The prisoner was a traveller by a train on the railway on the 7th day of May in company with another person. She had with her a parcel wrapped up in paper. Both got out at one of the stations, and in the presence and hearing of the prisoner the other person (who was called as a witness) gave the parcel to the engine driver with directions to leave it at the railway refreshment room, and the parcel was so left in charge of a waitress *there, and was seen there [487 by the person mentioned on the next day (8th May).

On the 10th day of May the prisoner called at the office of the railway station, and inquired of the clerk if a parcel had

(¹) Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

1880

Reg. v. Downer.

arrived for her, describing it by an old label, such as was in fact put upon her parcel. No such parcel being there, she called a second time the same day, and then stated to the clerk that the parcel contained a gold watch and chain worth £10, a silk dress (afterwards alleged by her to be worth £4 10s.), and other valuable articles.

On the part of the prosecution two gentlemen were then called who were in partnership as solicitors, and certain letters were shown to each of them, and these questions asked: "Did you have an interview on the 20th day of May with the prisoner?" Answer: "Yes." "Did you write this letter in consequence of that interview?"

Counsel for the defence objected to the question as against the rules of evidence relating to privileged communications between attorney and client. "I ruled that it was admissible." Answer: "Yes."

A piece of paper was handed to one of these witnesses, and the question asked, "Have you ever seen that piece of paper before?" Answer: "Yes."

"Where did you last see it?" Answer: "On my desk in my office."

"On what day?" Answer: "On the day on which I wrote the last letter shown to me."

"Whose handwriting is it in?" Answer: "My clerk's—he is my son."

The manager of the railway was then called and proved that he received three letters dated respectively the 20th, 24th and 26th days of May, which letters were those proved to have been written by the solicitors mentioned, or one of them, and which it was then proposed should be read on the part of the prosecution.

Counsel for the defence objected that the letters were not written by the prisoner, nor seen by her after they were written, nor dictated nor adopted by her, and so were not admissible. Also that the letters being written by a solicitor after, and as a result of communication with his client, they were inadmissible as evidence against the client.

I held that the writers of the letters were proved to be the agents of and acting under instructions from the prisoner, and that although all communications to them were privileged as to them as witnesses, yet that the letters being produced by a third party to whom they were sent were admissible, the rule as to privilege of solicitors being, in my opinion, confined to their giving evidence as to communications made to them in their professional character.

The piece of paper proved to be in the handwriting of the

solicitor's clerk was then produced by the manager of the railway, *and he stated that it was inclosed in the [488 letter from the solicitor of the 26th day of May. In that letter there was the following passage: "I inclose you a list of the principal contents, and must ask you to be good enough to make further inquiry into the matter. I mention that the brown paper in which the parcel was wrapped had somewhere the name or ticket of 'Golden and Vibert,' who are grocers at Newport, and from whose shop it came."

It was proposed by the prosecution to read this paper, which, in fact, was a list of valuable articles alleged by the prisoner to be in the lost parcel.

Counsel for the defence objected to its admissibility, but I ruled against the objection on the ground that it formed a part of the letter in which it was inclosed and in which reference was made to an inclosure.

Another ground for the admission of the list as evidence was that it was proved by the police sergeant, who was witness in the case, to have been read over by him to the prisoner after saying to her, "Here is a list the railway people have received with the articles you say you've lost." To which she replied, "That is right what I have said there; but there is more than that."

Subsequently the prisoner stated to the police constable (under circumstances which rendered the evidence admissible), "That the articles mentioned in the list," naming them without reference to the list, "were never in the parcel."

The parcel delivered to the engine driver was obtained from the waitress at the refreshment room, and shown to the prisoner, who acknowledged it to be the one in question, and, being opened in her presence, she stated some articles of small value in it, old clothing, &c., were hers. The articles mentioned by her as being in it to the railway clerk, and to the policeman, and which were enumerated in the list mentioned, were not in it.

This being the case for the prosecution, counsel for the defence contended that there was no case for the jury on these grounds:

1. No evidence on the first count of any attempt to obtain £19 14s. 6d., or any other sum, because there was no evidence of any value.

2. No evidence on the second count of any attempt to defraud the company of the goods mentioned in that count, because those goods were never in their possession.

1880

Reg. v. Downer.

3. That the circumstances proved amounted only to an actionable wrong, and that no criminal fraud had been committed.

4. That no crime can be committed by substitution, and that in this case the claim on the company being made by a solicitor acting for his client no crime had been committed.

5. That there was no evidence of any attempt to defraud the person named in the indictment, viz., "Herbert Simmons, being manager of the Ryde and Newport Railway Company."

I ruled against all these objections, and must confess that I was unable to comprehend the fourth objection.

489] *The jury convicted the prisoner.

At the urgent request of the counsel for the defence, I consented to reserve and to state a case for the opinion of the Court for Crown Cases Reserved, and discharged the prisoner on bail, to come up for judgment hereafter.

(Signed) W. CLEMENT D. ESDAILE,

Chairman of Second Court, Hants Quarter Sessions.

No counsel appeared for the prisoner.

C. Matthews, for the prosecution.

DENMAN, J.: Was the letter admissible in evidence? The question put is this, "Did you write this letter in consequence of that interview?" The proper question to put was, "Did you write this letter in pursuance of the instruction of the prisoner?" It is not like a civil case, in which every letter written by a solicitor is evidence against his client; but this is a criminal case, which makes a difference. Knowing how inaccurate solicitors sometimes are in making claims for compensation on behalf of clients, the client cannot in a criminal case be made responsible unless it is proved that the letter making the claim is written in pursuance of the instructions of the client.

C. Matthews: I did put the question in the first instance in this form: "Was the letter written by the direction of the prisoner?" but that question was objected to, and the chairman ruled it to be inadmissible, on the ground of privilege; I then had to shape the question as best I could. In one of the letters there was a slip of paper containing a list of articles alleged to have been contained in the parcel. This list was admitted by the prisoner, when read over to her by the police sergeant, to be correct.

COCKBURN, C.J.: That does not make the statement of her solicitor in the letter admissible. To make her responsible, you must show that he had authority to write the letter.

STEPHEN, J.: The admission to the sergeant was an adoption by her of the list of articles, but not of the letter.

C. Matthews : Her conduct and admissions showed that the solicitor was acting under her directions.

COCKBURN, C.J.: I am of opinion that the conviction cannot be upheld. A piece of evidence was received which was not admissible; viz., a letter written by the solicitor for the prisoner to the manager of the railway. In order to make that letter admissible, it was necessary to show that it was written by the instructions of the prisoner. To show that, a question was put by the counsel for the prosecution to the counsel which was right in form, viz.: Did you write that letter by the direction of the prisoner? and, if that question had been answered in the affirmative, the letter would have been admissible; but that question was not allowed to be put, and then the counsel put the question in this form: "Did you write this letter in consequence of an interview with the prisoner?" A letter written by the instructions *of the client is equivalent to a letter written [490 by the client himself. But that is not the effect of the question put, "Was this letter written in consequence of the interview with the prisoner?" that is, "after the interview with the prisoner," and the answer clearly does not make it admissible in evidence against the prisoner. The letter having been admitted as part of the case for the prosecution against the prisoner, the conviction must be quashed.

DENMAN, J.: I am of the same opinion. The court are unanimous that the question put in the first instance by the counsel for the prosecution was not objectionable on the ground of privilege, because this was a criminal case. The letter was tendered to show that the prisoner had made an inordinate claim. There was no evidence to show that the solicitor had written anything for which the prisoner was criminally liable, and therefore the conviction must be quashed.

MANISTY, STEPHEN, and WATKIN WILLIAMS, JJ., concurred.

Conviction quashed.

See 2 Eng. Rep., 195 note; 2 id., 233 note; 15 id., 158 note.

Where G. and O. were indicted for a conspiracy with S. and others to defraud the United States out of the duties on silks and laces, to be imported contrary to law. On the trial, S. testified that O. delivered him silks which he sold contrary to law, and delivered the proceeds to O. Other acts of G.

and O. not alleged in the indictment were proved to show the character of that act. S. swore that one W. introduced him to O.; that he, in W.'s presence, agreed with O. to dispose of silks which O. should bring, the same as W.'s, and that there then was an agreement between S. & W. as to the illegal sale by S. of W.'s goods. At the trial, letters from W. to S. were

1880

Reg. v. Michell.

admitted as evidence for the prosecution to explain the nature of the importations by W., and of the agreement between S. and O., and to corroborate the testimony of S.

S., after the discovery of his guilt, fled, and wrote a letter to G., which never reached G. The letter spoke of O. and of the smuggling operations. There was evidence to show the connection of G. with O. and S. in the conspiracy. The letter, by its contents, was an act done in furtherance of the conspiracy, and was admitted in evidence against G. and O.: *U. S. v. Graff*, 14 Blatchf., 381.

In a criminal prosecution, where a letter, previously written and sent by the defendant to his wife, is not in the custody or control of either the defendant or his wife, nor in the custody or control of any agent or representative of either, but is in the custody and control of a third person, who is the prosecuting witness in the case, such letter may be used as evidence in the case by the prosecution against the defendant: *State v. Buffington*, 20 Kans., 599.

On a trial for murder, the State offered in evidence several letters written by the defendant to his wife.

Held, that they were not protected as confidential communications between husband and wife, but were admissible. Communications between husband and wife are not privileged so as to pre-

vent a third person who overhears them from testifying to them.

And it makes no difference that the communications are in writing: *State v. Hoyt*, 47 Conn., 519.

Confessions made by one when intoxicated are admissible, but evidence of the condition of the party making them is competent to impair or destroy their effect. The fact that such evidence was elicited only upon cross-examination, was immaterial: *State v. Feltes*, 51 Iowa, 495.

W. was indicted for stealing \$150, the money of S. On the trial it was proved that J., a detective, arrested W. who made a confession, which was made under a promise, and was excluded as evidence. In this confession he directed J. to go to certain gamblers and get the money back from them. J. sent for the gamblers named, told them what W. had said, and they paid over to J. for S. \$104, though one of them protested that W. had not been at his house, and the others denied that he had lost the money claimed with them; the balance of the money, \$46, was paid over by the father of W. Held, it not being proved that the money paid to J. was the same lost by S., the statement of W. to J., and of what passed between J. and the gamblers and the father of W., is not competent evidence: *Williams v. Commonwealth*, 27 Gratt., 997.

[14 Cox's Criminal Cases, 490.]

COURT FOR THE CONSIDERATION OF CROWN CASES RESERVED.

Saturday, December 4, 1880.

(Before Lord Coleridge, C.J., Field, Lopes, Stephen, and Watkin Williams, JJ.)

REG. v. MICHELL (').

Misdemeanor—*Debtors Act*, 1869 (32 & 33 Vict. c. 62), sect. 11, sub-sect. 1—*Full and true disclosure by bankrupt of all his property*—*Limit of time to which the disclosure relates*.

The 32 & 33 Vict. c. 62, s. 11, sub-sect. 1, enacts that a bankrupt or liquidating debtor shall be guilty of a misdemeanor "if he does not to the best of his knowledge and belief fully and truly discover to the trustee of his estate all his property, real and personal, and how and to whom, and for what consideration, and when he dis-

(') Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

posed of any part thereof, except such part as has been disposed of in the ordinary way of his trade (if any), or laid out in the ordinary expense of his family," &c.

Held, that the disclosure was not restricted to property in possession of the bankrupt at the commencement of his bankruptcy.

CASE reserved for the opinion of the Court for the Consideration of Crown Cases Reserved, by the Common Serjeant of the city of London, at the January Sessions, 1880, of the Central Criminal Court.

The defendant was tried before the Common Serjeant on the *16th day of January, 1880, and following days, [49] on an indictment under the Debtors Act, 1869 (32 & 33 Vict. c. 62), s. 11, sub-sects. 1, 12, 14, and 15, and s. 13, sub-sect. 1, and also under sects. 88 and 89 of the Larceny Consolidation Act (24 & 25 Vict. c. 96).

The indictment contained thirty-eight counts, and the defendant was convicted upon all the counts except the second, sixth, seventh, eighth, twenty-first, and thirty-fifth counts.

The question reserved for the opinion this court was in the following terms: If the court should be of opinion that there was no evidence to go to the jury on any of the counts of the indictment (except evidence which was objected to by the defendant's counsel, and which the learned Common Serjeant was wrong in admitting), the conviction is to be quashed.

W. H. Clay (*Lyon* with him) appeared for the prisoner.

LORD COLERIDGE, C.J.: We need not go through the whole of this voluminous case, for if the court should be against you on any one count of the indictment on which the jury have found him guilty, the conviction will stand. We will hear what you have to say as regards the first count of the indictment.

The first count was in the following terms:

"Central Criminal Court, to wit: The jurors for our Lady the Queen upon their oath present that Frederick Michell was, on the 1st day of May in the year of our Lord 1879, adjudicated a bankrupt in the London Court of Bankruptcy, upon the petition of Robert Hyde and others, trading together under the style of Robert Hyde and Co. Limited, duly filed in the said court on the 1st day of April in the year of our Lord 1879, and that on the 21st day of May, in the year of our Lord 1879, one Edward Pryor Everett was duly appointed the trustee to administer the estate of the said Frederick Michell for the benefit of his creditors. And the jurors aforesaid upon their oath aforesaid do further present that

1880

Reg. v. Michell.

the said Frederick Michell afterwards, to wit, on the said 21st day of May in the year of our Lord 1879, and from that day up to the day of taking this inquisition, and within the jurisdiction of the said Central Criminal Court, unlawfully and with intent to defraud, did not to the best of his knowledge and belief fully and truly discover to the said Edward Pryor Everett, then being such trustee administering his estate for the benefit of his creditors as aforesaid, how, and to whom, and for what consideration, and when, he had disposed of a certain part of his personal property, to wit, goods of the value of £4,000, and £4,000 in money, the same not having been disposed of in the ordinary way of his trade, nor laid out in the ordinary expense of his family; contrary to the form of the statute in such case made and provided, and against the peace of our Lady the Queen, her crown and dignity."

The evidence upon which the defendant was convicted on this count related to goods bought by him in the years 1877-8, and to goods bought from a person named Keighley, and almost immediately afterwards sold by him at a loss to a person named Harefield, and to goods bought from his creditors set out in list A of his statement of affairs in bankruptcy.

The defendant's counsel at the trial submitted that there was no evidence to go to the jury in support of the first count, and insisted that the sub-section in the Debtors Act on which the first count was founded only requires the bankrupt to disclose his dealings in relation to property which he had under his control at the time of the act of bankruptcy (28th day of January, 1879), and to which his trustee is entitled, and which is divisible among his creditors, and therefore that the evidence as to the defendant's purchases from Keighley, and resales to Harefield at a loss between the months of January and July, 1878, had no bearing on the offence charged in the first count.

For the prosecution it was submitted that, as the latter part of the sub-section requires a disclosure to be made of property which the prisoner had disposed of, and omits the words "in his custody or control," which are to be found in sub-sect. 2, the word "property" in the first sub-section must have a wider meaning than that contended for by the defendant's counsel, and must include property to which the trustee would have been entitled, and which would have been divisible among his creditors if the prisoner had not put out of the trustee's reach by disposing of it, and that therefore the defendant was bound to disclose his transactions in 1878.

The case of *Reg. v. Bolus* (11 Cox's C. C., 610,) was cited, where the Recorder of Birmingham, A. B. Adams, Q.C., in summing up, said that the sub-section in question "provided that a person seeking to be discharged of his debts should make a full and free disclosure of his transactions for a considerable time immediately preceding his bankruptcy."

The Common Serjeant held that the evidence of purchases from Keighley and resales at a loss to Harefield, between the months of January and July, 1878, had a distinct bearing on the offence charged in the first count, because they were part and parcel of the reckless course of trading which led directly up to the act of bankruptcy.

It is unnecessary to set out the evidence in detail, as the court were clearly of opinion that it warranted the conviction if it was properly receivable on the first count.

Clay: The Common Serjeant was wrong in receiving this evidence upon the first count of the indictment. That is framed upon sub-sect. 1 of sect. 11 of the Debtors' Act, 1869 (32 & 33 Vict. c. 62), which enacts, "Any person adjudged bankrupt, and any person whose affairs are liquidated by arrangement, shall in each of the cases following be deemed guilty of a misdemeanor;" that is to say, (1), "if he does not to the best of his knowledge and belief fully and truly disclose to the trustee administering his estate for the benefit of his creditors all his property, real and personal, and how, and to whom, and for what consideration, and when he disposed of any part thereof, except such part as has been disposed of in the ordinary way of his trade (if any), or laid out in the ordinary expense of his family, unless the jury is satisfied that he had no intent to defraud." The words "all his property" are restricted to his property at the time of his bankruptcy. By sect. 3 of the 32 & 33 Vict. c. 62, "words and expressions defined or explained in the Bankruptcy Act, 1869, are to have the same meaning in the Debtors Act, 1869." And, by sect. 15 of the Bankruptcy Act, 1869, the words "property divisible among the creditors are to comprise all such property as may belong to, or *be vested in, the bankrupt at the [493 commencement of the bankruptcy, or may be acquired by or devolve on him during its continuance."

Grain (*Avory* with him), for the prosecution, was not called upon to argue.

LORD COLERIDGE, C.J.: I am of opinion that the conviction should be affirmed. The question arises on the words of sect. 11, sub-sect. 1, of the 32 & 33 Vict. c. 62 (the Debtors Act, 1869), which are these: [Reads it.] The contention for the defendant is, that the disclosure is to be

1880

Reg. v. Michell.

restricted to property which the bankrupt had at the time of his bankruptcy, and that, because by sect. 3 of the 32 & 33 Vict. c. 62, it is enacted that "words and expressions defined or explained in the Bankruptcy Act, 1869 (32 & 33 Vict. c. 71), shall have the same meaning in this act;" and because, in the Bankruptcy Act, 1869, it is enacted that the words "property divisible among the creditors" shall comprise "all such property as may belong to or be vested in the bankrupt at the commencement of the bankruptcy, or may be acquired by or devolve on him during its continuance." I am of opinion that there is no ground for such a construction. The great object of sect. 11 of the Bankruptcy Act, 1869, was to create several offences, into all of which fraud of the creditors enters, and in some of which it is enacted that the fraud must have taken place within the period of four months next before the bankruptcy; and, if the whole section is looked at, it will be found to contain a most complete and absolute scheme providing for the discovery of the bankrupt's property. It seems to me perfectly plain that sub-sect. 1 of sect. 11 must relate to other property than what the bankrupt has at the time of his bankruptcy. It was said that, if that was its meaning, a bankrupt might come within it if he did not disclose something relating to his dealings with property that he may have had within five years before his bankruptcy. If there was nothing fraudulent in such dealings, it does not fall within the sub-section; but, if the question of fraud arises, there is no reason why it should not be inquired into. The fact of the lapse of five years, in the absence of any evidence of fraud, would be strong to show that the transaction was not within the sub-section. I therefore think that the count is a good count.

FIELD, J.: I am of the same opinion, and entertain no doubt upon the point. The two acts, the Debtors Act, 1869, and the Bankruptcy Act, 1869, are to be taken and read together. Sect. 15 of the Bankruptcy Act first defines the property which is to vest in the trustees, and then that which is in the apparent ownership of the bankrupt at the commencement of his bankruptcy. But the latter may be the smallest portion of his property, because in some cases the bankrupt takes means before his bankruptcy to dispose of his property among his relatives and friends. Then the Legislature has said that is not sufficient unless we (the Legislature) give the trustees the means of finding out all about the bankrupt's property, and compel the bankrupt 494] to *disclose all about it. It is said that this sub-sec-

tion was only meant to apply to property which he had on the day he became bankrupt. That cannot be the meaning of it. The exception in sub-sect. 1 of sect. 11, "except such part as has been disposed of in the ordinary way of his trade," shows the contrary.

LOPES, J., concurred.

STEPHEN, J.: I am of the same opinion. With respect to the definition of the word "property," it is obvious that the definition in section 15 of the Bankruptcy Act, 1869, only applies to the definition of the words, "property divisible among the creditors," and it was not intended that that definition should apply wherever the word "property" occurs in the acts; for, in sect. 4 of the Debtors Act, 1869, there is a definition of the word "property" which is to be taken in the widest sense of that word.

WATKIN WILLIAMS, J., concurred.

Conviction affirmed.

[14 Cox's Criminal Cases, 497.]

CENTRAL CRIMINAL COURT.

Wednesday, December 15, 1880.

(Before Sir William Charley, Common Serjeant.)

*REG. v. LARNER⁽¹⁾.

[497

False pretences—Entry to race—Obtaining prize—Remoteness.

The prisoner was charged with obtaining a prize in a certain swimming race by false pretences. He obtained his competitor's ticket for the race by representing himself to be member of a certain club, and by a letter purporting to be written by the *secretary of that club. On the faith of these representations—which [498 turned out to be false—he was allowed twenty seconds start in the race, and won the prize:

Held, by the Common Serjeant after consulting Stephen, J., that the false pretences were too remote, and that the count charging them could not be sustained.

WILLIAM LARNER was charged under an indictment containing counts for false pretences, forgery, and uttering. The first count set forth the false pretences as follows: "That the said William Larner was member of a certain club called and known as the Myddleton Swimming and Athletic Club, and that a certain letter which he, the said William Larner, had caused to be received by one Alfred Ernest Endin, had then been written and sent by one Henry Green, the secretary of the said club, and that he, the said

⁽¹⁾ Reported by W. AUSTIN METCALFE, Esq., Barrister-at-Law.

1880

Reg. v. Larner.

William Larner, as member and competitor in certain club swimming races and matches by members of the said club, had been allowed to start from the starting point twenty-five seconds before certain other competitors.

Purcell, for the prosecution.

Keith Frith and *Rundle Levey*, for defendant.

On the 23d day of August a swimming handicap took place at the Surrey County Baths. Entries were to be made previously to Alfred Endin, Esq., and competitors to be handicapped by qualified persons. A competitor's ticket was issued by Mr. Endin to each accepted entry. The length of the course was 100 yards, and there being a good many entries the race was swum in heats.

A programme was printed and circulated, containing, amongst other matters, the names of the competitors and the arrangement of the various heats, and on that programme appeared the name of W. Larner, to whom a start of twenty seconds had been assigned.

Some few days before the issuing of the programme, Mr. Endin received the following letter:

"Nelson Club, 90 Dean Street, Oxford-Street.

"August 19, 1880.

"Sir,—I inclose entrance fee for another entry for your 100 yards handicap. W. Larner (Middleton Swimming and Athletic Club) in club races receives twenty-five seconds from scratch.—I remain, sir, yours respectfully,

"H. Green, Hon. Sec."

Another letter of the same kind had been received by Mr. Endin entering one Binns for the same race. The letters were received in the usual course through the post-office. The two entries of Larner and Binns were accepted, and the entrance fee of 2s. 6d. each paid. Mr. Endin stated that he knew nothing about Larner or his accomplishments as a swimmer; that he received his entry in consequence of the representations contained in the letter, and that the start of twenty seconds was apportioned to him for the like reason. He further stated that he handed Larner a competitor's ticket; that Larner swam in the competition, and after being second in his own heat won the final easily. It was believed that Larner could have won the race from scratch.

499] *For the prisoner it was objected that the false pretences were too remote, that if he obtained anything thereby it was the competitor's ticket, and not the cup; that the cup was obtained by his own bodily activity; and that the

case fell within *Reg. v. Gardner* (1 Dears. & B. C. C., p. 40; 7 Cox's C. C., 136), in which case the prisoner had at first obtained lodgings only by a false representation, and after he had occupied the lodgings for a week he obtained board; and it was held that the false pretences were exhausted by the contract for lodging, the obtaining board not having apparently been in contemplation when the false pretence was made.

For the prosecution it was urged that the false pretence was a continuing one, that the winning of the cup was clearly in the contemplation of the prisoner when he entered for the race, and that the judgment of Willes, J., in *Reg. v. Gardner*, citing *Reg. v. Abbott* and *Reg. v. Burgess*, was an authority the other way. They also cited *Reg. v. Martin* (L. Rep. Cas. Res., 56; 10 Cox's C. C., 383).

Held, by the Common Serjeant, after conferring with Stephen, J., in the old court, that the objection must prevail as the false pretences were too remote.

The prisoner was afterwards tried for uttering the letter knowing it to be forged, and convicted.

[14 Cox's Criminal Cases, 499.]

CENTRAL CRIMINAL COURT.

Friday, December 17, 1880.

(Before Mr. Justice Stephen.)

REG. V. O'CALLAGHAN and Others⁽¹⁾.

24 & 25 Vict. c. 100—*Indictment—Inciting to commit crime—Too general—Amendment.*

Where the case has not been inquired into before a magistrate but the bill has been merely found by the grand jury, the court will not go out of its way to assist the prosecution by amending the indictment and inserting certain names, on objection taken that the charges therein set out are not specified with sufficient particularity.

THE defendants were indicted for a misdemeanor in tempting and soliciting one Thomas Titley to commit a crime, viz., to procure the miscarriage of a certain woman.

The case arose out of *Reg. v. Titley*, where the police had set a *trap for the defendant, a chemist, and pro- [500 cured his conviction for selling noxious drugs: (See next case, p. 645.)

⁽¹⁾ Reported by W. AUSTIN METCALFE Esq., Barrister-at-Law.

1880

Reg. v. O'Callaghan.

Edward Clarke, Q.C., and Besley, for the prosecution.
Poland, and Montagu Williams, for the defence.

The indictment was as follows :

Central Criminal Court, to wit: The jurors for our Lady the Queen upon their oath present, that John O'Callaghan, Phillip Shrives, William Stroud, and Martha Diffey, on the 11th day of November, in the year of our Lord 1880, and on divers days and times thereafter between that day and the date of this inquisition within the jurisdiction of the said Central Criminal Court, by divers artful and subtle means, stratagems, tricks, and devices, and by divers false representations, did attempt and endeavor to seduce one Thomas Titley to commit an indictable misdemeanor, to the great damage and injury of the said Thomas Titley, to the evil and pernicious example of all others in the like case offending, and against the peace of our Lady the Queen, her crown and dignity.

Second count :

And the jurors aforesaid, upon their oath aforesaid, do further present that the said John O'Callaghan, Phillip Shrives, William Stroud, and Martha Diffey, on the 11th day of November, A.D. 1880, and on divers days and times between that day and the day of taking this inquisition, unlawfully, wickedly, and maliciously did attempt and endeavor to induce the said Thomas Titley to contravene the law of the land, with the intent that the said Thomas Titley should thereafter be convicted of an offence and punished, to the great damage and prejudice of the said Thomas Titley and against the peace of our Lady the Queen, her crown and dignity.

Third count :

And the jurors aforesaid, upon their oath aforesaid, do further present that the said John O'Callaghan, Phillip Shrives, William Stroud, and Martha Diffey, on the 11th day of November, A.D. 1880, and on divers days and times between that day and the day of taking this inquisition within the jurisdiction of the said Central Criminal Court, unlawfully, wickedly, and maliciously did solicit the said Thomas Titley to commit a criminal and indictable offence to the great damage of the said Thomas Titley, and against the peace of our Lady the Queen, her crown and dignity.

Fourth count :

And the jurors aforesaid, upon their oaths aforesaid, do further present that the said John O'Callaghan, Phillip

Shrives, William Stroud, and Martha Diffey, on the 11th day of November, A.D. 1880, and on divers days and times thereafter between that day and the date of this inquisition, unlawfully, wickedly, and maliciously did solicit, incite, and endeavor, so far as in them lay, to persuade the said Thomas Titley to unlawfully supply a noxious thing, knowing that the same was intended to be unlawfully used with intent to procure the miscarriage of a woman, and thereby to contravene the provisions of the statute (24 & 25 Vict. c. 100), to the great damage and prejudice of the said Thomas Titley, and against the peace of our Lady the Queen, her crown and dignity.

Poland: The first three counts are clearly bad. The words are far too general. It is not sufficient to charge the defendants generally with having committed an offence, but the facts and circumstances constituting the offence must be set out. Here it is impossible for the defendants to tell what is the particular charge alleged against them. The defendants are charged with inciting one Thomas Titley to commit a crime, and no information is given as to what is the nature of that crime. With regard to the fourth count, there it is true that a crime is specified, viz., "to unlawfully supply a noxious thing," &c., but this is not sufficient. It should be stated to whom the noxious thing was supplied. Some person's name must appear. And further "with intent to procure the miscarriage of a woman" is not sufficient. The woman must be specified, not necessarily by name, but as one "to the jurors unknown," or in [501 some way to fix a particular woman as the person for whom the drug was intended. He further mentioned that the case had never been inquired into before a magistrate, or in any other way, and contended there was the need for greater accuracy on that account.

Clarke and Besley abandoned the first three counts of the indictment, but contended that the fourth was a good count, or at any rate submitted that his Lordship should amend by the insertion of what names might be necessary. The special amendment they suggested was the insertion of the name of William Stroud in the earlier, and the "daughter of Martha Diffey" in the later part of the count. They reminded him that the prosecution yesterday (*Reg. v. Titley, post*, p. 645) had been allowed to make an amendment identical with one which they now desired.

1880

Reg. v. O'Callaghan.

STEPHEN, J.: With regard to the first three counts of this indictment I need say but little. It is in fact admitted by the prosecution that they cannot be supported, and I entirely agree with them. The fourth count is somewhat different. As it stands, I am of opinion that it is bad for the reasons urged on me by Mr. Poland, viz., that it does not set out the name of any person to whom the drugs were supplied, nor does it point out any particular woman for whom the drug was intended. I am however pressed by Mr. Clarke to amend by inserting the requisite name, and am reminded that at the commencement of yesterday's trial (*Reg. v. Titley, post*, p. 645) I allowed the second amendment to be made, and the words "by a certain woman to the jurors unknown" to be inserted. This was so, and I should have no hesitation in allowing the same amendment, were that all that was requisite to support this count. To do so effectually, however, I should have to allow another and different amendment, and this I am not disposed to do. I have been reminded that there has been no preliminary examination into this matter, and that the grand jury have returned this identical bill. On the one hand I am loth to quash an indictment for what may be merely an error of the pleader; on the other, I remember that where a case comes before me without previous inquiry, substantial injustice may be done by making alteration in the terms of the bill sent down by the grand jury. On the whole I decline to make the proposed amendment, and therefore the whole indictment will fail; but of course this will in no way prejudice any further indictment to be prepared hereafter.

Indictment quashed.

[14 Cox's Criminal Cases, 502.]

CENTRAL CRIMINAL COURT.

Thursday, December 16, 1880.

(Before Mr. Justice Stephen.)

*REG. v. THOMAS TITLEY (').

[502

Supplying noxious thing—Intending to procure abortion—24 & 25 Vict. c. 100, s. 59—Indictment.

Supplying a noxious thing to a person with the intent that it shall be used by a certain woman to produce abortion is a misdemeanor within the 24 & 25 Vict. c. 100, s. 59, although the woman for whom it was intended by him was not pregnant.

On objection before plea to the first count of the indictment that the words "a certain woman" were too vague, and therefore that the count was bad, the judge allowed the prosecution to amend by inserting the words "a woman to the jurors unknown," instead of the words objected to.

THE defendant was indicted for unlawfully supplying to William Stroud a quantity of ergot of rye and tincture of perchloride of iron, well knowing that the same was intended to be unlawfully used with intent to procure the miscarriage of a certain woman.

A second count varied the charge by alleging that the woman was the daughter of one Martha Diffey.

Poland and Montagu Williams, for the prosecution.

Edward Clarke, Q.C., and *Besley*, for the defence.

Before the plea, *Clarke, Q.C.*, objected to the first count on the ground that it was too general.

STEPHEN, J., allowed the prosecution to amend by alleging that the offence was intended to be committed on "a woman to the jurors unknown."

The defendant was a chemist, and the evidence for the prosecution showed that the police authorities had laid a trap for him.

A woman named Martha Diffey was sent to the defendant's shop by Inspector O'Callaghan. Martha Diffey was the wife of a police constable, and was the mother of two daughters, aged twenty and sixteen, neither of whom were pregnant, or in need of any instruments or drugs for procuring abortion. Mrs. Diffey saw the defendant at his shop, and said to him, "My daughter is in trouble, will you help her?" The defendant said, "Who sent you?" She replied, "A friend of the young man." The defendant said, "How long is she gone?" She replied, "Three *months." [503] The defendant then asked to see the girl, but was told that she would not come.

This conversation was reported to O'Callaghan, who concocted a letter and sent it to Titley by the woman.

(1) Reported by W. AUSTIN METCALFE, Esq., Barrister-at-Law.

1880

Reg. v. Titley.

The letter purported to come from the young man before referred to, and is as follows :

“Saturday, Nov. 13, 1880.

“Dear Sir,—This woman’s daughter, who was in our service, is about three months advanced in pregnancy, and is naturally desirous of getting rid of her trouble. A friend has informed me of your skill in such matters, and I have advised the girl to call on you ; she has, however, some hesitation in doing so, and the mother who has been to me informs me that in her absence you have some difficulty in prescribing effectually. As a man of the world you will quite understand my position in the matter. The mother is a virago, and constantly accuses me of having been the ruin of her family ; and the daughter, although not quite so bad, is getting troublesome too. If the thing goes on to the end I shall have to pay ; I should prefer doing so now, and so get rid of an annoyance which is becoming intolerable. I have, however, no desire to be seen in the matter ; my part will be to pay, and I should be glad of your advice as to what is the best to do under the circumstances. I can understand how desirable it is that you should see the girl herself, but I have hitherto failed to persuade her to go and see you. Kindly say whether you cannot possibly prescribe in her absence, and I shall be glad to pay any sum which may be reasonable for the service rendered, and I shall, moreover, be indebted to you for relieving me of an annoyance which is becoming unbearable. I can send you no money by this woman, as I am uncertain that it will reach you. In your note say how I am to remit.

“Faithfully yours,

“— Titley, Esq.

H. W.”

This letter was accepted and read by Titley, who wrote in reply as follows :

“Saturday Night.

“Dear Sir,—This is an awkward and unpleasant business to write about, and to a stranger. I should rather see you, it would give me confidence. I am not at all anxious to assist a person who does not wish to be seen. You must call on me if you wish me to help you, otherwise I must decline. I can speak what I cannot here write, and advise you to your advantage. Shall be here to-morrow evening (Sunday), from half-past six till ten).

Yours, &c.,

T. T.”

On the receipt of this letter by inspector O’Callaghan, it was arranged by him, in concert with the authorities at

Scotland Yard, that a police officer should be sent to Titley's shop to represent the pretended seducer. A police sergeant named Stroud was accordingly selected, and was intrusted with five bank notes of £5 each. On the next day he went to Titley's shop, and introduced himself as the writer of the letter. The prisoner said to Stroud, "The girl must be brought to me." Stroud replied, "It is quite impossible." Titley then showed a number of bottles, each containing a foetus, one of which he pointed out as the most successful operation he had performed. He further said, "My business generally lies with ladies whose husbands are away. I think I can give her something, but it will not be so successful as an operation." He then proceeded to fill two bottles, which he handed to Stroud, at the same time saying, "You must give it to her three times a day, and she must put her feet in hot water at night," with other directions. Stroud then gave him one of the £5 notes, taking care that the defendant should see the four others, and in change for this Titley returned £4 16s.

*The prisoner was then apprehended, when he tried [504 to tear up the letter signed "H. W."

At the trial evidence was given that the bottles contained a mixture of ergot of rye and tincture of iron perchloride, and that such a mixture would in all probability be dangerous if administered to a pregnant woman, and would probably operate by producing a miscarriage.

Edward Clarke, Q.C., for defendant: There is no evidence to support the indictment. The woman is alleged in the first count to be "a woman to the jurors unknown," and, in the second, to be a "woman, the daughter of one Martha Diffey." With regard to both counts, the objection will apply that there was no person in existence for whose use the medicine was given, inasmuch as the only person for whom it could be intended was one who was not, and never had been, pregnant. With respect to the case of *Reg. v. Hillman* (9 Cox's C. C., 386; L. & C., 343), there was there actually a person to whom the medicine was to be given, and one who believed herself to be pregnant. The case of *Reg. v. Collins* (9 Cox's C. C., 497; L. & C., 471) is in point. There it was held that there could be no conviction for attempted larceny where the prisoner put his hand into the empty pocket of the prosecutor. Here there is no woman who is in a condition to be made the subject of an abortion.

STEPHEN, J., overruled the objection, and, in his charge to the jury, said: "The case of *Reg. v. Israel Hillman* is precisely in point, and I am of opinion that the evidence

1880

Reg. v. Jacobson.

brings this offence within the section of the statute. If a man supplies any noxious thing, intending it to be used to procure the miscarriage of a woman, it is immaterial whether there is a woman in a state fit to be the subject of the operation or not. It does not matter in the least whether Mrs. Diffey intended her daughter to use this medicine. You have first to consider whether the medicine was supplied by the prisoner to Stroud; secondly, whether such medicine, if so supplied, was a noxious thing. In case you should find both those issues in the affirmative, you have further to consider: What was the intention of the prisoner when he supplied it? If the intention in his mind was that it should be applied for the purpose of procuring the miscarriage of Martha Diffey's daughter, you must convict him."

Verdict, Guilty.

[14 Cox's Criminal Cases, 522.]

HIGH COURT OF JUSTICE.

QUEEN'S BENCH DIVISION.

(Before Lord Chief Justice Cockburn and a Special Jury.)

December 20, 1880.

522]

*REG. V. JACOBSON (').

Burial ground—Unconsecrated—Disinterring—Disturbing and removing human remains—Misdemeanor.

Defendant was indicted for unlawfully, wilfully, and indecently digging open graves in a burial ground, and taking and removing parts of the bodies of persons buried therein, and interfering with and offering indignities to the remains of the said bodies.

The evidence showed that defendant employed persons to excavate for building operations, the burial ground attached to a Nonconformist place of worship, which had been disused as a burial ground for some time; and the jury found that, in the course of the excavations, bones that formed parts of human remains, and of the same human skeleton, were dug up, but that they were not disturbed in an improper and indecent manner:

Held, that the defendant was guilty of a misdemeanor at common law.

CENTRAL CRIMINAL COURT. The jurors for our Lady the Queen upon their oath present, that heretofore and before the taking at this inquisition there was a certain burial ground in the parish of St. Pancras, in the county of Middlesex, and that the bodies of certain persons, whose names to the jurors aforesaid are unknown, were from time to time buried in the said ground, and, at the time of the committing of the offence hereinafter charged and stated, large por-

(') Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

tions of the said bodies remained, and were in the said ground; and the jurors aforesaid upon their oaths aforesaid do further present that Nathan Woolf Jacobson, on divers days between the 21st day of March, A.D. 1880, and the taking of this inquisition within the jurisdiction of the said court, well knowing the premises, did unlawfully, wilfully, and indecently, dig open, or cause and procure to be dug open, certain graves in the said burial ground wherein had been buried the said bodies as aforesaid, and did then and there unlawfully, wilfully, and indecently take out, and cause and procure to be taken out, of the said graves certain portions of the said bodies, and did then and there unlawfully, wilfully, and indecently interfere with and offer indignities to the remains of the said bodies, and did then and there unlawfully, wilfully, and indecently remove from the said graves certain portions of the said bodies so buried as aforesaid, to the great scandal and disgrace of religion, decency, and morality, to the evil example of all others in the like case offending, and against the peace of our Lady the Queen, her crown and dignity.

Second count. And the jurors aforesaid upon their oath aforesaid do further present that the said N. W. Jacobson, on the 30th day of March, A.D. 1880, and within the jurisdiction of the said court, unlawfully, wilfully, and indecently did dig open certain graves in the burial ground in the 1st count mentioned, and unlawfully, wilfully, and indecently, did remove from the said graves certain portions of the bodies of certain persons whose names to the jurors aforesaid are *unknown, the said bodies having been [523] theretofore buried in the said graves, to the great scandal and disgrace of religion, decency, and morality, to the evil example of all others in the like case offending, and against the peace of our Lady the Queen, her crown and dignity.

Third count. And the jurors aforesaid upon their oath aforesaid do further present, that the said N. W. Jacobson, on divers days between the 24th day of March, A.D. 1880, and the taking of this inquisition within the jurisdiction of the said court, was the occupier of the said burial ground in the said court mentioned, and that he did then and there unlawfully and injuriously cause and suffer certain persons, whose names to the jurors aforesaid are unknown, to unlawfully and indecently mutilate and offer indignities to portions of the bodies of certain persons whose names to the jurors aforesaid are unknown, and who had been theretofore buried in the said burial ground, to the great damage and common nuisance of all liege subjects of our Lady the Queen

1880

Reg. v. Jacobson.

in the vicinity of the said ground inhabiting, being, going, returning, and passing, and against the peace of our Lady the Queen, her crown and dignity.

The indictment, having been preferred and found at the Central Criminal Court, was removed into the Court of Queen's Bench by *certiorari*.

The trial took place on the 30th day of June, 1880, at Westminster, before Cockburn, C.J., and a special jury.

The material facts were these: About the year 1756 the celebrated Nonconformist preacher, Whitfield, built a chapel, known as the Tabernacle, in Tottenham-court-road, London; and attached to it was a burial ground of about half an acre in extent. The chapel and land were held on a lease, which expired in 1827, and no portion had been consecrated. From the register it appeared that the first interments in the ground took place in November, 1756, and the last in 1853. From 1827 to 1831 no burials took place, but, in the latter year, the chapel trustees bought the copyhold of inheritance, and burials were again resumed. The trustees borrowed the purchase-money, and mortgaged the chapel and ground to secure the same. From 1756 to 1853 there had been about 30,000 interments in the ground. In 1862, the mortgage was foreclosed, and the chapel and ground sold in separate lots. The land was advertised by the auctioneer as building land, and the sale was by direction of the Court of Chancery. The defendant bought the ground at the sale, and in 1863 he began to excavate, with a view to building on it. The vestry of St. Pancras thereupon took out a summons against him, under the 20 & 21 Vict. c. 81, s. 25, which provides that, except in the case where a body is removed from one consecrated place of burial to another by a faculty, it shall not be lawful to remove any body, or the remains of any body, which may have been interred in any place of burial, without license under the hand of a Secretary of State—penalty, on summary conviction, not exceeding £2. The defendant was thereupon convicted at the Marlborough Police Court. In 1879, the ground, through neglect, was invaded by street boys, and became a disgrace to the neighborhood; and the vestry, at the solicitation of near inhabitants, repaired the railings and fences, and endeavored to plant and improve it, in pursuance of the order of the Secretary of State, made under the 20 & 21 Vict. c. 81, s. 23. Upon this the defendant obtained an injunction from the 524] Master of the Rolls to restrain the vestry *from interfering, the Master of the Rolls being of opinion that the Burial Acts did not apply to grounds like this one, and that

the Order in Council was therefore of no authority. Shortly afterwards the defendant laid before the Metropolitan Board of Works plans for the erection of buildings on the ground, but the board refused to sanction the plans unless the ground was first excavated down to the virgin soil. The defendant then consulted Dr. Rogers, a Professor of Chemistry and Toxicology, who advised him that no injury would ensue to the public health from excavating the ground. Having obtained this opinion, the defendant proceeded with the excavation of the ground. The vestry then laid another information against the defendant at the police court, and the defendant was bound over to take his trial at the Central Criminal Court for a misdemeanor. The indictment was preferred and found and removed into the court of Queen's Bench for trial by a special jury. The defendant pleaded not guilty.

It was proved that the defendant employed a contractor of the name of Cousens to excavate the ground, and the contractor employed a number of men who dug out of the ground a number of human bones which had not become decomposed, and also the remains of coffins. About a hundred cartloads of the mould were removed, some being sold to florists at 2s. to 3s. per load. One witness said that he saw skulls picked out of the ground with a pickaxe. Another witness, the survivor of a family that had been buried in the graveyard, gave evidence as to the manner in which the human remains had been removed by the contractor. One of the workmen employed deposed that the workmen picked up the bones sometimes with their hands and sometimes with their shovels, and placed them in a temporary trench prior to their removal to a vault which was being made for their reception, and that a man was placed to see that no human bones were carried away in the carts. Doctors Rogers and Richardson were called on behalf of the defendant to prove that the decomposition of the remains was complete and that there was no appearance of organic matter and no offensive odor.

The Lord Chief Justice, in summing-up, said the point had been raised whether the disinterring of such bones as had been proved to have been disinterred was an offence at law, and although he had his own opinion upon that point he would ask the jury, with the view of obtaining the opinion of the court—there not being any judicial decision on the subject—whether the bones were, in their opinion, those of human remains. In a churchyard there might be bones, some of which belonged to one human body and some to

1880

Reg. v. Jacobson.

another not in immediate proximity; and in such cases he doubted whether their removal would bring the case within the law. He would therefore put it to the jury whether, in their opinion, those bones ever formed part of the same human body. If they were of opinion that they were human remains, and as such, entitled to the protection of the law, 525] *then came the most material question: Assuming that the defendant was warranted in disinterring them, was it done in such a manner as not to be improper and indecent? It had been laid down by the late Mr. Justice Byles that "indignities offered to human remains in improperly and indecently disinterring them are the grounds of an indictment." Further, as to the first question, were these human remains those constituting the same body, and forming one integral skeleton? It was shown that in the course of 100 years more than 30,000 bodies had been interred in the burial ground, and they could quite understand that as it became necessary to open fresh graves from time to time, there must have been some dispersion of bones and disturbance of bodies, but it was also obvious that those who came last must remain uppermost, and as there was no operation in nature which could remove one part of the human structure from the other, the bones must still be found in their original position as a corpse, and when disturbed by a pickaxe or shovel, the jury could not doubt that those in the uppermost layer were the bones which formed the same skeleton which had heretofore formed the same body and had been interfered with and disturbed. He would ask them further to find—and this was the most important branch of the case—was the removal of the bones improperly and indecently done? Undoubtedly the defendant had bought the freehold, but then he had done so subject to the duties imposed on its trustees, and no law could justify a man in removing the remains of the dead from their proper resting-place improperly and indecently. Assuming that the defendant had the right to remove them, he had no right to do so irreverently and indecently. Putting to them a suppositious case, he would ask the jury if any of them, having relatives interred in a burial ground, would be satisfied by their removal in such a manner as had been proved in this case, though no doubt the men employed, as honest men, had done their best. His Lordship, in conclusion, handed the three questions in writing indicated in his remarks to the jury, namely: First, were the bones that were disinterred those of human remains; secondly, did they form the bones

of the same skeleton? and, thirdly, were they disturbed in an improper and indecent manner?

The jury answered the first two questions in the affirmative and the third in the negative.

A verdict of guilty was entered upon the record, and the Lord Chief Justice reserved the legal question for further consideration.

Dec. 20. The defendant came before the court for judgment when the legal question was discussed.

Webster, Q.C. (*Bullen* with him), for the defendant: The facts as proved showed that the defendant had not committed any criminal offence, for at the time of the alleged commission this land, which was unconsecrated ground, was not *de facto* or *de jure* a burial ground. It is not an offence against the common law of *England if an owner of land wherein persons have been buried remove the bodies, provided he does so properly and decently. In this case the remains were unrecognizable. In *Foster v. Dodds* (L. Rep., 3 Q. B., 67), which was an action, for trespass, by the owner of land formerly used as a burial ground attached to Bridewell, Bridge-street, Blackfriars, against the churchwardens of the parish of St. Bride, Fleet-street, who had entered upon the ground and done the acts complained of under an order of the Secretary of State made under the Burial Acts, 20 & 21 Vict. c. 81, s. 23, and 22 Vict. c. 1, s. 1, Byles, J., said: "A dead body by law belongs to no one, and is therefore under the protection of the public. If it lies in consecrated ground, the ecclesiastical law will interpose for its protection; but whether in ground consecrated or unconsecrated, indignities offered to human remains in improperly and indecently disinterring them are the ground of an indictment." Here it is found by the jury that the remains were not disinterred in an improper or indecent manner. This is a different case from *Reg. v. Sharpe* (7 Cox's C. C., 214; 26 L. J., M. C., 41), where it was held that it was indictable to remove, without lawful authority, a corpse from a grave in a burial ground belonging to Protestant dissenters. There the defendant removed several coffins out of a family grave, and took away that of his mother, which was much decomposed, after placing it in a shell, and reburied it in a consecrated churchyard. In that case the removal was without the assent of the owners of the soil, and was done in an improper manner. In this case the remains had become pulverized and mixed with the soil, and there was nothing that could be recognized as belonging to any particular grave or coffin or skeleton. The protec-

1880

Reg. v. Jacobson.

tion at common law to bodies interred in unconsecrated ground is against the indecent disinterment of them, and the disinterment must be with the assent of the owner of the ground.

Poland (*Mead* with him): The evidence shows that the defendant has been guilty of an offence at common law. The offence consists in opening divers graves and taking out parts of whole skeletons, so that they ceased to be whole skeletons, and separating the bones and mixing them up with the mould, so as to destroy the identity of the skeletons. That is an offence *contra bonos mores*, and revolting to human nature, as was said in *Rex v. Lynn* (2 T. Rep., 733; 1 Leach, C. C., 497), where it was held to be an indictable offence to take up a dead body for the purpose of dissection. It is no answer to say that the disinterment was done in a decent way, any more than it would have been to say that in *Rex v. Lynn* the disinterment was for the advancement of medical science. In the present case it was proved that persons now living had relatives buried in this ground. In *Reg. v. Sharpe* there was a trespass for want of the consent of the owner of the ground, but that does not constitute the offence at common law, which is the disinterment, the disturbance of the remains of the dead. A 527] time may come when *the bones are not recognizable as human remains, when the bones have become dust and the grounds might be built upon. To disturb the remains of Druids who had been buried on Salisbury Plain, for instance, would not be indictable. This must always be a question of degree, and the same rule would not be applicable if the remains were in such a state that their removal would be a shock to our moral feeling. The defendant cannot lawfully disinter bodies recently buried and place them in a common vault, even if decently done. In *Reg. v. Sharpe*, Erle, C.J., said, "We have considered the grounds relied upon on behalf of the defendant, and, although we all feel sensible of the estimable motives on which the defendant acted, namely, filial affection and religious duty, still, neither authority nor principle would justify the position that the wrongful removal of a corpse was no misdemeanor if the motive for the act deserved approbation. A purpose of anatomical science would fall within the category. Neither does our law recognize the right of any one child to the corpse of its parent as claimed by the defendant. Our law recognizes no property in a corpse, and the protection of the grave at common law as *contra-distinguished* from ecclesiastical protection to consecrated ground depends on this form of

indictment, and there is no authority for saying that relationship can justify the taking of a corpse from the grave where it has been laid."

FIELD, J.: The defendant has been convicted of the offence charged in the indictment, and we are of opinion that what the defendant has done, he being present at the time, and having told the inspector of nuisances that he would be responsible for what was done, is an offence by the common law of England. In my opinion it is an offence of a very serious nature that the remains of human beings who had gone to their rest should be disturbed and subjected to indignities, although the defendant was entitled to credit for doing what he did in a manner that seemed to him most proper. It was true that he had consulted a medical gentleman whose opinion he thought warranted him in commencing the excavations. But when he saw human remains disinterred, he should have paused and desisted, instead of which he persisted, and sheltered himself under the responsibility of his professional adviser. On the other hand, I acquit him of all intention of desecration or hurting the feelings of others, and moreover he may have thought that the conditions under which he bought the land at a sale by order of the Court of Chancery carried with them a sort of sanction for what he was doing, and as a layman he might have supposed that the land which he had purchased was available for building purposes. It is also in favor of the defendant that since the trial he has abstained from further disturbance of the remains, and the court would further take into account that he would have to pay the expenses of the prosecution. Lastly, the prosecutors, the vestry of St. Pancras, had expressed the wish not to press the case against the defendant, *but to leave it entirely in the [528 hands of the court. The court, however, desired to prevent the repetition of offences like these, but under all the circumstances, and as an indulgence to the defendant on the distinct understanding that this serious offence should not be repeated, would only impose a penalty of £25.

MANISTY, J.: I agree with my learned brother, and I desire that it should be understood that there is no doubt as to the question of law in this case. In my opinion the freeholder was bound when he originally disposed of the land for a burial ground to see that it was preserved for interments only, and that the bodies of persons buried there should not be disturbed, and I also think that each one who succeeded took the ground under the same obligation.

Conviction affirmed.

1881

Reg. v. Jones.

See 12 Eng. Rep., 667 note; 18 id., 427 note.

It is larceny to steal a coffin in which the remains of a human being are interred. This was so at common law; and the rule is not changed by anything contained in Wag. Stat., §§ 11, 12, 13, p. 500. Sections 11 & 12 relate only to the exhumation of the remains. Section 13 prescribes the punishment for an attempt to remove the remains, or to steal the coffin, or any article interred with the body. Neither

of these provides for the case where the theft of the coffin is actually accomplished.

It is not necessary in an indictment for a common law offence to negative exceptions contained in a statute.

In an indictment for the larceny of a coffin in which the remains of a human being are interred, the coffin is properly laid to be the property of the person who furnished it and buried the deceased: *State v. Doepeke*, 68 Mo., 208.

[14 Cox's Criminal Cases, 528.]

NORTH WALES CIRCUIT.

Carnarvon Winter Assizes. Monday, January 17, 1881.

(Before Mr. Justice Fry.)

REG. V. JOHN WILLIAM JONES (¹).

Practice—Restitution—Stolen property—Post-office.

The Postmaster-General is not entitled to have restored to him moneys found on the prisoner part of the proceeds of the theft, the prisoner having pleaded guilty to an indictment for stealing a letter containing two bank notes the property of the Postmaster-General.

THE prisoner pleaded guilty to an indictment under the Post Office Act (7 Will. 4 & 1 Vict. c. 36), which charged him with stealing, while in the employment of the Post Office, a post-letter containing two Bank of England £10 notes. There was no count for a simple larceny. The Postmaster-General was the prosecutor, and the property was laid in his name.

Trevor Parkins, instructed for the prosecution, applied that a sum of £7 9s. 6d., part of the proceeds of the theft, which was in the hands of the police, should be handed over to the Postmaster-General. He relied upon sect. 100 of 24 529] & 25 Vict. c. 96 *(the Larceny Act), and contended that the compound larceny of which the prisoner had been convicted comprised the offence of simple larceny, and that the case accordingly fell within the words of that section, viz., "any such felony as is mentioned in this act in stealing." He pointed out that the prisoner might under the indictment have been convicted of a simple larceny if the circumstances of aggravation which brought the offence within the terms of the Post Office Act had failed to be proved.

(¹) Reported by CLEMENT HIGGINS, Esq., Barrister-at-Law.

FRY, J.: I think I have no power to make an order. Before I can do so it must be shown that the prisoner was indicted for such an offence as is specified in the act 24 & 25 Vict. c. 96, and convicted thereof. I will, however, if you like, adjourn my decision till I return to London; and you can then, if you are able to do so, bring before me any authority which extends the construction of this section so as to comprise such cases as the present one. There seems, however, to be a further difficulty. The section provides that the property is to be restored to the *owner*, and it is not clear that the Postmaster-General is the owner.

Trevor Parkins said it was a case of great hardship. The sender of the bank-notes had no remedy against the Post Office. If the money were handed over by the police to the Postmaster-General it would be given to the sender. The police had no right to keep the money, and if an intimation of his Lordship's opinion were made they would no doubt act upon it.

FRY, J.: I think the money ought to be returned by the police, although I cannot order them to do so.

Application refused.

[14 Cox's Criminal Cases, 563.]

NORTH EASTERN CIRCUIT.

Newcastle-upon-Tyne. Wednesday, April 27, 1881.

(Before Stephen, J.)

*REG. V. DAVIS (').

[563]

Felonious wounding—Delirium tremens—When a defence.

Drunkenness is no excuse, but delirium tremens caused by drinking, and differing from drunkenness, if it produces such a degree of madness, even for a time, as to render a person incapable of distinguishing right from wrong, relieves him from criminal responsibility.

WILLIAM DAVIS, thirty-eight, laborer, was charged with feloniously wounding his sister-in-law, Jane Davis, at Newcastle, on the 14th day of January, with intent to murder her.

Milvain for the prosecution.

Steavenson for the defence.

On the 14th day of January, 1881, the prisoner (who had been previously drinking heavily, but was then sober) made an attack upon his sister-in-law, Mrs. Davis, threw her down, and attempted to cut her throat with a knife. Ordinarily he was a very mild, quiet, peaceable, well-behaved man,

(') Reported by RICHARD LUCK, Esq., Barrister-at-Law.

1881

Reg. v. Davis.

and on friendly terms with her. At the police station he said, "The man in the moon told me to do it. I will have to commit murder, as I must be hanged." He was examined by two medical men, who found him suffering from *delirium tremens*, resulting from over indulgence in drink. According to their evidence he would know what he was doing, but his actions would not be under his control. In their judgment neither fear of punishment nor legal nor moral considerations would have deterred him—nothing short of actual physical restraint would have prevented him acting as he did. He was disordered in his senses, and would not be able to distinguish between moral right and wrong at the time he committed the act. Under proper care and treatment he recovered in a week, and was then perfectly sensible.

For the defence it was submitted that he was of unsound mind at the time of the commission of the act, and was not responsible for his actions.

STEPHEN, J., to the jury: The prisoner at the bar is charged with having feloniously wounded his sister-in-law, Jane Davis, on the 14th day of January last with intent to murder her. You will have to consider whether he was in 564] such a state of mind as *to be thoroughly responsible for his actions. And with regard to that I must explain to you what is the kind or degree of insanity which relieves a man from responsibility. Nobody must suppose—and I hope no one will be led for one moment to suppose—that drunkenness is any kind of excuse for crime. If this man had been raging drunk, and had stabbed his sister-in-law and killed her, he would have stood at the bar guilty of murder beyond all doubt or question. But drunkenness is one thing and the diseases to which drunkenness leads are different things; and if a man by drunkenness brings on a state of disease which causes such a degree of madness, even for a time, which would have relieved him from responsibility if it had been caused in any other way, then he would not be criminally responsible. In my opinion, in such a case the man is a madman, and is to be treated as such, although his madness is only temporary. If you think he was so insane—that if his insanity had been produced by other causes he would not be responsible for his actions—then the mere fact that it was caused by drunkenness will not prevent it having the effect which otherwise it would have had, of excusing him from punishment. Drunkenness is no excuse, but *delirium tremens* caused by drunkenness may be an excuse if you think it produces such a state of

mind as would otherwise relieve him from responsibility. A person may be both insane and responsible for his actions, and the great test laid down in *McNaughten's Case* (10 Cl. & Fin., 200; 1 C. & K., 130 n.), was whether he did or did not know at the time that the act he was committing was wrong. If he did—even though he were mad—he must be responsible; but if his madness prevented that, then he was to be excused. As I understand the law, any disease which so disturbs the mind that you cannot think calmly and rationally of all the different reasons to which we refer in considering the rightness or wrongness of an action—any disease which so disturbs the mind that you cannot perform that duty with some moderate degree of calmness and reason may be fairly said to prevent a man from knowing that what he did was wrong. *Delirium tremens* is not the primary, but the secondary consequence of drinking, and both the doctors agree that the prisoner was unable to control his conduct, and that nothing short of actual physical restraint would have deterred him from the commission of the act. If you think there was a distinct disease caused by drinking, but differing from drunkenness, and that by reason thereof he did not know that the act was wrong, you will find a verdict of not guilty on the ground of insanity; but if you are not satisfied with that, you must find him guilty either of stabbing with intent to murder or to do grievous bodily harm.

The jury returned a verdict of Not Guilty on the ground of insanity.

The prisoner was ordered to be detained during Her Majesty's pleasure.

See 10 West. Jur., 641; 15 Am. L. Reg. (N.S.), 505; 8 Cent. L. J., 662; 8 Am. Jur., 5.

The voluntary intoxication of one who without provocation commits a homicide, although amounting to phrensy, does not exempt him from the same construction of his conduct, and the same legal inferences upon the question of intent, as affecting the grade of his crime, which are applicable to a person entirely sober: *People v. Rogers*, 18 N. Y., 9.

Alabama: *Mooney v. State*, 38 Ala., 419; *Ross v. State*, 62 id., 225; *Beasley v. State*, 50 id., 149.

California: *People v. Ferris*, 55 Cal., 588, 2 Crim. Law Mag., 18, 2

Kentucky L. Repr., 190, 194 note; *People v. Williams*, 48 Cal., 844; *People v. Belencia*, 21 id., 544.

Connecticut: *State v. Johnson*, 41 Conn., 584.

Dakota: *People v. Odell*, 1 Dakota, 197.

Delaware: *State v. Hurley*, 1 Houst. Cr. Cas., 28; *State v. Till*, id., 238; *State v. Thomas*, id., 511.

English: *Reg. v. Doody*, 6 Cox's Cr. Cas., 463; *Reg. v. Moon*, 8 Car. & Kirw., 819.

Georgia: *Estes v. State*, 55 Geo., 81; *Marshall v. State*, 59 id., 154.

Illinois: *Rafferty v. People*, 66 Ill., 118.

Indiana: *Fisher v. State*, 64 Ind.,

1881

Reg. v. Davis.

435; Cluck v. State, 40 id., 264; Bradley v. State, 31 id., 492; Dawson v. State, 16 id., 428.

Iowa: State v. Maxwell, 42 Iowa, 208.

Kansas: See State v. White, 14 Kans., 588.

Kentucky: Blimm v. Com., 7 Bush, 320, 10 Amer. Law Reg. (N.S.), 577, 583 note; Nichols v. Com., 11 Bush, 576; Shannahan v. Com., 8 id., 463.

Massachusetts: Com. v. Malone, 114 Mass., 295.

Michigan: See People v. Finley, 88 Mich., 482.

Minnesota: State v. Herdina, 25 Minn., 161; State v. Welch, 21 id., 22.

Missouri: State v. Pitts, 58 Mo., 556; State v. Hundley, 46 Mo., 414; Schaller v. State, 14 Mo., 502.

Nebraska: Schleneker v. State, 9 Neb., 242.

Nevada: State v. Thompson, 12 Nev., 140.

New York: People v. Rogers, 18 N. Y., 9, affirming 2 Park., 632; Kenny v. People., 31 N. Y., 830, 836; O'Brien v. People, 36 id., 283, 48 Barb., 280; Lanergan v. People, 38 N. Y., 363, 6 Park., 209, reversing 50 Barb., 66; People v. Robinson, 2 Park., 235; People v. Batting, 49 How. Pr., 392.

The cases of People v. Fuller, 2 Park., 16, People v. Wiley, Id., 19, are not sound law.

Pennsylvania: Jones v. Com., 75 Penn. St. R., 403; Com. v. Fletcher, 33 Leg. Int., 13; Com. v. Crozier, 1 Brewst., 349.

Tennessee: Pirtle v. State, 9 Humph., 663; Stuart v. State, 1 Bart., 178.

Texas: Colbath v. State, 2 Tex. App. R., 391; S. C., 4 id., 76; Brown v. State, Id., 275; McCarty v. State, Id., 462; Payne v. State, 5 id., 85.

United States, Circuit and District: U. S. v. McGlue, 1 Curtis, 1; U. S. v. Forbes, Crabbe, 558; U. S. v. Cornell, 2 Mason, 111.

Vermont: State v. Tatro, 50 Verm., 483, 18 Am. Law Reg. (N.S.), 153, 159 note.

Virginia: Willis v. Com., 32 Gratt., 929, 8 Vir. L. J., 741.

Drunkenness is no defence to an indictment for voting twice: State v. Welch, 21 Minn., 22.

Nor for assault and battery: Com. v. Malone, 114 Mass., 295.

Nor of shooting with intent to kill: Marshall v. State, 59 Geo., 154.

Evidence of intoxication is, however, always admissible where intent constitutes a portion of the crime. Where the crime was committed after provocation, it may be considered in determining whether it was done in the heat of passion, and in other cases, whether threatening words were uttered by the culprit with deliberate purpose or otherwise, and generally to explain his conduct: People v. Rogers, 18 N. Y., 9.

Alabama: Mooney v. State, 33 Ala., 419; Ross v. State, 62 id., 225.

California: People v. Ferris, 55 Cal., 588, 2 Crim. Law Mag., 18, 2 Kentucky L. Reporter, 190, 194 note; People v. Williams, 43 Cal., 344; People v. Belencia, 21 id., 544.

Connecticut: State v. Johnson, 41 Conn., 584, 40 id., 136.

Dakota: People v. Odell, 1 Dakota, 197.

Delaware: State v. Hurley, 1 Houst. Cr. Cas., 28.

English: Reg. v. Doody, 6 Cox's Cr. Cas., 463.

Georgia: Malone v. State, 49 Ga., 210.

Iowa: State v. Maxwell, 42 Iowa, 208.

Kansas: State v. White, 14 Kans., 588.

Kentucky: Blimm v. Com., 7 Bush, 320, 10 Am. L. Reg. (N.S.), 577, 583 note; Nichols v. Com., 11 Bush, 576; Shannahan v. Com., 8 id., 463.

Michigan: People v. Walker, 88 Mich., 156; People v. Roberts, 1 Mich. N. P. Appendix, viii.

Nebraska: Smith v. State, 4 Neb., 277.

New York: People v. Rogers, 18 N. Y., 9, affirming 2 Park., 632; People v. Eastwood, 14 N. Y., 562, affirming 3 Park., 25; Lanergan v. People, 33 N. Y., 363, 6 Park., 209, reversing 50 Barb., 66; Friery v. People, 54 Barb., 319, 2 Abb. Dec., 215, 2 Keyes, 424; People v. Robinson, 2 Park., 235; People v. Batting, 49 How. Pr., 392.

Ohio: Lytle v. State, 31 Ohio St. R., 196.

Pennsylvania: Jones v. State, 75 Penn. St. R., 403; Com. v. Crozier, 1 Brewst., 349; Com. v. Platt, 11 Phila., 415, 421, 33 Leg. Int., 468, 436; Com. v. Baker, 11 Phila., 639, 33 Leg. Int., 868; Com. v. Fletch, 33 Leg. Int., 13.

Scotland: *Regina v. Granger*, 16 Scottish Law Repr., 253; *Dingwall's Case*, 4 Irvine, 301; *McLean's Case*, 3 Couper, 334.

Tennessee: *Lancaster v. State*, 2 Lea, 575; *Perth v. State*, 9 Humph., 663.

See *Stuart v. State*, 1 Baxt., 178.

Texas: *Wenz v. State*, 1 Tex. App., 36, 39; *Loza v. State*, Id., 488; *Colbath v. State*, 2 id., 391; *Colbath v. State*, 4 id., 76; *Brown v. State*, 4 id., 275; *McCarty v. State*, 4 id., 462; *Ferrell v. State*, 48 Tex., 502.

Vermont: But see *State v. Tatro*, 50 Verm., 483, 18 Am. L. Reg. (N.S.), 153, 159 note.

Virginia: *Willis v. Com.*, 32 Gratt., 929, 3 Virg. L. J., 741; *Boswell v. Com.*, 20 Gratt., 860.

If one, at the time of taking property, is so under the influence of intoxicating liquor that a felonious intent cannot be formed in his mind, he is not guilty of larceny: *Wood v. State*, 34 Ark., 341; *Wenz v. State*, 1 Tex. App., 488; *People v. Walker*, 38 Mich., 156; *Bailey v. State*, 26 Ind., 422.

Contrà: *Dawson v. State*, 16 Ind., 428. The case of *Bailey v. State*, 26 Ind., 422, holds *contra*, but does not refer at all to *Dawson v. State*.

So in perjury: *Lytle v. State*, 31 Ohio St. R., 196.

Insanity occasioned by previous acts of intemperance, and not directly resulting from the immediate influence of intoxicating liquors, is entitled to the same consideration as insanity from any other cause: *People v. Rogers*, 18 N. Y., 9.

Alabama: *Beasley v. State*, 50 Ala., 149.

Delaware: See *State v. Thomas*, 1 Houst. Cr. Cas., 511.

Indiana: *Fisher v. State*, 64 Ind., 435; *Cluck v. State*, 40 id., 264; *Bradley v. State*, 81 id., 492.

Missouri: *State v. Hundley*, 46 Mo., 414.

New York: *People v. Rogers*, 18 N. Y., 9; *People v. O'Brien*, 36 id., 282, 48 Barb., 280; *People v. Robinson*, 2 Park., 235.

Pennsylvania: *Com. v. Crozier*, 1 Brewster, 349.

Tennessee: *Stuart v. State*, 1 Baxt., 178.

United States, Circuit and Dis-

trict: *U. S. v. McGlue*, 1 Curtis, 1; *U. S. v. Forbes, Crabbe*, 558.

Virginia: *Boswell v. Com.*, 20 Gratt., 860.

Temporary insanity produced immediately by intoxication does not destroy responsibility, where the accused when sane and responsible made himself voluntarily drunk: *Schleneker v. State*, 9 Neb., 241.

There is much conflict in the cases as to which party has the onus in cases of insanity. In many it is held that though every person is presumed sane, and if no evidence is given as to the sanity of the accused he is presumed sane, yet where evidence tending to show insanity is given, the onus is upon the prosecution, and if the jury have a reasonable doubt as to the sanity of the defendant, they should acquit:

English: See *Regina v. McNaughten*, 1 Carr. & Kirw., 131, 47 Eng. C. L.

Illinois: See *Alexander v. People*, 96 Ill., 96.

Indiana: *Guetig v. State*, 63 Ind., 279; *S. C.*, 66 id., 94, 32 Am. R., 99, 108 note; *Bradley v. State*, 31 Ind., 492.

Iowa: *State v. Bruce*, 48 Iowa, 530. **Massachusetts:** *Com. v. McKie*, 1 Gray 61, 1 Bennett & Heard's Lead. Cr. Cas. (2d ed.), 295, 299 note.

See *Com. v. Rogers*, 7 Metc., 500.

Mississippi: *Cunningham v. State*, 56 Miss., 269.

Missouri: *State v. Simms*, 68 Mo., 305.

New York: *Brotherton v. People*, 75 N. Y., 159; *People v. McCann*, 16 id., 58; *Flanagan v. People*, 52 id., 467, 471.

See *Weed v. Mutual*, etc., 70 N. Y., 561; *People v. Schryver*, 42 id., 1, 18, reversing 46 Barb., 625.

Ohio: *Loeffner v. State*, 10 Ohio St. R., 598.

See *Silvus v. State*, 22 Ohio St. R., 90.

Texas: See *Webb v. State*, 5 Tex. App., 596.

United States, Supreme Court: See *U. S. v. Gooding*, 12 Wheat., 460.

United States, Circuit and District: See *U. S. v. McGlue*, 1 Curtis, 1.

Vermont: *State v. Patterson*, 45 Verm., 308, 12 Am. R., 200, 212 note.

West Virginia: *State v. Abbott*, 8 W. Va., 744, 763.

In others, that insanity is an affirmative defence which the defendant must establish, and if the jury entertain a

1881

Reg. v. Hubbard.

reasonable doubt as to his sanity, they should convict him :

Connecticut: See *State v. Hoyt*, 48 Conn., 330.

Georgia: *Carter v. State*, 56 Geo., 463, 467.

Iowa: See *State v. Murphy*, 33 Iowa, 270 ; *State v. Porter*, 34 id., 181.

Ireland: *Regina v. Cavendish*, Irish R., 8 C. L., 178.

Missouri: *State v. Redemeier*, 71 Mo., 173, 2 Crim. Law Mag., 456, 465 note.

New Jersey: *State v. Spencer*, 21 N. J. Law (1 Zab.), 196.

Ohio: *Bergin v. State*, 31 Ohio St. R., 111.

Virginia: *Baccigalupo v. Com.*, 33 Gratt., 807.

See *Boswell v. Com.*, 20 Gratt., 860.

Proof that one had previously been adjudged a lunatic, is competent: *Wheeler v. State*, 34 Ohio St. R., 394.

See *Newton v. Mutual*, etc., 76 N. Y., 426.

[14 Cox's Criminal Cases, 565.]

SOUTH-EASTERN CIRCUIT.

Ipswich Assizes. Thursday, Feb. 3, 1881.

(Before Sir H. Hawkins, J.)

565]

*REG. V. HUBBARD.

Evidence—Declarations under sense of impending death—Subsequent hope of recovery.

A declaration made under a belief of impending death was held admissible in evidence, even though the declarant at a later period of the day took a more cheerful view of her position, and thought that she should recover.

MURDER. The prisoner was indicted for the murder of his wife, Priscilla Hubbard, at Ipswich, on the 21st day of December, 1880.

Carlos Cooper and *Blofeld* were counsel for the prosecution ; and *Sims Reeve* and *Haggard*, for the prisoner.

In support of the case for the prosecution, the counsel for the Crown tendered in evidence certain declarations of the deceased woman, as dying declarations made by her on the day preceding her death. A body of testimony was adduced which satisfied the learned judge that the declarations tendered were made by the deceased on the 29th day of December, under the solemn belief that her death was impending.

For the prisoner two witnesses were called, who proved to the satisfaction of the learned judge that later in the day, after the making of the declarations in question the deceased took a more cheerful view of her condition and thought she would recover.

Upon this evidence the counsel for the prisoner contended, upon the authority of *Rex v. Fagant* (7 Car. & P., 238 (')),

(') *Rex v. Fagant*. Indictment for manslaughter. The deceased expressed an opinion (*sic*) that she should not recover, and made a declaration, and subsequently, on the same day, asked her

nephew if he thought "she would rise again." Held, per Gaselee, J., after consulting with Lord Denman, C.J., that this declaration was not admissible.

and *Rex v. Megson* (9 Car. & P., 418) (¹), that the hope of recovery which the *deceased entertained after making the declarations rendered those declarations inadmissible. [566]

HAWKINS, Sir H.: I think the declarations are admissible. Their admissibility depends on the state and condition of the deceased at the time those declarations were made, and if they would, as they clearly would, have been admissible had the woman died the instant after they were made, their admissibility is not affected by the fact that subsequently to making them and before she died she had entertained an opinion she would recover.

(¹) *Rex v. Megson*. Indictment for murder. Two days before the death of the deceased the surgeon told her that she was in a very precarious state; and on the day before her death, when she had become much worse, she said to the surgeon that she found herself growing worse, and that she had been in hopes she would get better, but as she was getting worse she thought it her duty to mention what had taken place. Immediately after this she made a statement. Held, per Rolfe, B., that this statement was not receivable in evidence as a declaration *in articulo mortis*, as it did not appear clearly that at the time of making it, the deceased was without hope of recovery.

[4 Queen's Bench Division, 9.]

Nov. 16, 1878.

9] *PAUL and Another, Appellants; SUMMERHAYES, Respondent.

Trespass to Land—Foxhunting.

A person is not justified in entering the land of another against his will for the purposes of the sport of foxhunting.

Gundry v. Feltham (1 T. R., 334) discussed.

CASE stated by justices under 20 & 21 Vict. c. 43, upon a conviction of the appellants upon an information for an assault.

The appellants were persons who, on the occasion in question, were engaged in hunting with a pack of foxhounds. In the pursuit of a fox, which the hounds were running, the appellants sought to enter upon a field forming part of a farm belonging to the respondent's father, which the respondent managed on his father's behalf. The respondent warned them off, and endeavored to resist their entry on the field. For the purpose of overcoming his resistance to their entry, they committed the assault complained of, and the main question in the case was whether, under the above-mentioned circumstances, there was any justification for the assault. The justices convicted the appellants in the sums of 20s. and 10s. respectively.

Cole, Q.C., for the appellants: The case of *Gundry v. Feltham* (1) is authority to show that persons in fresh pursuit of a fox have a right to go on the land of another. No doubt the principle of that decision depends upon the notion that the destruction of a noxious animal is for the good of the public, and the motive of the modern sport of foxhunting is certainly not the destruction of a noxious animal. But it is contended that the motive is immaterial. The law has always given the right, because it favors the destruction of foxes, and the effect is the same whatever the motive. [He also cited *Mitten v. Faudrye* (2); Year Book, 12 Hen. 8, p. 10, and 1 & 2 Wm. 4, c. 32, ss. 31-35.]

Charles, Q.C.: The 1 & 2 Wm. 4, c. 32, has no bearing on the present case. It relates to trespassers in pursuit of game, and a fox is not game. It leaves the question as to a [10] justification at *common law quite untouched. The case of *Gundry v. Feltham* (1) is distinguishable. There the demurrer admitted that the means adopted were the only means of killing the fox. Now, it cannot be contended that

(1) 1 T. R., 334.

(2) Poph., 161.

the modern mode of foxhunting is essential to the killing of the fox. The case of *Gundry v. Feltham* ⁽¹⁾ was cited to Lord Ellenborough sitting at Nisi Prius in *Lord Essex v. Capel* ⁽²⁾, and that learned judge was of opinion that the principle upon which it went was inapplicable to the modern sport of foxhunting pursued as a diversion, and held that that sport can only be pursued on the land of another by his consent. [He cited *Baker v. Berkeley* ⁽³⁾.]

Cole, Q.C., in reply.

LORD COLERIDGE, C.J.: I am of opinion that the conviction should be affirmed. The statute 1 & 2 Wm. 4, c. 32, s. 35, really has no application to the case. That section of the statute merely provides that certain foregoing provisions shall not apply to persons in fresh pursuit of a fox. But, in truth, when the statute is examined, it will be seen that those provisions would not apply to the pursuit of the fox, the animal not being game. So the provisions of s. 35 seem only to have been put in *ex majori cautela*, to prevent certain penalties for a particular class of trespass, viz., trespass in pursuit of game, from applying to foxhunters. There is nothing, therefore, in the act to alter the common law with regard to trespass so far as concerns foxhunting. The real question is whether under the circumstances the respondent was justified in resisting the entry of the appellants on his father's land. I am of opinion that he was. It was suggested that there is authority that foxhunting in the popular, well understood, sense of the term, that is, as a sport, can be carried on over the land of a person without his consent and against his will, and the case of *Gundry v. Feltham* ⁽¹⁾ was cited as authority for that proposition. I am of opinion that no such right as that claimed exists. The sport of foxhunting must be carried on in subordination to the ordinary rights of property. Questions such as the present fortunately do not often arise, because those who pursue the sport *of foxhunting do so in a reasonable [1] spirit, and only go upon the lands of those whose consent is expressly, or may be assumed to be tacitly, given. There is no principle of law that justifies trespassing over the lands of others for the purpose of foxhunting. The case of *Gundry v. Feltham* ⁽¹⁾ is distinguishable from the present case, and can be supported, if it is to be supported at all, only on the grounds suggested by Lord Ellenborough in the case of *Lord Essex v. Capel* ⁽²⁾, to which we have been referred.

The demurrer admitted that what was done was the only

⁽¹⁾ 1 T. R., 334.

⁽²⁾ 3 C. & P., 32.

⁽³⁾ Locke on Game Laws, 5th ed., 45;
Chitty on Game Laws, 2d ed., 82.

⁽⁴⁾ Locke on Game Laws, 45.

means for destroying the fox, and Buller, J., expressly puts his decision on that ground. The case was brought under the consideration of Lord Ellenborough in *Lord Essex v. Capel* (¹), and he was distinctly of opinion that, where any other object was involved than that of the destruction of a noxious animal, an entry on the land of another, against his will, could not be justified. In the case of *Lord Essex v. Capel* (¹) it had been pleaded that the means adopted were the only means, and also that they were the ordinary and proper means of destroying the fox. But the evidence clearly showed that in the case of foxhunting, as ordinarily pursued, the object of destroying the animal is only collateral. The interest and excitement of the chase is the main object. Lord Ellenborough, than whom there could be no higher authority on such a point, was of opinion that where this was the case, and where the real object was not the mere destruction of a noxious animal, a trespass could not be justified. If persons pursue the fox for the purpose of sport or diversion, they must do so subject to the ordinary rights of property. It would seem that there may be some doubt as to the validity of the justification even where the only object is the destruction of a noxious animal. The idea that there was such a right as that of pursuing a fox on another's land appears to have been based on a mere dictum of Brook, J., in the Year Book, 12 Hen. 8, p. 10. This dictum was not necessary for the decision of the case, for there the chasing of a fox was not in question, and the case went off on an entirely different point. It may well be doubted in my opinion whether, even if the case were one in which the destruction of a fox as a noxious animal was the sole object, [2] there would be any justification. That *question, however, does not, I think, arise here. It is enough to say that the case of *Gundry v. Feltham* (²), and the dictum of Brook, J., in the Year Book, 12 Hen. 8, p. 10, do not at all conflict with the opinion expressed by Lord Ellenborough in *Lord Essex v. Capel* (¹), which appears to me to be the true view of the law, viz., that a person has no right, in the pursuit of the fox as a sport, to come upon the land of another against his will. For these reasons our judgment must be for the respondent.

MELLOR, J.: I am of the same opinion. The 1 & 2 Wm. 4, c. 32, has really no application to the case. The 31st section of the act contains certain provisions for preventing trespasses in pursuit of game. Foxes, however, are not game, and so not within the provisions of the section. In

(¹) Locke on Game Laws, 45.

(²) T. R., 334.

any case the exception in favor of foxhunting in the 35th section could only apply to the special provisions of the act for the protection of game, and could not affect the question whether a trespass could be justified at common law in the course of hunting a fox, which is the real question in the case. That question has been fully discussed by my Lord. The counsel for the appellants did not venture to insist, in contravention of all common sense and experience, that the object of foxhunting, as ordinarily pursued, was the destruction of a noxious animal which does mischief to farmers and others. The case of *Gundry v. Feltham* (*) is therefore distinguishable. The view taken by Lord Ellenborough in the case of *Lord Essex v. Capel* (*), in which the question was really the same as that in the present case, was quite consistent with the decision in *Gundry v. Feltham* (*), and it appears to me to be the only view that is possible consistently with common sense and the ordinary rights of property.

Judgment for the respondent.

Solicitors for appellants: *Coode & Co.*

Solicitors for respondent: *Read & Lovell.*

(*) 1 T. R., 384.

(*) Locke on Game Laws, 45.

See 28 Eng. Rep., 126 note.

As to when animals are *fera natura*, and when not, see 1 Broom & Hadley's Com. (Wait's ed.), 799.

Doves are animals *fera natura*, and cannot be the subject of larceny unless they are in the custody of the owner, as, for example, in a dove-house: Com. v. Chace, 9 Pick., 15.

Where one was pursuing a fox, and another person in his sight killed and carried away the animal, it was held that the former had not such possession of as to maintain trespass: *Piereson v. Post*, 3 Caines, 175, 2 Am. Dec., 264, 267 n.

Though property in an animal *fera natura* may be acquired by occupancy, or by so wounding it as to bring it within the power and control of the pursuer, yet, if after wounding the animal, the party continues the pursuit until evening and then abandons it, though his dogs continue the chase, he acquires no property in it: *Buster v. Newkirk*, 20 Johns., 75.

Where the plaintiff, being engaged in fishing, cast a seine around a school of mackerel, with the exception of a small opening which the seine did not quite fill up, and through which, in

the opinion of experienced persons, the fish could not escape, and the defendant entered with his boat and took the fish, it was held that the plaintiff's possession was not complete so as to enable him to maintain trespass: *Young v. Hichhens*, 1 Dav. & Meriv., 592; 8 C., 6 Q. B., 606. In that case, Lord Denman, C. J., used the following language: "It certainly results from the evidence in this case, that the fish were reduced to a condition in which it was in the highest degree probable that the plaintiff would become possessed of them. But it is equally certain that he had not become possessed. Whether the necessary possession be rightly described by the word *custodia* or *occupatio*. I think it is not attained until the plaintiff has brought the animals into his actual power. It may be, indeed, that the defendant has committed a tortious act in preventing the plaintiff from completing his possession."

Bees are *fera natura*; and until hived and reclaimed, no property can be acquired in them. Finding a tree on the land of another, containing a swarm of bees and marking the tree with the initials of the finder's name,

1878

Paul v. Summerhayes.

is not reclaiming the bees, nor does it vest in the finder any exclusive right of property in them; nor can the finder maintain trespass against a person for cutting down the tree and carrying away the bees: *Gillet v. Mason*, 7 Johns., 16; *Fisher v. Steward*, Smith (N.H.), 60 and note.

The owner of bees which have been reclaimed may bring an action of trespass against a person who cuts down a tree into which the bees have entered, on the soil of another, destroys the bees and takes the honey.

Where bees take up their abode in a tree, they belong to the owner of the soil if they are unreclaimed; but if they have been reclaimed, and their owner is able to identify his property, they do not belong to the owner of the soil, but to him who had the former possession, although he cannot enter upon the lands of the other to retake them without subjecting himself to an action of trespass: *Goff v. Kilts*, 15 Wend., 550.

Wild bees in a bee-tree belong to the owner of the soil where the tree stands. Though another discover the bees and obtain license from the owner to take them and mark the tree with the initials of his name, this does not confer the ownership upon him until he has taken actual possession of the bees. If he do not do so, the owner may give any other leave to do so, and he may take, without being liable to the first finder: *Ferguson v. Muller*, 1 Cow., 243.

A buffalo which has been captured when a calf, and reared on a farm with domestic cattle and becomes so tame as to take food from the hands of its master like other cattle, and to be easily driven home when it strays away, is no longer of a wild nature, but is the subject of property, and for any trespass committed by it, the owner is liable, and for any injury done to it by others, he can recover damages: *Ulery v. Jones*, 81 Ills., 403.

So wild geese: *Amoy v. Flynn*, 10 Johns., 102, 6 Am. Dec., 318.

See *People v. Kaatz*, 3 Park., 129.

By public usage there is no trespass in taking fish from a small lake nearly surrounded by another's land, unless the landowner has given notice that it will not be allowed: *Marsh v. Colby*, 39 Mich., 626.

Although the right of fishing in the

navigable waters of the State is common to all of its citizens, yet when one has staked out a bed where no oysters are there growing, planted oysters therein, and taken measures to save and protect the young oysters, or "spat," such oysters and their offspring belong to him, and he may maintain an action against one who takes them away and converts them to his own use: *McCarty v. Holman*, 22 Hun, 53; *Decker v. Fisher*, 4 Barb., 592; *Lowndes v. Dickerson*, 34 id., 586; *Fleet v. Hegeman*, 14 Wend., 45; *Brinckerhoff v. Starkins*, 11 Barbour, 248.

See *Paul v. Hazleton*, 37 N. J. Law, 106; *Wooley v. Campbell*, Id., 163; *Day v. Compton*, Id., 514; *State v. Taylor*, 27 id., 117; *Arnold v. Mundy*, 6 id. (1 Halst.), 1; *Bennett v. Boggs*, *Baldw. C. C.*, 60, 76.

A person who plants oysters in navigable waters opposite to the land of another person, does not thereby acquire such a possession of them as will enable him to maintain trespass against the owner of the adjacent land for taking them away: *Brinckerhoff v. Starkins*, 11 Barb., 248.

But see *Arnold v. Mundy*, 6 N. J. Law (1 Halst.), 1, 1 *Amer. Law Reg.* (N.S.), 579-580.

But actual possession acquired by a wrongful act will not, in such a case, enable one to sue in trespass.

Where a trespasser kills game on another's land, it has been held in England that it belongs to the owner of the land, and the trespasser acquires no title to it by his possession: *Blades v. Higgs*, 11 H. L. Cas., 621.

This case, however, seems to have turned upon the legal interest which the owner of land has, in England, in game upon it: *Rigg v. Earl of Lonsdale*, 1 Hurl. & Norm., 923; *Blades v. Higgs*, 13 C. B. (N.S.), 844; *Regina v. Tounley*, L. R., 1 Crown Cas. Res., 315, 12 Cox's Cr. Cas., 59; and would not be followed here.

The expression "go and kill him if you want to," made in May, by the owner of an animal in a heated conversation with one who was complaining of a trespass committed by it, and in reply to a threat to kill it, is not a license to such person to kill the animal in September following: *Ulery v. Jones*, 81 Ills., 403.

[4 Queen's Bench Division, 13.]

Nov. 19, 1878.

SPENCER and Another v. SLATER and Others. [13Fraudulent Conveyance—18 Eliz. c. 5—Delaying Creditors.*

A debtor in insolvent circumstances executed a deed by which he conveyed all his estate to trustees on trust to carry on his business, or get in and realize his estate in the manner they might deem expedient, and apportion the residue of the proceeds after payment of expenses, &c., according to an equal pound rate among his creditors. It was provided by the deed that a dividend should only be payable to a creditor on his executing or assenting to the deed; and that, if within a certain time any creditor did not execute or assent, his dividend should be paid by the trustees to the debtor. The deed also provided that the executing and assenting creditors should indemnify the trustees against any personal loss or risk they might sustain, otherwise than by their own wilful negligence or default, by reason of their proceedings under the deed:

Held, that the deed was fraudulent and void under 18 Eliz. c. 5, as tending to defeat or delay creditors.

SPECIAL CASE stated in an interpleader issue between the plaintiffs, the trustees under a deed of assignment hereinafter mentioned, and the defendants, the execution creditors of one Thomas Keating.

The facts were as follows:

On the 23d of July, 1877, a deed was made between Thomas Keating, thereafter styled "the said debtor," of the first part, the plaintiffs, thereafter styled "the trustees," of the second part, and the several creditors of the debtor, who should execute the deed or otherwise signify their assent thereto before the declaration of a dividend, of the third part.

The deed assigned all the debtor's estate and effects to the trustees on the conditions and trusts, and for the purposes thereafter declared, viz.:

1st. To carry on the business of the debtor, or to get in and realize his estate in such manner as the trustees may deem expedient, and out of the proceeds to pay all fair and usual charges attending the liquidation thereof or incidental thereto; and all rent, taxes, salaries, and preferable claims that would be payable in bankruptcy; and then to apportion the residue according to an equal pound rate to all creditors parties hereto, or of whose claims the trustees shall have received notice, and have *no sufficient [14 grounds to dispute or shall dispute the same unsuccessfully.

2d. The execution of this deed, or the assent thereto by any creditor, shall operate as a full release to the debtor in

1878

Spencer v. Slater.

respect of the debt of such creditor so executing these presents or assenting thereto.

3d. The dividend so apportioned to every creditor as aforesaid shall be paid to him, her, or them severally, provided he, she, or they have executed these presents or assented thereto as aforesaid. And on the expiration of twelve calendar months from the date hereof the debtor may apply to the trustees to be paid the dividend or dividends of any creditor or creditors who have neglected or refused to assent hereto or execute this deed; and thereupon the trustees shall give such creditor or creditors written notice by post of such application made by the debtor; and if such creditor or creditors shall for seven days thereafter still neglect or refuse to execute these presents or assent hereto, such dividend or dividends shall be then forthwith paid to the debtor by the trustees.

4th. The trustees may require full particulars relating to the debt of any creditor, and that such debt be verified on oath or by statutory declaration, before admitting such debt or paying dividends thereon.

5th. All matters not herein specially provided for shall be dealt with on principles applicable under the present English bankruptcy law.

7th. And lastly, the several parties hereto, of the third part, do hereby severally, in proportion to their respective claims, covenant, promise and agree with the trustees to hold them harmless and indemnified from all personal risk, loss, or damage they may sustain by reason of their proceedings under the trusts hereof, excepting such loss or damage as may result from their own wilful negligence or default, and to hold them harmless and indemnified against any claim or claims by any person or persons of which they may not have received notice before making a dividend, and from and against any claim by any future trustee or trustees of the estate and effects of the debtor, and from and against any order of any court made in respect of the debtor [5] or *his estate, or of this deed and the trusts thereof, or any of them, and from and against all costs, damages and expenses thereof, consequent thereon or incidental thereto.

On the 3d of August, 1877, the defendants obtained a judgment against the debtor for £40, and on the same day a writ of *fi. fa.* was delivered to the sheriff of Lancashire, indorsed to levy the amount of the judgment without any costs.

On the 14th of August the sheriff seized the goods in

question under the *fl. fa.*, such goods forming part of the property included in the deed.

The goods were, at the time of the seizure, on premises consisting of a house and shop occupied by the debtor, but from the 22d of July, 1877, up to the time of the seizure, a person employed by the plaintiffs was on the premises to keep possession of the goods for the plaintiffs. On such taking possession of the goods by the plaintiffs the shop was closed. No business was carried on in the shop, nor was the same open to the public. No other indication of any change of possession was visible or open to the public, but the plaintiffs had advertised the property for sale by tender before the seizure under the execution, and had nearly concluded a *bona fide* sale for value of the said property, but the seizure prevented the actual sale and delivering over of the said goods.

The execution-debtor was a trader within the meaning of the Bankruptcy Act, 1869, when he executed the deed, and was then indebted to several creditors respectively, whose debts respectively amounted to £50 and upwards. He was in insolvent circumstances when he executed the deed, and he executed it for the purpose of defeating any execution, including an execution at the suit of the defendants, which was then apprehended by him, and which execution might prevent the equal distribution of the debtor's property among all his creditors, and also for the purposes stated in the said deed.

The question for the court was whether the goods seized by the sheriff or any of them were, at the time of the seizure, the property of the plaintiffs as against the defendants.

Crompton, for the plaintiffs: This deed is not fraudulent within the statute of Elizabeth. The rule at common law, independently *of the bankruptcy laws, was that a [16 debtor might prefer any of his creditors to the exclusion of the others. There is no question here of the bankruptcy laws. The statute of Elizabeth was aimed at preventing conveyances by which the debtor colorably conveyed away his property, so as to defeat his creditors and retain for himself the enjoyment of the property that ought to have been applicable to his debts. This is a deed for the benefit of the debtor's creditors, or at least for such of them as choose to take advantage of it. It is quite a novel contention to suggest that a deed may be void under the statute of Elizabeth, because it is against the policy of the bankruptcy

1878

Spencer v. Slater.

laws. The point most strongly against the plaintiffs is the provision that the dividends of creditors who do not come in shall be repaid to the debtor, but after all, this places the creditor in a position no more unfavorable than he always was in at the common law. The creditor, when any such sum is in existence, may obtain the fruits of his judgment against it in the hands of the trustees by attachment. [He cited *Siggers v. Evans* (1); *Twyne's Case* (2).]

R. T. Reid, for the defendants: The deed is fraudulent under the statute of Elizabeth, because its effect is to delay, hinder, and defraud creditors. The debtor seeks to obtain by it protection for his property under a scheme framed in his interests, and no creditor can come in without incurring the responsibility of indemnifying the trustees. A certain class of creditors, viz., those whose debts are under £50, and who cannot take bankruptcy proceedings, are without any remedy if they do not choose to come in and incur this responsibility. The deed is precisely within the principles on which deeds have always been held fraudulent under the statute of Elizabeth, because it contains a resulting trust for the benefit of the debtor, if the creditor will not come in. Even supposing that there is, as suggested, a remedy against such sum of money as may be payable to the debtor by attachment, the creditor who does not come in is delayed for a year. [He cited *Freeman v. Pope* (3); *Ex parte Saffery* (4); *Ex parte Jones* (5).]

Crompton, in reply.

17] *MELLOR, J.: I am of opinion that our judgment should be for the defendants. I think this deed was invalid by reason of the provisions of 13 Eliz. c. 5. Its object plainly was to prevent the creditors from exercising their ordinary remedies in respect of the sums due to them, and to compel them to come in under the scheme of arrangement prescribed by the debtor. By this scheme the trustees may carry on the business if they think fit, and the creditors, in order to get their dividends, must enter into obligations not required of them in the ordinary course of law, for the executing or assenting creditors are to indemnify the trustees against personal risk and loss. If any creditor refuses to come in, there is a resulting trust in favor of the debtor, in respect of the dividend that would otherwise have been due to such creditor. It seems to me quite

(1) 5 E. & B., 367; 24 L. J. (Q.B.), 305.

(2) 4 Ch. D., 555; 20 Eng. Rep., 758.

(3) 1 Sm. L. C., 1.

(4) Law Rep., 10 Ch., 668; 10 Eng.

(5) Law Rep., 5 Ch., 538.

Rep., 628.

clear that the effect is to defeat and delay creditors whose debts are under £50. Creditors to a greater amount might treat this deed as an act of bankruptcy, but those whose debts are under £50 are without remedy if the deed be good. It is admitted that the deed was executed for the purpose of defeating any execution, including that of the defendants, which was then apprehended, and for the purposes stated in the deed itself. We are of opinion that those purposes are contrary to law, for the reasons above mentioned, and therefore that the deed cannot be sustained against the execution creditors.

MANISTY, J.: I am of the same opinion. The question is whether this deed is good with reference to the provisions of the statute 13 Eliz. c. 5. That depends on whether or not its object was to defeat, delay, or hinder creditors. It is stated in the special case that the execution of the deed was for the purpose of defeating any execution, including that of the defendants, which might prevent an equal distribution of the debtor's property among all his creditors, and also for the purposes stated in the deed itself. What, then, are the purposes stated in the deed? One of the provisions is that the trustees may carry on the business if they think fit, irrespective of the wishes of the creditors, and any creditor, before getting a dividend, must consent to indemnify the trustees in respect of personal loss and risk. The creditors are not only subjected to serious delay. The trustees *may carry on the business and incur debts, and [18 the creditors may suffer. If they come in and assent to the deed, they must indemnify the trustees, and if they do not, they get no dividend, the dividend apportioned to them being handed over to the debtor. This is, at any rate *prima facie*, a resulting trust in favor of the debtor, but the plaintiffs' counsel says that the dissenting creditor might get execution against any such fund in the hands of the trustees, by way of attachment of it as a debt due to the debtor. That is a very remote and doubtful remedy under the circumstances. The deed, in my opinion, tends to defeat, or at least delay, the creditors. It provides that unless the creditor claims his share of the proceeds of the estate in the hands of the trustees upon terms which no prudent man, in my opinion, would come under, that share shall go to the debtor, and the creditor, after a long delay, is left to the shadowy remedy to which I have alluded. The deed seems to me, therefore, to be clearly void under the statute as con-

1878

Moyce v. Newington.

taining a resulting trust in favor of the debtor, and tending at least to delay creditors.

Judgment for the defendants.

Solicitors for plaintiffs: *Field & Roscoe.*

Solicitor for defendants: *Charles Butcher.*

[4 Queen's Bench Division, 32.]

Dec. 20, 1878.

32]

*MOYCE V. NEWINGTON.

Sale of Goods—Fraud, Contract induced by—Passing of Property—Conviction for False Pretences, Effect of, under 24 & 25 Vict. c. 96, s. 100—On Conviction “the property shall be restored.”

By 24 & 25 Vict. c. 96, s. 100, if any person guilty (*inter alia*) of obtaining any chattel, money, or other property by false pretences “shall be indicted on behalf of the owner of the property and convicted, in such case the property shall be restored to the owner.”

W. purchased and obtained delivery of certain sheep from the defendant by false pretences. The plaintiff purchased the sheep from W. and paid W. for them without knowledge of the fraud, the defendant having done nothing in the meantime to avoid the contract between himself and W. The defendant finding that the sheep were on the plaintiff's premises retook possession of them; W. having been convicted of obtaining the sheep by false pretences on the prosecution of the defendant:

Held, that the effect of 24 & 25 Vict. c. 96, s. 100, was not to revest the property in the sheep in the defendant as against the plaintiff, who had acquired a good title to them before the conviction, and consequently that the defendant was liable in an action by the plaintiff for the value of the sheep.

THIS was an action for the conversion of certain sheep, tried before the Lord Chief Justice at the last Maidstone assizes.

The facts sufficiently appear from the judgments.

At the trial the verdict was entered for the plaintiff, but the Lord Chief Justice did not enter the judgment for either party.

Nov. 7. *Willoughby and Shiress Will*, for the plaintiff, moved for judgment: It is clear that, apart from the statute 24 & 25 Vict. c. 96, s. 100, the plaintiff is entitled to judgment. The sale by the defendant to Wale being procured by fraud was voidable by the defendant but not void, and the plaintiff having purchased the sheep *bona fide* before the defendant did any act to avoid the sale, his title to the sheep holds good: *Benjamin on Sales*, 342; *Stevenson v. Newnham* ⁽¹⁾; *White v. Garden* ⁽²⁾; *Powell v. Hoyland* ⁽³⁾; *Load v. Green* ⁽⁴⁾. The question, therefore, is whether the statute makes any difference. The case of *Lindsay v.*

⁽¹⁾ 13 C. B., 285.

⁽²⁾ 10 C. B., 919.

⁽³⁾ 6 Ex., 67.

⁽⁴⁾ 15 M. & W., 216.

Cundy (*) is an authority to the contrary. The judgment *of this division was overruled in the Court of Ap- [33
peal (*), but on a different point. The statute does not say
that the "property" shall "revest," using the term "prop-
erty" to denote the right of the owner, but it says that the
"property," meaning thereby the thing itself, shall be "re-
stored." The meaning is that when the property is found in
the possession of the criminal, and is in the hands of the
police, it shall be given back to the prosecutor, and the
section goes on to say that the court may award a writ of
restitution or order the restitution thereof in a summary
manner. It never was intended that an intermediate good
title that had been obtained by an innocent purchaser should
be divested. [They also cited *Horwood v. Smith* (*); *Kings-
ford v. Merry* (*); *Parker v. Patrick* (*).]

Grantham, Q.C., and *Arbuthnot*, for the defendant,
showed cause: There was not prior to 7 & 8 Geo. 4, c. 29,
s. 57, of which 24 & 25 Vict. c. 96, s. 100, is substantially a
re-enactment, any provision for restitution in case of false
pretences. It is submitted that the intention of these en-
actments was to put the case of property obtained by false
pretences on the same footing as that obtained by larceny.
Lindsay v. Cundy (*) was not a similar case to the present.
There the original owner of the goods, from whom they had
been obtained by fraud, sued *bona fide* purchasers who had
before the conviction parted with the goods. It was held
that the title which the original owner of the property ac-
quired under the statute did not relate back, so as to give
him a right of action against the defendants who had parted
with the goods while they had a good title. *Scattergood v.*
Sylvester (*), and *Nickling v. Heaps* (*), are authorities in the
defendant's favor. [They also cited *Reg. v. Stancliffe* (*);
Fowler v. Hollins (10); *Peer v. Humphrey* (11).]

Willoughby, in reply, referred to *Cundy v. Lindsay* (").

Cur. adv. vult.

*Dec. 20. The judgment of the Court (Cockburn, [34
C.J., Mellor and Field, JJ.) was delivered by

COCKBURN, C.J.: This was a case tried before me at the
last assizes for the county of Kent, and in which the action

(1) 1 Q. B. D., 348; 16 Eng. R., 392.

(2) 2 Q. B. D., 96; 19 Eng. R., 237.

(3) 2 T. R., 750.

(4) 1 H. & N., 503; 26 L. J. (Ex.), 83.

(5) 5 T. R., 175.

(6) 1 Q. B. D., 348; 16 Eng. R., 392;
2 Q. B. D., 96; 19 Eng. R., 237.

(7) 15 Q. B., 506; 19 L. J. (Q.B.), 441.

(8) 21 L. T. (N.S.), 754.

(9) 11 Cox's C. C., 318.

(10) Law Rep., 7 H. L., 757; 14 Eng.
R., 138.

(11) 2 A. & E., 495, 499.

(12) 3 App. Cas., 459; 24 Eng. R., 345.

1878

Moyce v. Newington.

had been brought by the plaintiff to recover a lot of forty-nine sheep under the following circumstances. On the 30th of October, 1877, the plaintiff, who is a butcher, and who is in the habit of attending cattle and sheep markets, being at Maidstone market, bought of a man named Wale, through a salesman of the market, this flock of forty-nine sheep. The purchase was made in the open market, the price was a fair one, and was paid. The transaction was a regular one, and no blame attached to the plaintiff in respect of it. It turned out, however, that the sheep had been obtained from the defendant, who is a farmer, by Wale, under color of a purchase, but in reality by false pretences. Professing to buy the sheep at the price of 48s. a head, Wale gave in payment a check on a bank at which he had no funds and kept no account. The check was of course dishonored. A warrant was taken out against Wale by the defendant on the 25th of October, and he was afterwards convicted of having obtained the sheep by false pretences, and it must be taken for the present purpose that they were so obtained.

It is to be observed that, though the sale from Wale to the plaintiff took place in open market, it was admitted before us that the market, having been recently established by the corporation of Maidstone under a local act, was not one in respect of which the protection arising from a sale in market overt would attach. The sheep were taken to the plaintiff's premises at Seale, which is some distance from Maidstone, and arrived there on the 31st, the ensuing day. On the 7th of November the defendant, having in the meantime set the police to work, and having learned what had become of the sheep, went with a police officer to the plaintiff's premises, and there took possession of the sheep, which were afterwards removed to his own farm. On the 7th of November Wale was convicted of obtaining the sheep by false pretences. The sheep being already in the defendant's possession no order of restitution was asked for. The question, under the circumstances, *is which of the two, the plaintiff or defendant, is entitled to the sheep.

Although, if the matter rested on abstract principle, it might be open to be contended that, inasmuch as, to make a valid contract, both parties must intend to be bound by it, consequently, when in an apparent contract of sale the buyer intends to get the goods, but not to pay for them, but to defraud the seller, the contract fails to take effect, and though the seller intended the property to pass, yet that, the contract failing to take effect, the property still remains unaltered, yet the question is now so concluded by

authority as to be no longer open to discussion. We must now take it to be settled—it is unnecessary to go through the cases, which are set out in Mr. Benjamin's work—that though a seller is induced to sell by the fraud of the buyer, and though it is competent to the seller by reason of such fraud to avoid the contract, yet, till he does some act to avoid it, the property remains in the buyer, and that, if he in the meantime has parted with the thing sold to an innocent purchaser, the title of the latter cannot be defeated by the original seller. The reasoning on which this conclusion is based may not appear altogether consistent with principle, and agreeing in the result we should prefer to adopt the view of the American courts, as stated in the case of *Root v. French* (¹), a case decided in the Supreme Court of Judicature of the State of New York, according to which the preference thus given to the right of the innocent purchaser is treated as an exception to the general law, and is rested on the principle of equity that where one of two innocent parties must suffer from the fraud of a third, the loss should fall on him, who enabled such third party to commit the fraud. But on whatever ground it may be said to rest, the law must be taken to be now definitely settled.

The question which in some cases might be a very material one, as well as one of some nicety, viz., what, on the part of the defrauded seller, short of retaking possession of the thing sold, will amount to an avoidance of the contract, does not arise in the present instance. The defendant not knowing what had become of his sheep, or where to find Wale, his buyer, had done and could *do nothing, beyond [36 giving notice to the police, up to the time when the sheep were bought by the plaintiff.

We must take it, therefore, as incontestible, that but for the subsequent conviction of Wale for having obtained these sheep by false pretences, no question could be raised as to the title of the plaintiff. But it is contended that by reason of such conviction the defendant is entitled to the benefit of the provision of 24 & 25 Vict. c. 96, s. 100, which enacts that where property has been obtained (*inter alia*) by false pretences, on conviction of the party so obtaining it, restitution shall be made to the party from whom it has been so obtained. But we are clearly of opinion that this enactment, which is in these terms,—“If any person guilty of any felony or misdemeanor, in stealing, taking, obtaining, extorting, embezzling, converting or disposing of, or in knowingly receiving any chattel, money, valuable security

(¹) 18 Wendell, 570.

or other property whatsoever, shall be indicted for such offence by or on behalf of the owner of the property or his executor, or administrator, and convicted thereof, in such case the property shall be restored to the owner"—has no application to such a case as the present. The language applies, and is obviously intended to apply, to cases, and to these only, in which possession has been obtained without the property passing. This was the construction put on the statute by this court in *Lindsay v. Cundy* ('); and though the view there taken by the court on the primary question, as to whether a contract had been made by the sellers with the person obtaining the goods, was reversed on appeal; the second ground of the judgment, which is the one immediately applicable to the present case, remains unshaken, and we have no hesitation in adhering to it. And it is strongly confirmed by the case of *Horwood v. Smith* (*), which was a case of sheep stolen and sold by the thief in market overt, and in which the thief was convicted of the larceny; yet it was held that, as the conviction did not take place till after the sale, the owner was not entitled to restitution under 21 Hen. 8, c. 11. In the present case, as in the foregoing, there was no property in the prosecutor at the time of the conviction. It had been parted with by a contract, which, though under the circumstances voidable, ceased on the sale [37] *before it had been avoided to be any longer voidable; and as to which, therefore, the right of the plaintiff had become indefeasible. It cannot have been the intention of the statute to defeat it nevertheless, and by the mere conviction of the fraudulent purchaser to deprive the innocent buyer of the right which, according to the decisions in the series of cases already referred to, had become absolute in him.

Our judgment must therefore be for the plaintiff.

Judgment for the plaintiff.

Solicitor for plaintiff: *Knocker.*

Solicitor for defendant: *Langham.*

(¹) 1 Q. B. D., 348; 16 Eng. R., 392.

(²) 2 T. R., 750.

See 12 Eng. R., 615, note; 16 id., 405, note; 19 id., 242, note; 24 id., 357, note; 25 id., 514, note; 3 Leg. News (Lower Can.), 225.

One G., who was a member of the board of education, the defendant herein, as attorney for it, received \$3,600.84 of its money, which he wrongfully appropriated to his own use: he subse-

quently procured from plaintiff on a forged mortgage \$4,129.34, which he deposited in a bank to his credit, and on the same day drew his check on said bank to defendants' order for the amount so appropriated, and delivered the same to defendant, who received it, without notice or knowledge of the fraud perpetrated upon plaintiff, and

gave G. credit therefor; the check was paid, and the money received thereon used by defendant.

In an action to recover the amount so received by defendant from G., held, that defendant having received the money in good faith and in the ordinary course of business, for a valuable consideration, was not liable. The possession of money vests the title in the holder, as to third persons dealing with him and receiving it in due course of business and in good faith, upon a consideration good as between the parties.

The doctrine that an antecedent debt is not such a consideration as will cut off the equities of third parties in respect to negotiable securities obtained by fraud, has no application to money so obtained: *Stephens v. Board*, etc., 79 N. Y., 183, distinguishing *Caussidiere v. Beers*, 2 Keyes, 198, 1 Abb. Ct. App. Dec., 333.

As between citizens of this State, the title to personal property cannot be divested without the assent or intervention and against the will of the owner, by the removal of the property from the State by another having no authority from the owner, and its sale in another country under different laws.

B. executed to plaintiff a chattel mortgage upon a span of horses, both parties then residents of this State, and the horses were in the State. B. subsequently took the horses to Canada where they were sold by a regular trader dealing in horses, the purchaser buying in good faith without knowledge of plaintiff's claim. Under the laws of Canada, property cannot be reclaimed from one so purchasing, without refunding to him the price paid. Defendant, a resident of this State, bought the horses in Canada from such purchaser; they were left in Canada. Upon refusal of defendant to deliver them up on demand, this action for their conversion was brought. Held, that plaintiff was entitled to recover: *Edgerly v. Bush*, 81 N. Y., 199, reversing 16 Hun, 80, and distinguishing *Camel v. Sewell*, 5 Hurl. & Norm., 728; *Cranch v. McLachlin*, 4 Johns., 84; *The Helena*, 4 Rob. Ad., 3; *Greenwood v. Curtis*, 6 Mass., 358.

In Lower Canada, under the statute of that province, it has been held, that, notwithstanding anything contained in articles 1488 and 2268 of the Civil Code of Lower Canada, a valid sale or

pledge cannot be made of stolen goods, except in the cases mentioned in article 1489, so as to divest the real owner of his right to reclaim them from the purchaser or pledgee, without reimbursing the price paid for or advances made on such goods, although the purchaser or pledgee may have bought or made advances on the stolen goods *bona fide* in the ordinary course of his business.

The words, "nor in commercial matters generally," in article 2268, do not protect a trader acquiring stolen goods in any commercial transaction, whether from a trader dealing in similar articles or not, but apply, apparently, to cases where the possession of the goods is obtained in a commercial transaction, whether by sale or otherwise, *but under the same circumstances by which a sale would be protected under article 1489*: *Cassils v. Crawford*, 21 Lower Canada Jurist, 1.

See 3 Leg. News (Lower Can.), 225, discussing the cases of *Edgerley v. Bush* and *Cassils v. Crawford*.

If A. sell goods to B., who sells them to C., the fact that A. supposed he was selling the goods to C. through B. as his agent, and would not have sold them to B. on his sole credit, will not entitle A. to maintain an action against C. for the conversion of the goods: *Stoddard v. Ham*, 129 Mass. R., 383.

See 18 Eng. R., 319 note; 19 Eng. R., 242 note.

An agent authorized to sell property, in the absence of any express limitation of his powers, is authorized to do any act or to make any declaration in regard to the property found necessary to make a sale, and usually incidental thereto.

Plaintiff being indebted to B. & Co., note brokers, placed in their hands his promissory note, to be sold at a discount of twelve per cent. and proceeds applied on his account. Defendant G. purchased the notes of B. & Co. at the discount stated, upon the representation by B. & Co. that they were first-class business paper. In an action among other things to compel the cancellation of the notes as usurious: held, that the notes had no inception until they were passed to G., and were therefore usurious; but that B. & Co. were the agents of plaintiff in making the sales; that he was bound by their representations, and so was estopped from setting up usury. Prior to the execu-

tion by the plaintiff of any note and before B. & Co. had received any authority to sell, G. applied to the latter to purchase notes, stating he wanted first-class business paper, B. & Co. stated that they would have paper of that kind, mentioning plaintiff's name. They subsequently procured a note from plaintiff, with authority to sell and apply on their account, he knowing at the time that it was to be sold at a discount of twelve per cent., in pursuance of a prior negotiation on the part of B. & Co. This note B. & Co. sent to G., who purchased, and the avails, less their commission for sale, were passed by B. & Co. to plaintiff's credit, and statement of sale made to him. Plaintiff had been a large purchaser of paper from B. & Co. and knew their method of effecting sales, and it was customary for the buyer to exact representations that paper sold was business paper. Held, that the facts justified a finding that the note was purchased in reliance upon representations by B. & Co. that it was business paper, and also that there was a ratification by plaintiff of the acts and declarations of B. & Co.: *Ahern v. Goodspeed*, 72 N. Y., 108.

An agent, with express authority to sell, has no implied authority to warrant, where the property is of a description not usually sold with warranty.

One employed to make a sale of bank stock, is not presumptively empowered to warrant it in the name of his principal.

The receipt of the proceeds by the owner of the stock, in ignorance of an unauthorized warranty by the agent, is not a ratification of the unauthorized engagement.

Where a party claims, receives and retains the property of another, knowing that it was obtained by an unauthorized use of his name, it is a ratification the assumed agency of which evinces his assent to the original contract.

So, too, where an agent, acting within the scope of his actual authority, perpetrates a fraud for the benefit of his

principal, and the latter receives the fruits of it, he thereby adopts the fraudulent acts of the agent.

But the mere receipt by the owner of the proceeds of his own property is not a ratification of a collateral contract made without his authority, and to which he never knowingly assented: *Smith v. Tracy*, 36 N. Y., 79.

Defendant made his promissory note payable to plaintiff, which was indorsed by the latter and by T. Judgment was obtained thereon by the holder, who assigned it to N. for the benefit of T. Certain real estate of plaintiff's was sold upon the execution issued on said judgment. A. purchased and took a certificate of sale for the benefit of T. but in his own name. Defendant, ignorant of the sale, and deceived by T., paid the judgment in full to T., receiving a formal satisfaction of the judgment from N. Subsequently plaintiff paid T. the amount of the bid on the sale, and received an assignment of the sheriff's certificate from N. After the discovery of the fraud practised by T. plaintiff brought an action against him therefor, obtained judgment and collected a portion thereof. He then brought this action to recover the residue of the money paid by him. Held,

1. The payment of the judgment to T. and satisfaction thereof operated to cancel sale, and was, in fact, a redemption. Plaintiff was, therefore, under no obligation to redeem, and having paid the money to T. in ignorance of the facts, could recover it back, but had no claim against defendant; and

2. Even if this were not so, plaintiff had the election to affirm sale, claim it as payment of the judgment and sue defendant, or to claim the sale as cancelled by the transaction between defendant and T., and sue the latter to recover back the money paid. But he could not pursue both, as they were inconsistent. Having elected to pursue the latter remedy, he is estopped from pursuing the former, although he failed to recover his whole judgment of T.: *Goss v. Mathier*, 46 N. Y., 689.

[4 Queen's Bench Division, 42.]

June 21; Dec. 20, 1878.

***THE QUEEN V. HOLBROOK and Others. [42]**

Libel—Criminal Information—Authority, Consent, or Knowledge of Defendant, Publication without—6 & 7 Vict. c. 96, s. 7—Liability of Proprietor of Newspaper for acts of Editor.

The 7th section of 6 & 7 Vict. c. 96, enacts that "whosoever upon the trial of any indictment or information for the publication of a libel, under the plea of not guilty, evidence shall have been given which shall establish a presumptive case of publication against the defendant by the act of any other person by his authority, it shall be competent to such defendant to prove that such publication was made without his authority, consent, or knowledge, and that the said publication did not arise from want of due care or caution on his part."

On the trial of a criminal information for libel against the proprietors of a newspaper it appeared that the defendants had appointed an editor with general authority to conduct the paper, and left it entirely to his discretion what should be inserted therein, and that such editor had inserted the libel in question without the knowledge or express authority of the defendants. The jury found the defendants guilty. On a motion for a new trial on the ground that the verdict was against evidence, and of misdirection:

Held (by Cockburn, C.J., and Luah, J., Mellor, J., dissenting), that the general authority given to the editor was not *per se* evidence that the defendants had authorized or consented to the publication of the libel, within the meaning of 6 & 7 Vict. c. 96, s. 7; and that, as the learned judge at the trial had summed up in terms which might have led the jury to suppose that it was, and the jury had apparently given their verdict on that footing, there must be a new trial.

In this case a criminal information had been obtained by J. Howard against the defendants, R. E. G., and A. R. Holbrook, the proprietors of the *Portsmouth Gazette*, for a libel published in that newspaper. The case was tried in the first instance before Lindley, J., at the Winchester Summer Assizes, 1877, when a verdict of guilty against all the defendants was found by the jury under the learned judge's direction. This verdict was set aside on the ground of misdirection, and a new trial ordered: see the report of the case⁽¹⁾. The second trial took place before Grove, J. The facts of the case as proved on the second trial did not materially differ from those proved on the first, and are fully set out in the report above referred to, and the judgments reported below. It appeared that the defendants intrusted the editorial department of the newspaper to one Green. He stated that they *appointed him with general au- [43] thority to conduct the paper, that they left it entirely to his discretion what should be put in the paper, and that they never took notice of his articles one way or the other. It

⁽¹⁾ 3 Q. B. D., 60; *ante*, 53.

1878

The Queen v. Holbrook.

appeared that the libel in question, which was in the form of a letter, was inserted by Green without the knowledge or express authority of the defendants, one of whom was absent from Portsmouth at the time. The learned judge, in summing up at the second trial, left it to the jury to say whether the general authority to the editor included an authority to publish the libel complained of. The jury found all the defendants guilty.

Cole, Q.C., moved for a rule *nisi* for a new trial on the ground of misdirection, and that the verdict was against evidence, contending that the learned judge had misdirected the jury, in not sufficiently pointing out to them the difference between criminal and civil proceedings for libel in regard to the effect of the general authority given to the editor by the defendants, and in not directing them that an authority with relation to the publication of the particular libel must exist since 6 & 7 Vict. c. 96, s. 7, in order to render the defendants criminally responsible.

A rule *nisi* having been granted,

June 21. *Charles*, Q.C., and *A. L. Smith*, showed cause: It is submitted that it must be a question for the jury whether the general authority given to the editor included an authority to publish the libel in question, and that the jury were fairly entitled on the evidence to come to the conclusion that there was authority to publish the libel, or an absence of due care and caution on the part of the defendants in respect of the publication of the same. *Reg. v. Holbrook* (1) only decided that the general authority does not necessarily as a matter of law involve the authority to publish the particular libel, as would be the case in a civil action for libel, but it must be a question for the jury, taking all the circumstances into consideration, whether such a general authority in the particular case included authority to publish the particular article complained of. The evidence of the editor is that an altogether unlimited, plenary [44] discretion was vested in him, and that *the defendants never took any notice of what he inserted either way. It would be a most dangerous result of the statute that the proprietor of a paper should escape from responsibility by giving a plenary discretion to an editor and never taking any notice of what he inserts, however libellous it may be, while at the same time he takes the profit derived from the sale of the paper. All that the statute intended was that it should no longer be the law that the proprietor should be

(1) 3 Q. B. D., 60; *ante*, 53.

conclusively presumed to have authorized the publication of anything inserted in the paper.

[They cited *Cooper v. Slade* (*).]

Cole, Q.C., and *Folkard*, supported the rule: A general authority to conduct the editorial department of a newspaper, so far as criminal proceedings are concerned, only includes authority to conduct it lawfully. An authority to commit a crime is not to be implied. The learned judge in summing up did not sufficiently point out to the jury the difference that there is in this respect between civil and criminal proceedings. It is contended that the intention of the statute was to do away with the anomalous state of the criminal law theretofore existing with regard to libel, and to render the law of libel uniform with the remainder of the criminal law, by making the existence of a criminal intent necessary to the crime of libel. The dangerous consequences suggested on the other side do not follow, because the party libelled has his remedy by civil action against the proprietor, who is still liable civilly in respect of the conduct of his servant the editor. [They cited *Poulton v. London and South Western Ry. Co.* (*).]

Cur. adv. vult.

Dec. 20. The following judgments were delivered:

LUSH, J.: The question presented for our decision on this rule is substantially that which arose upon the former motion for a new trial, and which was argued in November of the last year. Upon the first trial it was proved that the literary department of the newspaper in question had been intrusted to an editor, who inserted in it what he thought fit in the way of articles, correspondence, &c.; that of the three defendants, who were proprietors *of the paper, each [45 took the management of a particular department of the business other than the literary department; that at the time of publication of the libel one of them was absent from home on account of ill-health, and that neither of them had given any authority for or consent to the publication complained of, or had any knowledge of the libellous article until his attention was called to it after the paper was in circulation. My Brother Lindley on that occasion ruled as a matter of law that, as an authority had been given to the editor to edit the paper and to insert what he thought fit without supervision or control, the libel could not be said to have been published without the authority of the defendants, within the meaning of the act 6 & 7 Vict. c. 96, s. 7.

(*) 6 H. L. C., 746, at p. 793.

(*) Law Rep., 2 Q. B., 534.

The Lord Chief Justice and myself took a different view of the meaning of that section, and for reasons we then gave, we held that the "authority" mentioned in the 7th section was an authority to publish the libel, and that the general authority given to the editor, to use his discretion in admitting or rejecting articles or correspondence, was not of itself sufficient under the circumstances to make the proprietor criminally responsible.

Upon the second trial, the ruling in which is now in question, the evidence of authority was carried no further than on the former occasion, but instead of holding as a matter of law that the 7th section of the act did not protect the defendants, the learned judge left the question of authority to the jury, but without such an explanation of the meaning of the section, as appeared to the majority of the court on the previous occasion to be required, in order to enable the jury properly to apply it to the facts. Other grounds, such as want of due care and caution, the omission to stop the sale of papers outstanding in the hands of retail sellers, when the attention of the two defendants, who were in Portsmouth, was called to the objectionable article, and the inadvertent sale in the shop afterwards of another copy of the paper, were also put forward, but the jury must have found their verdict on the question of authority, inasmuch as they implicated the absent defendant, against whom these, which I may call minor matters of complaint, were not and could not have been made. As my Brother Mellor, after a 46] second argument, retains the opinion *which he expressed before, and as my Brother Grove, as I infer from his summing up, rather inclines to the same opinion, I have carefully reviewed the authorities and the argument, and after the best consideration which I can give to the case, I am constrained to hold that the construction of the act which the Lord Chief Justice and myself adopted on the former occasion is the true construction. It must be admitted that the 7th section, upon which the question turns, is not so precise and clear as it might have been. In order to ascertain the intention of the Legislature, we must have recourse to the well-known rule of construction laid down by Coke, C.J., in *Heydon's Case*⁽¹⁾: "For the sure and true construction of all statutes in general," he says, "(be they penal or beneficial, restrictive or enlarging of the common law) four things are to be discerned and considered: 1st, what was the common law before the making of the act; 2d, what was the mischief and defect for which the common

(¹) 3 Rep., 7 a.

law did not provide; 3d, what remedy the parliament hath resolved and appointed; 4th, the true reason of the remedy, and then the office of the judges is always to make such construction as shall suppress the mischief and advance the remedy."

Pursuing this line of reasoning, the first question is, what was the law as regards the criminal liability of the proprietor of a newspaper for libel. Libel on an individual is, and has always been, regarded as both a civil injury and a criminal offence. The person libelled may pursue his remedy for damages or prefer an indictment, or by leave of the court a criminal information, or he may both sue for damages and indict. It is ranked amongst criminal offences because of its supposed tendency to arouse angry passion, provoke revenge, and thus endanger the public peace, but the libeller is not the less bound to make compensation for the pecuniary or other loss or injury which the libel might have occasioned to the person libelled. In this respect libel stands on the same footing as an assault or any other injury to the person. But the publication of a libel, when prosecuted as a criminal offence, was treated upon an exceptional principle, and with exceptional severity. The maxim "respondeat superior," which (with rare exceptions founded on reasons not applicable to *libel, and which I will [47 presently notice) pertains to civil liability only, was applied to an indictment for libel, and the proprietor of a newspaper in which a libellous article had been inserted was held to be criminally as well as civilly responsible for it, though he had never authorized it, nor had anything to do with its insertion, and whether the editor had inserted it by negligence or wilfully. It was not so in other cases of personal injury. If a coachman accustomed to drive were, while engaged on his master's business, by carelessness or furious driving, to cause the death of another, the master would be liable to an action for damages, but not to a criminal prosecution. The offending servant alone could be charged with the manslaughter. And if the coachman were to be found guilty of such an offence while using his master's carriage without his permission and upon his own business, or if while doing his master's work he were wantonly to assault another, the master would not be liable even to an action for damages. Subject to the exceptions already referred to, the criminal law makes no one punishable for an offence but the person who either committed it or incited and procured the other to commit it, or who aided in its commission. I need only select two cases from the books

1878

The Queen v. Holbrook.

to show what the criminal law of libel was. The one is *Rex v. Walter* ⁽¹⁾. A criminal information had been filed against the proprietor of the *Times* for a libel on a lady. The defendant pleaded not guilty, and proved at the trial that, although he was the proprietor of the paper, he had nothing to do with the conducting of it, that he resided entirely in the country, and that his son was concerned in the conducting of the paper without any interference on his part. Mr. Erskine, his counsel, contended upon this evidence that, though his client might be liable in a civil suit for all acts of his agent, it was otherwise when he had to answer criminally; that though the proving him to be the proprietor of the paper might *prima facie* subject him criminally, it was otherwise when it was clearly shown that the fact of the publication was not his, nor done with his privity; that "*actus non facit reum, nisi mens sit rea*," so that, if the act of publication which constituted the crime was proved to be that of another, the jury would be bound 48] to acquit the defendant. Lord Kenyon said "he was clearly of opinion that the proprietor of a newspaper was answerable criminally for the acts of his servants or agents for misconduct in the conducting of the paper, that this was not his opinion only, but that of Lord Hale, Justice Powell, and Justice Foster, all high law authorities, and to which he subscribed. This was the old and received law for above a century, and was not to be broken in upon by any new doctrine upon libel." This occurred in 1808. I have cited the case in full from the report because of its exact analogy in all material circumstances to the present case. The other case is that of *Colbourn v. Patmore* ⁽²⁾, tried in 1834. A criminal information had been filed against Mr. Colbourn as the proprietor of the *Court Journal*, for a libel on a lady. He pleaded guilty, and was sentenced to pay a fine of £100 and to be imprisoned till the fine was paid. He paid the £100, and then brought an action against his editor for breach of duty in inserting the libellous paragraph, alleging that it was done without his authority or knowledge, and in violation of the contract between them. This allegation was fully proved, and a verdict was given for the plaintiff for a sum by way of damages, which included the £100 penalty. A motion was then made to arrest the judgment, on the ground that the plaintiff was in contemplation of law a party to the offence, and one wrongdoer cannot have, in a court of law, contribution or redress against another who was his accomplice. The judgment

⁽¹⁾ 8 Esp., 21.⁽²⁾ 1 C. M. & R., 73.

was ultimately arrested, because of a defect in the pleadings, it not being alleged that the plaintiff did not sanction the circulation of the journal after he knew of the libel, and so become actual "publisher" of the libel. But the case is important for the unanimity which evidently prevailed both on the bench and between the counsel on both sides as to the state of the law. The late Mr. Justice Maule was counsel for the defendant, the editor, and it never occurred to his astute and well-informed mind to suggest that Mr. Colbourn brought the mischief upon himself by pleading guilty, and that he might have defended himself by proving the real facts. This would have been an obvious ground of defence for his client. On the contrary, he admits in his argument "the law has made the proprietor of a newspaper criminally answerable for the publication of a libel in its *columns, whether the libel was inserted with or without his knowledge," and his only argument was, that though the plaintiff was actually innocent, the two parties were in the eye of the law equally guilty. Sir William Follett, on the part of Mr. Colbourn, contended that, as his client was in fact innocent, the rule of law which prohibited a claim for redress by one wrongdoer against another ought not to be held applicable. Baron Alderson remarked, in the course of the argument, "Is it not more correct to say that the plaintiff was actually ignorant but legally cognizant?" He afterwards remarks, "A master is presumed to authorize the insertion of a libel; in other cases he is not presumed to authorize the wilful act of his servant, either in civil or criminal proceedings. Does not the proprietor of a newspaper give authority to the editor to publish everything libellous or not?"

This, then, was the state of the law before the act was passed. The proprietor of a newspaper which contained a personal libel was treated as a criminal, though he had not himself committed the criminal act, nor procured or incited another to commit it, nor aided in its commission, nor knew that it was about to be committed. I think it cannot be doubted from the tenor of the act itself, apart from its historical origin, that the intention of the Legislature was, amongst other things, to mitigate the rigor of the common law in this particular, and to place the proprietor of a newspaper in the same position as any other employer whose servant had in the course of his employment committed an offence against, and to the injury of, a third person. The act is entitled, "An Act to Amend the Law of Libel," and its declared objects are—1st, the better protection of private

1878

The Queen v. Holbrook.

character; 2dly, the more effectually securing the liberty of the press; and, 3dly, the better preventing abuses in exercising the said liberty."

The second object forms the subject of several sections, and by them the defendant in an action for libel is allowed to give in evidence in mitigation of damages, under certain conditions, an apology, and to pay money into court; and the defendant in an indictment or information is permitted to plead the truth as a justification, provided he shows that the publication was for the public benefit, and to be entitled to costs upon a verdict of not guilty. Between these latter 50] provisions comes the 7th section, the *true meaning of which is the question now before us. The words are, "whosoever upon the trial of any indictment or information for the publication of a libel, under the plea of not guilty, evidence shall have been given which shall establish a presumptive case of publication against the defendant by the act of any other person by his authority, it shall be competent to such defendant to prove that such publication was made without his authority, consent, or knowledge, and that the said publication did not arise from want of due care and caution on his part." Although the section is wanting in precision, it seems clear that the word "publication," wherever it occurs in the section, points to the libel and not to the newspaper. The section says nothing about newspapers; it applies to any printed or written slander, whether contained in a newspaper, book, pamphlet, handbill, or letter. What it deals with is the libel and nothing more. Again, the clause does not say what is to be the effect of proving the negative, but there can be as little doubt that it means it to be an entire defence, entitling the defendant to a verdict and not merely to a mitigation of punishment. The effect of it read by the light of previous decisions, and read so as to make it remedial, must be that an authority from the proprietor of a newspaper to the editor to publish what is libellous is no longer to be, as it formerly was, a presumption of law, but a question of fact. Before the act the only question of fact was whether the defendant authorized the publication of the paper; now, it is whether he authorized the publication of the libel. It is true that the production of the paper which contains the libel, coupled with proof that the defendant is the proprietor, is *prima facie* evidence that he caused the publication of the libel, and the onus is on him to prove the negative. But when he has proved that the literary department was intrusted entirely to an editor, the question what was the extent of the authority which that employment in-

volved is to be tried upon the principle which is applicable to all other questions of authority. And I think the jury ought to be told, in this as in every other case, that criminal intention is not to be presumed, but is to be proved, and that, in the absence of any evidence to the contrary, a person who employs another to do a lawful act is to be taken to authorize him to do it in a lawful and not in an unlawful *manner. This is the doctrine which is applied to [51] other cases of wrongs done by servants, when it is sought to fix with criminal liability the employer, and the statute intended to place libel upon the same footing in this respect as other torts. Otherwise the statute has afforded no remedy for an admitted anomaly, and the case of *Rex v. Walter* (¹), if it occurred to-morrow, must be decided as it was decided in 1808. Although the employer is liable civilly for such a wrong, this is not upon the presumption of authority but by virtue of the maxim "*respondeat superior*," which on grounds of policy and general convenience puts the master in the same position as if he had done the wrong himself, a maxim which, as I before observed, pertains to civil and not, except in rare instances, to criminal liability. I am far from saying that the mere appointment of an editor without supervision or control may not, in some cases, involve an authority to publish libels. If the paper was a calumnious paper, its general character would negative the ordinary presumption of innocent intention, and fairly lead to the inference that the proprietor authorized the insertion of slanderous articles. But that cannot be said of a respectable paper as the one in question is admitted to be.

The exceptional class of cases to which I have referred are public nuisances. In these cases the wrong is done to the public and not to any particular individual, and in that case no one can sue for damages unless he happens to have sustained some exceptional injury. Of such a class the case of *Reg. v. Stephens* (²) is an illustration. The workmen of the owner of a quarry had stacked the refuse of the quarry by the side of a navigable river, in such a manner that it fell into the stream and obstructed the navigation, and although the owner proved that he lived at a distance, and did not know what was being done, and although he had given directions to the contrary, he was held criminally liable for the nuisance. Here the wrong was common to all the public, and the remedy by indictment was the only remedy. This was the ground of the decision. Libel, as I have already observed, does not belong to this class, but to the

(¹) 8 Esp., 21.

28 ENG. REP.

(²) Law Rep., 1 Q. B., 702.

1878

The Queen v. Holbrook.

ordinary class of offences against the person. I am therefore of opinion that the direction *to the jury was imperfect and the verdict wrong, and consequently that the verdict ought to be set aside.

MELLOR, J.: The question for consideration in this case arose upon the trial before Mr. Justice Grove of a criminal information against the defendants, who are the proprietors and publishers of the *Portsmouth Times and National Gazette*, for a libel on a Mr. Howard, contained in that newspaper. On the trial the verdict passed against all the defendants, and they were all found guilty of the offence. There had been a former trial of the case, in which the judge had directed a verdict to be entered against all the defendants, on the ground that they did not, upon the evidence then given, come within the true intent and meaning of the 7th section of 6 & 7 Vict. c. 96.

A rule for a new trial was thereupon obtained by Mr. Cole, and afterwards made absolute, on the ground that the judge ought not to have withdrawn the question from the jury, but should have left it to them upon that evidence with a suitable direction.

The only respect in which my present judgment differs from that which I gave on the former trial is, that I think that I was wrong in holding that the judge was right in withdrawing the evidence from the consideration of the jury and deciding upon it himself. On the last trial Mr. Justice Grove left the question to the jury, with a careful and elaborate summing up, and they thereupon found a verdict of guilty against all the defendants.

Upon the hearing of the present rule Mr. Cole, for the defendants, made several objections to the verdict, viz., on the ground that it was against the weight of the evidence, and on the ground of misdirection by the judge.

On the argument against that rule the only substantial question turned upon the construction of the statute 6 & 7 Vict. c. 96, entitled, "An Act to amend the Law respecting Defamatory Words and Libel." The recital to the first section shows the object of the act to have been "for the *better protection of private character and for more effectually securing the liberty of the press, and for better preventing abuses in exercising the said liberty.*"

The section upon which the matter more particularly 53] depends *is the 7th, which enacts "that whensoever upon the trial of an indictment or information for the publication of a libel, under the plea of not guilty, evidence shall have been given which shall establish a presumptive

case of publication against the defendant by the act of any other person by his authority, it shall be competent to such defendant to prove that such publication was made without his *authority, consent, or knowledge*, and that the said publication did not arise from *want of due care and caution* on his part." I regret that there exists a difference of opinion amongst the judges who heard the argument as to the true construction of this statute. I have read the very able arguments of my Lord Chief Justice and my Brother Lush with care, and regret that I am not able to come to the same conclusion with them.

I admit the force of their reasoning, but it does not satisfy all the difficulties in the construction which press upon my mind.

I am of opinion, therefore, that the rule should be discharged, and that the verdict should stand.

The several defendants were joint proprietors of the newspaper in question, and each contributed his assistance in various departments to the management and publication of the same, but neither of them took part in the editorial management of it, but that department was by the defendants devolved upon a manager named Green, who it appeared on the evidence had procured the article in question to be written, and had caused it to be inserted in the newspaper.

The defendants were not any of them aware of the insertion of the offensive article in the newspaper until after the publication thereof, when their attention was called to it. I do not stop to refer to the subsequent sale of a single paper, or to the steps taken on the part of the defendants to stop the further circulation of the newspaper, when they became aware of the libel. I consider that the evidence of Mr. Green, the manager appointed by the defendants, raises the real question in the case, and it is upon that evidence that I base my opinion. Mr. Green being called as a witness on the part of the defendants, said that they, the defendants, "leave it entirely to my discretion what I shall put in the paper; they appointed me with general authority to conduct the paper; they have never taken notice of my articles one way *or the other; they have never found fault [54 with the articles." It is difficult to conceive of an authority more complete or unfettered, and it appears to me that by so constituting Mr. Green the editor with such authority the defendants must be taken to have authorized the insertion of every matter appearing in the newspaper in question. The recital in the statute defines one main object

1878

The Queen v. Holbrook.

of it to have been "*the better protection of private character*, as well as the "more effectually securing the liberty of the press," which I concede to be a perfectly reasonable object. The words are, "whenever, upon the trial of any indictment or information for the publication of a libel, under the plea of not guilty, evidence shall have been given which shall establish a *presumptive* case of publication against the defendant by the act of any other person by his authority, it shall be competent to such defendant to prove that such publication was made without his authority, consent, or knowledge." Now, I think that these words may well be satisfied by permitting the defendant to negative, in point of fact, the *presumption* which before arbitrarily prevailed, and could not be controverted on the trial by giving in evidence the real facts. For instance, as proprietors they might have expressly forbidden the insertion of some specific libel in the paper, and have ordered it to be destroyed; nevertheless, by accident, or by design or misunderstanding, it might have got into the newspaper against their order, and without their consent. Again, they may have expressly forbidden the editor to insert any article of a defamatory character without their express authority, but the editor may nevertheless have inserted it in the newspaper without their knowledge. Other circumstances may be imagined in which libels may have been inserted in the newspaper, and for which, but for this section, they would have been liable as upon an actual authority. But so to apply it to a case like the present, where the fullest authority to conduct the paper was given, and to insert any articles at the discretion of the editor, without restriction as to their character and nature, seems strangely at variance with the recited object of the statute, viz., "for the better preventing abuses in the exercise of such liberty." But it was contended that the statute did protect proprietors of newspapers in all cases in which they had not specially known of or authorized the 55] *insertion of the specific libel. I fear that if such a construction of this section should prevail, the other objects recited in the statute, viz., "*the better protection of private character and preventing abuses in exercising the said liberty of the press*," would be utterly lost sight of, and it would become, more properly speaking, a statute for the greater protection of newspaper proprietors, and for the more effectual encouragement of the sale of newspapers containing libellous articles. Another main consideration which influences my opinion is the increased difficulty which it introduces and imposes upon a party seeking re-

dress in a case of a scandalous libel in which the obtaining of damages can afford no adequate satisfaction. It is true that the cases of *Rex v. Walter* ⁽¹⁾, and of *Colbourn v. Patmore* ⁽²⁾, which established the criminal liability of a newspaper proprietor for the acts of his servants, were supposed to have inflicted a great hardship upon the defendant, and that these cases were doubtless in the mind of the framer of the statute in question, yet it by no means follows that he contemplated the giving of an entire immunity from liability on the part of newspaper proprietors, and it appears to me from the recitals in the statute, and the nature of its provisions, that it was not intended absolutely to reverse the rule laid down by Lord Kenyon in *Rex v. Walter* ⁽¹⁾.

I cannot help thinking that clearer and simpler language and different recitals would have been adopted had such been the case. It is argued, however, that unless such be the meaning of the section, it will be entirely nugatory. I cannot bring myself to that view of the statute; but, as I have already said, I think that many cases may be suggested in which the objects of the statute may be satisfied without so construing the words used. Should, however, such construction prevail, it will throw the greatest obstacles in the way of a prosecutor desiring to proceed criminally for a libel. Take the case of an indictment or information for a serious and scandalous libel, how is the person defamed to proceed to punish the libeller? If he attacks the proprietor, as the person who profits by the libel, and therefore apparently the right person to proceed against, he may be met by evidence on the trial that such proprietor had nothing to do with the actual management of *the newspaper, [56 but merely provided the capital necessary for its establishment, and his only interference was the receiving of the profits arising from the sale. How is the prosecutor to find out the actual libeller, whether proprietor, editor, or correspondent? and how is he to prove his identity? Surely, if the wide construction contended for had been intended by the framer of the act, provision would have been made for the registering of the name of the editor or author who was responsible for the libel, and for enabling the prosecutor to discover who he was. Even then it might be that the editor was a man of straw, without the means of satisfying any fine or the costs of any prosecution which on conviction might be imposed upon him; he might be a person alike destitute of character and principle, hired only for his skill in defamation and his capacity to create a wretched craving

⁽¹⁾ 3 Esq., 21.

⁽²⁾ 1 C. M. & R., 78.

1878

The Queen v. Holbrook.

to read the scandalous and libellous contents of the paper which he was hired to conduct. This is a consideration which much influences my opinion, seeing that no means are provided in a criminal case by discovery, by interrogatories, or otherwise, for ascertaining the real author or contributor. In fact, the result must be that, however scandalous the libel, the person defamed can have no real redress criminally against the actual libeller, as he, being, upon the hypothesis, a man of straw, can pay neither fine nor costs.

It may, however, be asked, What is then the provision "for more effectually securing the liberty of the press," if the meaning of the section be limited as suggested by me? I find a ready answer in the provisions of the 2d and 6th sections, which enable a person charged criminally with libel to plead that the substance of the libel is true, and in case of an action that it was inserted without malice, and that before action he had tendered an apology; which provisions form a most material alteration in the law heretofore in force with regard to the law of libel. On the trial of the present information no doubt could be suggested that a presumptive case of publication by authority of the defendants had been established; and the only question which then remained was whether the evidence given on behalf of the defendants negatived the presumption, and showed that the libel in question had been published without their authority, consent, or knowledge, *and that the said publication did not arise from want of due care or caution on their part.

I am of opinion that the evidence given on the part of the defendants wholly failed to establish such a defence under the statute, but on the contrary warranted the jury in finding them guilty on both divisions of the proposition which were essential to their defence. An unlimited discretion and authority had been in fact conferred on Mr. Green, the editor, to insert articles of whatever nature and character he might deem expedient to insert, and their consent was involved in the same authority; and therefore, unless it can be successfully contended that the authority, consent, or knowledge mentioned in the exempting clause of the section requires the prosecutor to prove that the particular specific libel must have been actually authorized, known of, and approved in each case, I cannot but think that the evidence sufficed to warrant the conclusion at which the jury arrived. It is true, as was observed during the arguments, that as a general rule an authority to an agent to conduct a commercial business does not extend to enable such agent by impli-

cation to make his principal liable for a crime committed by such agent. Now this may be true as a general proposition where a crime is committed by such an agent, beyond the scope of his authority, without the consent of his principal; but it has no application to a business or commercial speculation of this description, where, in the very nature of things, it is essential to the prosperity of the paper that articles of a very various character and description should be inserted. Indeed, the case of *Rex v. Walter* ⁽¹⁾ and *Colbourn v. Patmore* ⁽²⁾ show that this must be so, as those cases proceeded upon the principle that in such a case the liability of the proprietor and superior resulted from the act of the servant. In fact, Mr. Green in the management of the editorial department was the *alter ego* of each of the defendants, and was in fact authorized to insert in every issue of the newspaper whatever matter he considered suitable, and likely to increase its circulation, and the insertion of the libel in question in the newspaper was clearly within the scope of his authority.

As I cannot believe that the object of the statute was to require prosecutors in such cases to prove an actual authority or consent *to the specific libel, I cannot do other [58 than express my opinion that the jury were justified in finding the defendants guilty. I am further of opinion, although it is not necessary in order to discharge this rule to decide it, that there was a question upon the evidence fit for the consideration of the jury, whether the publication in question arose from want of due care or caution on the part of the defendants; and I think that the jury might well think that the defendants failed to show that it did not so arise. It appears to me that for proprietors of a newspaper to devolve upon an editor the entire control and unfettered discretion as to what articles he shall insert, without requiring him to abstain from the insertion of all defamatory matter, or without making some provision for supervision by the defendants, who are the parties interested in the speculation, does exhibit a want of due care or caution on their part. The object of an editor is generally to make the paper sell, and to become a profitable speculation to his employers; and unhappily the insertion of sensational or defamatory articles has too often a great tendency to bring about so profitable a result. I think, therefore, there was evidence that the defendants did not use due care and caution in intrusting Mr. Green with unfettered authority in the management of the editorial department of their news-

(1) 3 Esp., 21.

(2) 1 C. M. & R., 73.

paper; and I am of opinion, therefore, that on all grounds the rule should be discharged.

COCKBURN, C.J.: The question in this case is one of considerable importance as regards the law of libel, inasmuch as it involves the construction which is to be put on the 7th section of 6 & 7 Vict. c. 96, an enactment passed to relieve the proprietors of public journals from the heavy responsibility, so far as the criminal law was concerned, which rested on them before in respect of libellous matter published in such journals without their authority, knowledge, or consent. The state of the law which this enactment was intended to remedy was, in my opinion, inconsistent with the first and common principles of justice, and one which was discreditable to the legislation of this country.

It had been laid down authoritatively, at a time when perhaps less liberal views as to the liberty of the press prevailed, that the proprietor of a public journal, though absent, and 59] wholly ignorant *of matter inserted in the journal by his editor, was nevertheless responsible not only civilly, but also criminally, if the matter so inserted were libellous, in direct contravention, I cannot but think, of the fundamental principle that to constitute guilt there must be a *mens rea*, an intention to violate the law.

It was to remedy this state of the law that the statutory enactment 6 & 7 Vict. c. 96, s. 7, was passed with which we have here to deal. It provides that, "when evidence shall have been given which shall establish a presumptive case of publication against the defendant by the act of any other person by his authority, it shall be competent to such defendant to prove that such publication was made without his authority, consent, or knowledge, and that the said publication did not arise from want of due care and caution on his part." The question is as to what will satisfy the exigency of the terms by which immunity is thus given to the proprietor, on the condition of his showing that he has not given authority for the publication of the libel. In the first place, would it be enough for the defendant to show that he had not specifically authorized the insertion of the article or matter complained of, if it should appear that he has given authority to insert matter, whether libellous or innocent, at the discretion of the editor? I answer unhesitatingly in the negative. But it appears to me equally untenable to say that, because a proprietor intrusts the conduct of a public journal to the plenary discretion of an editor, he thereby gives authority to the editor to commit a breach of the law by the insertion of libellous matter. In the first place, let

me ask if the principal in appointing and giving authority to his editor were expressly to prohibit the insertion of any libellous matter in the paper, would not, so far as the question of authority is concerned, such express prohibition be sufficient to satisfy the statute? I think the answer must be in the affirmative; for what, unless he himself superintends the insertion of every article, in which case the statute would be useless, can the proprietor do more? But surely the prohibition not to violate the law is impliedly involved in every service in which an agent is employed, and in which the law may possibly be broken by such agent. Take the case of an agent employed to buy goods on which a duty is payable, and who, to benefit his employer, buys smuggled goods unknown to the employer. The agent would be criminally *liable. The employer would not. [60 As it seems to me the proprietor of a public journal, who gives general authority to the editor he employs, is entitled to assume that the editor, knowing the law as well as himself, will take care, for his own sake, as well as for that of his employer, to keep within the law, by inserting nothing which would bring himself within the reach of the law, both criminally and civilly, and make his principal liable in damages which he again would be liable to make good. I am at a loss to see to what cases the statutory provision in question would be applicable if not to this. It is notorious that in many, perhaps in the majority of instances, public journals are carried on for the benefit of proprietors, who find the necessary capital, by editors employed by them, and to whom the conduct of the paper is committed without any immediate control or interference of the principal. In my opinion it was intended to exempt principals so circumstanced, if able to satisfy a jury that they had not authorized directly or indirectly the insertion of libellous matter, from being held criminally liable. It is to be observed that in both the striking cases referred to by my Brother Lush, those of *Rex v. Walter* (*), and *Colbourn v. Patmore* (*), as also in the case of *Rex v. Gutch* (*), the conduct of the journal had been left by the proprietor, as in this case, to the management of an editor, while the proprietor, absent at a distance, had been ignorant of the fact of the libellous matter having been published. It was to meet such cases, I cannot doubt, that this section of Lord Campbell's Act was directed. It was a remedial act, and one which, as bringing the law into harmony with general principles, should receive a liberal interpretation. I think we should be defeat-

(*) 8 Esp., 21.

(*) 1 C. M. & R., 73.

(*) Mood. & M., 433.

ing what was intended to be its operation if we were to hold that a general authority given to an editor to manage the conduct of a public journal involved an authority to publish libellous matter, and that a proprietor giving such authority still remained criminally liable for a libel, without specific authority, express or implied, for publishing such libel, or any consent to or knowledge of the same on his part. It is true that the terms in which the authority was given to the editor in the present case at first sight seem large. According to the evidence of the editor, the defendants "left it entirely to his discretion what he should put 61] into the paper. *They gave him general authority to conduct the paper; they never took notice of his articles one way or the other." But what is this beyond what is implied in the general authority given to an editor by every proprietor? What is this more than *in extenso* what would be implied in a general authority to conduct the paper? In my opinion, it would be to put much too strained and unwarranted a construction on such authority to treat it as giving a license to the editor to publish libels in a paper he was employed to conduct. I have no hesitation in saying that, where a general authority is given to an editor to publish libellous matter at his discretion, it will avail a proprietor nothing to show that he had not authorized the publication of the libel complained of. It is equally clear that though in the authority originally given to the editor no license to publish libellous matter may have been contained, still such an authority may be inferred from the conduct of the parties, as, for instance, from the fact that other libels have been published in the paper, which have come to the knowledge of the proprietor and without his remonstrance or interference, or the removal of the editor, from which the assent of the proprietor might well be inferred. I therefore do not feel the apprehension which has been expressed of the mischief which would result from the impunity which newspaper proprietors would derive from holding them free from criminal responsibility, when they employ an editor with general authority to conduct the paper. The impunity would quickly cease, if they suffered the paper to become the vehicle of calumny. There are journals as to which no jury would hesitate to say that the editors were authorized by the proprietors to invent or give currency to libel

Protection is further afforded to individuals and the public by the immunity afforded by the statute being conditioned on the exercise of due care and caution on the part

of the proprietor. Many circumstances might be held by a jury to amount to the absence of the care and caution thus required. The employment of an incompetent or untrustworthy editor, or one who had before been proceeded against for libel; total omission ever to look at the paper to see in what manner it was conducted, or, as in this very case, the omission, though taking part in the publication of the paper, to insist on having articles of a doubtful tendency *submitted for approval, might be deemed by a [62 jury sufficient to disentitle a proprietor to the protection of the statute. It must always be borne in mind also that it is only on the penal responsibility of the proprietor that a limit is thus placed. His liability to damages in a civil action remains as before. No hardship is therefore imposed on the individual prosecutor, who, in the eye of the law, prosecuted not on his own behalf, but on that of the public, and who may still hold the proprietor liable in damages, and, if he pleases, prosecute the editor as the publisher of the libel.

This being the view I take of the statute, it seems to me that the direction of the learned judge at the late trial was defective, in not explaining to the jury that a general authority to an editor to conduct the business of a newspaper, in the absence of anything to give it a different character, must be taken to mean an authority to conduct it according to law. I agree that as regards two of the three defendants, there may have been evidence to go to the jury of knowledge and consent on their parts; as it appears that they became aware of the article in question before the sale of the paper had come to an end, and took no steps to stop the issue of the remaining numbers of the paper, and therefore might be held to have known of and consented to the publication of the libel in such later papers. The jury might also possibly have held that as regards the two defendants who were on the spot, and who might therefore have looked at the articles before the paper was published, there was a want of due care and caution, as required by the statute. But I agree with my Brother Lush that the verdict must have proceeded on the ground of authority, as the jury have included in their finding the third partner, who was absent at a distance on account of illness, and to whom none of the other circumstances can at all apply, and as to whom, taking the view of the case which I do on the subject of authority, I think there was no case to go to the jury.

1878

Griffiths v. Bramley-Moore.

I concur with my Brother Lush, therefore, in holding that the rule for a new trial must be made absolute.

Rule absolute.

Solicitors for prosecution : *Gregory, Rowcliffes & Co.*

Solicitors for defendants : *Ford & Ford*, for Feltham.

See *ante*, p. 64 note.

The mere fact that a person is a stockholder or director in a corporation, does not render him liable for the torts of the corporation or its agents. Some

knowledge of, and participation in, the act claimed to be tortious must be brought home to him : *Peck v. Cooper*, 8 Bradw. (Ills.), 403.

[4 Queen's Bench Division, 70.]

Nov. 29, 1878.

[IN THE COURT OF APPEAL.]

70] *GRIFFITHS and others v. BRAMLEY-MOORE and Others.

Marine Insurance—Deduction from Freight for Sea-damage—Insurance against loss of Freight—Extent of Underwriter's Liability—Calculation of.

The plaintiffs, shipowners, entered into a charterparty which provided for payment of freight at a specific rate, and that "If any portion of the cargo be delivered sea-damaged the freight on such sea-damaged portion to be two-thirds of the above rate." They effected an insurance with underwriters, "To cover only the one-third loss of freight in consequence of sea-damage as per charterparty." Sea-damage happened, and one-third of the freight on the sea-damaged portion of the cargo was deducted by the charterers from the total amount of freight:

Held, that the subject-matter of insurance was "the one-third loss of freight in consequence of sea-damage," and that the plaintiffs were entitled to recover from each underwriter such proportion of the amount of the loss as the amount of his subscription bore to the total sum for which the underwriters subscribed the policy.

CLAIM that the plaintiffs agreed by charterparty that their ship should carry and deliver a cargo of rice, and "that the charterers should pay freight on true delivery of cargo after the rate of £3 7s. 6d. per ton, subject to deductions as in the charterparty specified. The charterparty contained the following clause: "If any portion of the cargo be delivered sea-damaged, the freight of such sea-damaged portion to be two-thirds of the above rate, except only in case the vessel shall have been stranded."

The plaintiffs entered into a policy of insurance at the foot of which was the following clause: "To cover only the one-third loss of freight in consequence of sea-damage as per charterparty, unless the ship be stranded, sunk, or burnt." The names of the defendants and the amounts of their respective subscriptions were written thereunder. The

consideration expressed in the policy was 10s. per cent. The cargo was carried to London and there discharged, and during the continuance of the risk a portion of the cargo was delivered sea-damaged, and thereby the plaintiffs lost one-third of the freight on such sea-damaged portion. The total freight on the cargo was £3,871 16s. 3d., and one-third of the total freight was £1,290 12s. 1d., of which £1,200 formed the subject of insurance under the policy.

*The one-third of the freight lost by the plaintiffs on [71] the sea-damaged portion of the cargo amounted to £293 15s. 7d. The amount therefore due and payable to the plaintiffs under the policy was £273 13s. 8d.

By reason of the premises the plaintiffs alleged that they had become entitled under the policy to recover from the defendants respectively so much of £273 13s. 8d. as was proportionate to the sums for which the defendants respectively subscribed the policy.

The plaintiffs claimed the specific amounts so calculated to be due from each defendant and interest thereon.

Defence (*inter alia*) that, assuming the total freight to have been £3,871 16s. 3d. and the amount lost to have been £293 15s. 7d., the plaintiffs were entitled under the policy to the proportion of the loss which the amount insured bore to the whole freight and to no more, and that the defendants before action tendered the same which being refused they paid into court.

5. In the alternative the defendants alleged that at the time of effecting the policy it was represented by the plaintiffs to the defendants, and expressly agreed between them, that the policy should apply to recover the whole of the freight, and that any claim should be calculated on the whole amount of freight, and not on one-third thereof, and that the defendants executed the policy on the faith of such representation, and that the plaintiffs were endeavoring contrary to their representation and to good faith to avail themselves of a mistake in the form of the policy.

Issue thereon.

At the trial at the London sittings before Denman, J., the jury negatived the allegation in par. 5, the issue on which was the only question left to them, and the learned judge directed judgment to be entered in favor of the plaintiffs for the full amount of their claim.

The defendants appealed.

Cohen, Q.C., and *J. C. Mathew*, for the defendants: First. The insurance is not, as literally stated in the policy, a

"loss," but an insurance of freight against loss. The whole freight is insured. This is evident from the low rate of 72] premium taken by the *underwriters. The premium is calculated on the assumption that the liability will not be determined by the proportion which the subscription bears to the amount of the loss, but by the proportion which the subscription bears to the total amount insured. It is an insurance of the freight against a contingency which will reduce it by one-third. There is no hardship in the necessity of insuring the whole freight to protect one-third, because the premium is regulated in accordance with that system of insurance: *Hendricks v. Australasian Insurance Co.* (').

Secondly. The policy does not sufficiently describe the subject-matter of insurance. The space usually occupied in such policies of marine insurance by the description of the subject-matter is left blank in this policy, and there is no description of the subject-matter of insurance unless the final clause can be treated as description. But it is inaccurately expressed. There is an ambiguity, and no *consensus ad idem*, and so the policy is invalid: *Raffles v. Wichelhaus* (').

Holl, Q.C., and *Witt*, for the plaintiffs, were not called to argue.

BRAMWELL, B.: I think this is a very plain case. The plaintiffs had freight coming to them which might come to them at one or the other of two rates. If all the cargo arrived they would get a certain sum; if all was damaged, there would be a deduction of one-third in respect of it, and if part only, they would suffer a deduction in respect of that part. They stood, therefore, to lose one-third of the freight, more or less, or none. They desired to guard against that loss, and insured one-third of the freight, saying, as it were, "We assure 6s. 8d. out of every pound that comes to us as freight." The policy is "to cover only the one-third loss of freight as per charterparty," and the charterparty explains it. The argument of Mr. Mathew is that this is an insurance on the whole freight, and that although the utmost total loss can be only one-third of the freight, yet that the shipowner must insure the whole freight to get that one-third. It seems an unreasonable proposition. But the learned counsel endeavors to justify it by suggesting

(') Law Rep., 9 C. P., 460; 10 Eng. (') 2 H. & C., 906; 33 L. J. (Ex.), 160. Rep., 240.

that, in consideration of the shipowners insuring the whole *freight, the underwriters accept a proportionately [73 small premium. That seems a very roundabout process; it is surely better to insure one-third only—or 6s. 8d. out of every pound—as they did here.

BRETT, L.J.: The first point taken is that there is no description of the subject-matter insured, because the description relied on is not in the usual place in the policy. If it is not a description of the subject-matter insured, there is no description of any subject-matter insured, and there is no policy. Is it a true proposition to say that because such a sentence as this is not in the usual place in the policy it is not a description of the subject-matter? I cannot believe it. Mr. Cohen did not answer my question, whether, if the clause were written lengthwise across the policy, it would not be operative; but because it is written at the bottom, in a place which would hold it, he says it is not. I am of opinion that it is a description, and the only description of the subject-matter of insurance. Then what is the subject-matter of insurance? It is not freight other than chartered freight, because no other freight than chartered freight was at risk. It must be on charterparty freight or part of it. Moreover, it is shown to be so by the very description of the subject-matter insured. Therefore the question is whether the subject-matter of the insurance is the whole charterparty freight or only a part of it. It is said that the subject-matter of the insurance is not a loss; but the very words used are that the subject-matter of insurance is a loss; it is "the one-third loss of freight in consequence of sea damage as per charterparty." That sends us to the charterparty to see what was the subject-matter of insurance, and in the charterparty we find that freight is to be payable, on true delivery of cargo, at so much per ton; but then there is a provision in the charterparty that "If any portion of the cargo be delivered sea-damaged, the freight on such sea-damaged portion to be two-thirds of the above rate." Well then, if any portion of the cargo is delivered sea-damaged, there is a loss under the charterparty, and that loss is a loss of a portion of the freight on that portion of the cargo delivered sea-damaged, and that loss is one-third. Then, turning from that clause in the charterparty back to the policy *to see what is the subject-matter of insurance, we find [74 it is the loss—the one-third loss has accrued on the charterparty under and by virtue of the clause I have read. That is the subject-matter of insurance, and there is no other.

The subject-matter of the insurance is "the loss of freight in consequence of sea-damage, mentioned in the charter-party."

Such being the subject-matter of the insurance, what is the true mode of construing the whole of the policy? It is that when written and signed every part of the policy is to be applied which relates to the subject-matter of the insurance. It is said that some parts of the policy could not be applied to such a subject-matter of insurance. And this is used as an argument to show that this is not the subject-matter of the insurance. The rule above enunciated answers the suggestion. Then it is asked what is the nature of the loss? This policy, and some others of a similar kind, are peculiar and exceptional, as it seems to me, in this, that although the subject-matter of insurance is accurately defined or described, it or the quantity of it is not ascertained until the loss has occurred. The subject-matter, though defined in the policy, is not completely ascertained till the loss. The only peril is the peril by sea-damage; the only thing insured is one peculiar loss caused by such peril; it seems to me to follow that the only loss that could be recovered under this policy is a total loss. The subject-matter of insurance being a loss on the cargo which receives sea-damage, there can be no loss in this case but a total loss, and if there is a total loss then the underwriter is liable to the full amount of his subscription. So he is liable for this loss as for a total loss, and the ordinary rule of calculating such a loss must be applied.

COTTON, L.J.: The question is whether there is or no sufficient description of the subject-matter insured. I have no doubt as to the construction of the clause in the charter-party; if the cargo arrives in good condition a certain sum, say £3,000, is payable as freight, but if any part arrives sea-damaged then there is to be a deduction so as to make only two-thirds payable, so the difference of one-third in respect of sea-damaged cargo is the loss against which the insurance is effected.

75] *I find there is in this clause a reference to the subject-matter insured, that is to say, to the difference between the full freight and the freight payable if the cargo arrives sea-damaged. "To cover only the one-third loss of freight in consequence of sea-damage as per charterparty." There can be no doubt what is the sea-damage as per charterparty, and the difference is, I think, not inaptly described in the

policy as "the one-third loss of freight in consequence of sea-damage."

Judgment for the plaintiffs (').

Solicitors for plaintiffs: *Pritchard & Son.*

Solicitors for defendants: *Walton, Bubb & Walton.*

(¹) See *Joyce v. Kennard*, L. R., 7 Q. B., 78.

[4 Queen's Bench Division, 90.]

Nov. 25, 1878.

**Re* THE SONGS "KATHLEEN MAVOURNEEN" AND [90
"DERMOT ASTORE."

Ex parte HUTCHINS & ROMER.

Copyright in Music—Exclusive Right of Performance—5 & 6 Wm. 4, c. 45, ss. 2, 4, 14, 20, 22—Songs published before 5 & 6 Vict. c. 45—Right to have Entry Expunged—Person "aggrieved."

The act 5 & 6 Vict. c. 45, ss. 4, 20, does not confer any exclusive right to the performance of musical compositions published before the passing of the act.

Upon an application under s. 14, to expunge entries in the register at Stationers' Hall, representing A. to be the proprietor of the liberty of performing certain songs published before the act, it appeared that the applicants, who were music-publishers, claimed under a general grant of the copyright in the songs made by the composer after the act, and that A. claimed under a subsequent grant by the composer which purported to convey separately the right of performing them. A., under color of this grant, had threatened to take proceedings against persons performing the songs without his consent:

Held, that the application to expunge the entries must be granted; for although the applicants had equally with A. no exclusive right to the performance of the music, they were "aggrieved" by the existence of the entries, which were calculated to prejudicially affect their literary copyright in the songs by diminishing the number of copies sold.

[4 Queen's Bench Division, 104.]

Dec. 2, 1878.

[IN THE COURT OF APPEAL.]

*COVERDALE V. CHARLTON (').

[104

Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 149—Urban Authority, Streets to vest in—Street, Soil of—Possession, when sufficient to maintain Action against Wrongdoer.

By an award made under an Inclosure Act, passed in 1766, two private roads, E. and H., were set out. About 1818, the road E. became a public highway. Down to 1863, the surveyors of highways for the parish of C., within which E. and H. were situate, had from time to time let the pasturage upon E. and H. to various persons. A local board was formed in 1863 for the parish of C., who in 1876 let the pasturage upon E. and H. to the plaintiff. He thereupon commenced to depasture

(¹) Affirming 28 Eng. R., 331.

1878

August v. Dalton.

the herbage with his cattle on the roads. The defendant interfered with the plaintiff's enjoyment of the pasturage.

By 38 & 39 Vict. c. 55, s. 4, a street includes any highway. By s. 144, every local board are within their districts surveyors of highways. By s. 149, all streets shall vest in and be under the control of the local board:

Held, affirming the judgment of the Queen's Bench Division, that by force of the above enactment the property in the soil of E., being a "street," so far vested [105] *in the local board that they could demise the right of pasturage thereon to the plaintiff, who was entitled to maintain an action:

Held, also, that the local board having no power to demise H., being a private way, the plaintiff had not sufficient exclusive possession as occupier to enable him to maintain an action.

[4 Queen's Bench Division, 162.]

Dec. 21, 1878.

[IN THE COURT OF APPEAL.]

**162] *ANGUS & CO. v. DALTON and THE COMMISSIONERS
OF HER MAJESTY'S WORKS AND PUBLIC BUILDINGS (').**

Lateral Support of House by adjoining Soil—Twenty Years' uninterrupted Enjoyment without Grant by adjoining Owner—Presumption of Grant made and lost in Modern Times—Prescription Act (2 & 3 Wm. 4, c. 71)—Employer and Contractor—Liability of Employer for Injury caused to neighboring Property by the Execution of Work dangerous in its Nature.

The right to the support of a building by the adjacent soil of an adjacent owner is not a natural right of property; it is an easement which may be acquired by prescription from the time of legal memory, or by grant express or implied, but it is not an easement within the Prescription Act (2 & 3 Wm. 4, c. 71). It may also be acquired by the circumstance that the building has stood for twenty years, if during that period the owner of the adjacent soil knew or might have known that the building was thereby supported, and if he was capable of making a grant; and (by Cotton and Thesiger, L.JJ., as to this Brett, L.J., dissenting) after twenty years' enjoyment in point of fact of the support to the building the claim to it as matter of right will not be defeated by proof that no grant of the easement was ever made.

By Cotton and Thesiger, L.JJ., affirming *Bower v. Peate* (1 Q.B.D., 321) ('), where a contractor has been employed to do work which in its nature is dangerous to a neighboring property and damage results from the work, the employer is liable to compensate the owner of the neighboring property, although the contractor is competent and he has been directed by the employer to take proper precautions in executing the work.

For more than twenty years before 1849 two dwelling houses of considerable age had stood side by side; in that year one of them was converted into a factory, the internal walls being removed, and the girders, which supported the upper floors of the factory, being let into a large chimney-stack, the foundations of which being in contact with the soil under the adjoining house the lateral pressure upon that soil was materially increased. The owner of the adjoining house did not assent to these alterations. The plaintiffs became possessed of the factory, and after it had stood for twenty-seven years the defendants C. contracted with the defendant D. to pull down the adjoining house and to excavate the soil forming its site. D. employed N. to do the excavations; in consequence of these excavations, which, however, were not done negligently, the foundations of the chimney-stack of the plaintiffs' factory, being deprived of the support of the adjacent soil, gave way. An action having been brought to recover damages for excavating without leaving sufficient support to the

(') Reversing 28 Eng. R., 80.

(') 16 Eng. R., 374.

chimney-stack, the foregoing facts were proved, but it did not appear that the owner of the house pulled down by the defendants had been aware of the precise nature of the alterations made when the building occupied by the plaintiffs had been converted into a factory, and it was admitted that since the conversion he had not by deed granted any easement of support in respect of the factory. At the close of [163 the plaintiffs' case, the judge held that the defendants C. and D. were liable for the acts of N., and that as more than twenty years had elapsed since the conversion of the building occupied by the plaintiffs into a factory, it had acquired an absolute right to the support of the adjacent land, whether or not the owner of the house pulled down by the defendants had had notice of the alterations, and that the right of support did not depend upon the implication of a grant, and he directed the jury to find for the plaintiffs:

Held, by Cotton and Thesiger, L.JJ., overruling the judgment of the majority of the Queen's Bench Division, Brett, L.J., dissenting, that upon these facts the defendants were not entitled to judgment for the enjoyment during more than twenty years of the support in point of fact raised a presumption that the occupiers of the plaintiffs' factory were entitled thereto as matter of right, and the circumstance that no grant of the easement of support had been made was not material; but that the defendants were entitled to a new trial on the ground that they might rebut the presumption by evidence either that the owner of the house pulled down by the defendants did not know the nature of the alterations made when the building occupied by the plaintiffs was converted into a factory, or that he was incapable of making a grant.

By Brett, L.J., that as it had been admitted that no grant by deed of the right of support for the factory had ever been made, no easement had been acquired from the enjoyment in fact for twenty years of the support of the adjacent soil, and that the defendants were entitled to judgment.

APPEAL from the judgment of the Queen's Bench Division in favor of the defendants⁽¹⁾.

The facts of the case are stated in the judgments of Cockburn, C.J., and Lush, J., delivered in the court below, and also in the judgments of Brett and Thesiger, L.JJ., herein-after set forth.

The arguments in this court are sufficiently noticed in the judgments.

May 20, 21, 23. *Little*, Q.C., *G. Bruce*, and *Ridley*, for the plaintiffs.

Sir James Stephen, Q.C., and *A. E. Gathorne-Hardy*, for the Commissioners of Works and Buildings.

Herschell, Q.C., and *Wheeler*, for the defendant Dalton.

In addition to the cases mentioned in the judgments delivered in the Queen's Bench Division and in this court, the following were cited in the course of the argument; as to whether a newly built house is entitled to support from adjacent soil, *Slingsby v. Barnard*⁽²⁾; whether by [164 twenty years' enjoyment of support an absolute right is gained, *Holcroft v. Heel*⁽³⁾; *Rolle v. Whyte*⁽⁴⁾; *Jenkins v. Harvey*⁽⁵⁾; *Tapling v. Jones*⁽⁶⁾; *Aynsley v. Glover*⁽⁷⁾;

⁽¹⁾ 3 Q. B. D., 85; 28 Eng. R., 80.

⁽²⁾ 1 Roll. Rep., 430.

⁽³⁾ 1 B. & P., 400.

⁽⁴⁾ Law Rep., 3 Q. B., 286.

⁽⁵⁾ 1 C. M. & R., 877.

⁽⁶⁾ 11 H. L. C., 290.

⁽⁷⁾ Law Rep., 10 Ch., 288; 12 Eng. R.,

Harbidge v. Warwick ("); *Suffield v. Brown* ("); *Stroyan v. Knowles* ("); *Smith v. Thackerah* ("); whether the owner of land may negligently do upon his soil an act injurious to his neighbor, *Sutton v. Clarke* ("); *Radcliff's Executors v. Mayor, &c., of Brooklyn* ("); *Chadwick v. Trower* ("); whether the owner of the house pulled down by the defendants had consented to the conversion into a factory by acquiescence, *Hervey v. Smith* ("); whether an employer is liable for the default of a contractor, *Gray v. Pullen* ("); *Butler v. Hunter* ("); *Hole v. Sittingbourne Ry. Co.* ("); *Ellis v. Sheffield Gas Co.* ("); *Pickard v. Smith* ("); *Rapson v. Cubitt* ("); *Allen v. Haynard* ("); *Reedie v. London and North Western Ry. Co.* ("); *Overton v. Freeman* ("); *Peachey v. Rowland* (").

Cur adv vult.

Dec. 21. The following judgments were delivered:

THESIGER, L.J.: The material facts of this case may be shortly stated. Down to the year 1849 two dwelling houses of considerable age stood side by side, each having had in fact for a period long exceeding twenty years lateral support from the soil, upon which the other house rested. In 1849 the plaintiffs' predecessor converted one of the dwelling houses into a coach factory. In the course of the conversion the internal walls, which had previously existed, were removed, and girders supporting the upper floors of [165] *the factory were on one side let into a large chimney-stack, which extended along a portion of the dividing wall, and on the opposite side took their bearings from the plaintiffs' wall. The effect of this mode of construction was to throw a considerable part, estimated at one-fourth, of the whole weight of the factory upon the chimney-stack, the foundations of which being in contact with the soil under the adjoining house the lateral pressure upon that soil was materially increased. No express assent to the alteration was given by the owner of the adjoining house, but it must be taken that he was aware of the conversion of the dwelling house into a factory, although there is no evidence of

(1) 3 Ex., 552.

(2) 33 L. J. (Ch.), 249.

(3) 6 H. & N., 454.

(4) Law Rep., 1 C. P., 564.

(5) 6 Taunt., 29.

(6) 4 New York Rep., Co. of Ap. (Comstock), 195.

(7) 6 Bing. N. C., 1.

(8) 22 Beav., 299.

(9) 5 B. & S., 970; 34 L. J. (Q.B.), 265.

(10) 7 H. & N., 826; 31 L. J. (Ex.), 214.

(11) 6 H. & N., 488; 30 L. J. (Ex.), 81.

(12) 2 E. & B., 767; 23 L. J. (Q.B.), 42.

(13) 10 C. B. (N.S.), 470.

(14) 9 M. & W., 710.

(15) 7 Q. B., 960.

(16) 4 Ex., 244.

(17) 11 C. B., 867; 21 L. J. (C.P.), 52.

(18) 13 C. B., 182; 22 L. J. (C.P.), 81.

his having been aware of the precise nature of the internal alterations made for that purpose, or of the exact effect which they would produce as regards lateral pressure. The adjoining house continued in its condition of a dwelling house until shortly before the commencement of the present action, when the Commissioners of her Majesty's Works and Public Buildings became possessed of it, and by a contract with the defendant Dalton, a builder, engaged him to pull it down, to excavate to such a depth as would enable cellerage, which had not previously existed, to be made, and to erect upon the site of the old house a building to be used as a probate office. Under the specification, which was incorporated with the contract, Dalton was bound to shore up adjoining buildings and to make good all damage caused thereto during the erection of the building, and to provide three rods of brickwork in Portland cement, to be used, if necessary, in underpinning the adjoining property. Dalton employed Messrs. Newby & Thorpe, as sub-contractors, to do the whole of the excavators', drainers', bricklayers', and masons' work on the building under conditions, which may be assumed to have included those to which I have referred. They therefore excavated to the depth of several feet below the level of the foundation of the plaintiffs' chimney-stack, and notwithstanding that they left a thick pillar of the original clay around the stack for the purpose of supporting it during the erection of the new dividing wall, the clay gave way after exposure to the air and the stack sank and fell, carrying with it a considerable portion of the factory, and causing damage to the plaintiffs, in respect of which the present action was brought. The case came on *for [166 trial before Lush, J., and a special jury, when, in addition to proof of the above mentioned facts, the plaintiffs' witnesses gave detailed evidence as to the construction of the factory and the weight thrown upon the chimney-stack, the fair inferences from which evidence appear to me to be that the construction of the plaintiffs' factory, although somewhat unusual, was such as to make it reasonably stable, and that looking to the character of the building, and the purposes for which it was erected, the weight imposed upon the chimney-stack, although greater than if there had been internal walls, was not unduly great. The cross-examination of the plaintiffs' witnesses was obviously directed to displacing the plaintiffs' case upon these points, and at the close of the plaintiffs' case it was submitted on the part of the defendants that no right to support for the chimney stack with the weight upon it had been obtained, or that at

least it was a question for the jury whether the weight, which was thereby put upon the adjoining soil, was of such a character as the neighboring owner could reasonably be expected to be aware of and to provide for. It was contended also on the part of the commissioners that Dalton, the builder, being a contractor and not a servant or agent to them, was alone liable, while Dalton took the same point as regards his sub-contractors. Upon this point the learned judge held that he was bound by the authority of *Bower v. Peale* (') to hold both the commissioners and Dalton responsible for the acts of the sub-contractors; and upon the main question he ruled, as I gather from the shorthand writer's notes of the trial, that where a building has stood twenty years it has acquired an absolute right to the support of the adjacent land, without any reference to the question whether the adjoining owner has had notice of the alterations of structure and of the additional weight thereby imposed, and that such right is not dependent upon the implication of a grant. In accordance with his ruling he directed a verdict for the plaintiffs, leaving them to move for judgment.

Upon motion for judgment the case was argued in the Divisional Court of Queen's Bench, before Cockburn, C.J., Mellor and Lush, JJ., and while Lush, J., adhered in sub-167] stance to the view of *the case which he had taken at the trial, the other members of the court held that the facts proved showed no right of support, and directed the judgment to be entered for the defendants. Against this judgment the present appeal was brought. The principal question raised by it is of unusual difficulty as well as of great importance, and looking to the difference of opinion, which unfortunately exists upon it in this court as well as in the court below, I cannot but feel diffident as to the correctness of the conclusion at which I have arrived. If, indeed, that question had been wholly untouched by authority, I should have felt the greatest hesitation in forming an opinion upon it, for in every aspect in which it presents itself it discloses difficulties which render a satisfactory solution almost impossible. Although, however, the exact point for decision in this case may not have been covered by direct authority, the dicta of judges upon it are to be found in a large number of cases in which analogous points have formed the subject of distinct decision, and it is, I think, possible to obtain from these dicta and decisions valuable assistance in determining what is the nature of a right of

(') 1 Q. B. D., 321; 16 Eng. Rep., 374.

support such as is claimed in the present case, and under what circumstances it may be acquired.

The right to lateral support of buildings from adjoining soil holds an intermediate place between the right to lateral support of soil from soil, and the right of lateral support of buildings from buildings; and some light may be thrown upon this case by consideration of these kindred rights.

The right to support of soil from soil is a right of property which requires neither prescription nor grant for its acquisition, and which naturally exists wherever the lands of adjoining owners are in contact: *Humphries v. Brogden* ⁽¹⁾; *Rowbotham v. Wilson* ⁽²⁾.

The right to support of buildings from buildings, on the other hand, is an easement of a highly artificial character, and one which must necessarily be of infrequent occurrence. Properly constructed houses do not, as a rule, depend for their stability upon the existence of adjoining houses. No man can, therefore, from the mere existence in fact of this dependence, be presumed to have notice of it, and as a consequence be presumed, in the event of his not interrupting it, to acquiesce in his neighbor's enjoyment of it. Such enjoyment offends against one of the cardinal rules governing the acquisition of an easement, namely, that the user must not be secret. But although the general rule be as I have stated, still, so far as there is authority upon this point at all, it would appear to have been the opinion of the courts that the easement in question might, under special circumstances, be acquired. The decision in *Peyton v. Mayor of London* ⁽³⁾ turned in great measure upon the form of the declaration, which, as Lord Tenterden said, neither alleged as a fact that the plaintiffs were entitled to have their house supported by the defendants' house, nor contained any allegation from which a title to such support could be inferred as a matter of law; but the concluding passage of the judgment in that case, in which the court adverted to the want of evidence, from which a grant to the plaintiffs of a right to the support of the adjoining house might be inferred, as well as to the form of the declaration, leads fairly to the conclusion that upon stronger evidence directed to a more properly drawn declaration a grant of the right of support claimed might have been presumed. In *Solomon v. Vintners' Company* ⁽⁴⁾, which was a case in which the right of support for a house from another house not immediately adjoining was claimed,

⁽¹⁾ 12 Q. B., 739.

⁽²⁾ 8 E. & B., 123.

⁽³⁾ 9 B. & C., 725, at p. 736.

⁽⁴⁾ 4 H. & N., 585.

1878

Angus v. Dalton.

Pollock, C.B., in giving the judgment of himself and two other judges, although apparently not favorably disposed towards such a right under any circumstances, yet admitted that, if the house removed had been next adjoining the plaintiff's he would have been much embarrassed by cases and dicta in arriving at a decision against the right claimed.

Bramwell, B., was careful to rest his judgment against the particular claim made on the ground that, upon the facts proved, the enjoyment was not open. *Richards v. Rose*⁽¹⁾ was the case of houses originally built together and belonging to the same owner, and there the court presumed that upon the severance of the ownership there was a grant and a reservation of the reciprocal right of support. These cases, then, at least indicate that even in the case of a claim [169] to the purely artificial support *of building by building, the reason against presuming a right upon evidence of mere user is rather the particular one derived from the nature of the easement claimed, and the consequent improbability of knowledge and acquiescence on the part of the owner of the servient tenement, than a general one founded upon the impossibility of such an easement being acquired by user at all.

I come now to the consideration of the easement, which is claimed in the present case. It holds, as I have said, an intermediate place between the artificial right, to which I have just referred, and the natural right of property, by which a man is entitled to have his soil supported laterally by his neighbor's soil. It has an affinity to this natural right, if the means of support be looked at; it is more akin to the artificial right, if the object of the support be considered. I have applied the term "easement" to the right claimed in this action, because it is clear that the support of a building cannot be claimed as a natural right of property. Natural rights of property must be rights which attach to property in its primitive state, and cannot, without a contradiction in terms, be applied to an artificial subject-matter like a house; but I need not stop to reason this out, for the judgment of the Exchequer Chamber delivered by Willes, J., in *Bonomi v. Backhouse*⁽²⁾, following what had previously been laid down in *Wyatt v. Harrison*⁽³⁾, *Partridge v. Scott*⁽⁴⁾, and other cases, distinctly affirms the proposition that the right to support of buildings must be founded upon prescription, or grant express or implied. It is true that when *Bonomi v. Backhouse*⁽⁵⁾ came upon ap-

⁽¹⁾ 9 Ex., 218.⁽²⁾ E. B. & E., 646, at p. 654.⁽³⁾ 3 B. & Ad., 871.⁽⁴⁾ 3 M. & W., 221.⁽⁵⁾ 9 H. L. C., 508.

peal to the House of Lords, two members of that House, viz., Lords Cranworth and Wensleydale, used expressions to the effect that the right claimed in that case was not an easement, but a right of the plaintiffs to the enjoyment of their own property, and the language of Wightman, J., in the Court of Queen's Bench was to the same effect. In no part, however, of the opinions and judgment referred to was it suggested that the decisions in previous cases upon this point were erroneous, and the language used may be reasonably attributed to the fact that *while dam- [170 age to the plaintiff's buildings constituted the damage in respect of which the action was brought, it was caused by mining operations, which had affected the soil upon which the plaintiff's buildings stood, quite apart from the additional weight which they imposed upon it; in other words, that the natural right of property had been invaded. The Lord Chancellor and Lord Brougham accepted the reasons, as well as concurred with the judgment, of the Exchequer Chamber.

If then the right claimed be not a right of property, is it an easement which can be acquired; and if it can, how and under what circumstances may it be acquired? That it is a right or easement, which may under some circumstances be acquired, is treated as clear law by a long series of authorities and is admitted by all the judgments in the court below: that it is an easement not coming within the Prescription Act appears also to be generally admitted, and is assumed by me: that it is a right or easement, which must be founded upon "prescription or grant express or implied" is a proposition stated in terms already quoted in the judgment of the Court of Exchequer Chamber in *Bonomi v. Backhouse* (¹), and borne out by the general current of authority upon the subject of the acquisition of easements. I cannot therefore accede to the view suggested by Lush, J., in the court below, that an absolute right to an easement uninterruptedly enjoyed for twenty years may be obtained by analogy to the period of limitation fixed as regards entry on lands by 21 Jac. 1, c. 16. It may be that the commencement of the reign of Richard I, was originally fixed as the period of prescription for incorporeal rights by analogy to the statute 3 Edw. 1, c. 39, which fixed the same period for alleging seisin in a real action, and there are dicta to be found in the books supporting the view that as a matter of theoretical law the same analogy carried with it an alteration as regards incorporeal rights, when the period of

(¹) E. B. & E., 646, at p. 655.

1878

Angus v. Dalton.

sixty years was fixed for a writ of right, and fifty years for a possessory action by 32 Hen. 8. But, as a matter of practical law, this analogy does not appear to have been extended by the courts to these last-mentioned statutes. The reign of Richard I still remained the time, to which legal memory in regard to easements was supposed to relate, and [171] *although the later statute of 21 Jac. 1, c. 16, did undoubtedly suggest to the minds of the judges the propriety of giving to twenty years' uninterrupted enjoyment of incorporeal rights an effect to some extent at least commensurate with that produced by a similar enjoyment of land, they seem to have been unwilling, probably for good reasons, to go the whole length of applying the statute by analogy, notwithstanding that if they had done so they would have followed the example set them by their predecessors in respect of the statute of Edward I. They effected the object which they had in view by the creation of the fiction of a grant made and lost in modern times. Such a fiction, like other fictions, may be open to the strictures passed upon it, although, I must add, that it has had in my opinion in many respects a beneficial operation, and is, after all, but an extension of the fiction, which had previously formed the basis of prescriptive titles, for every prescription imports a grant which in most cases no one believes in. But whatever may be the merits or demerits of the fiction, it is too late to question the validity of its introduction. The doctrine of lost grant forms part of the law of the land, and any dislike which may be felt for this and like fictions cannot be allowed to interfere with the carrying out of the doctrines involved in them to the full extent, which has been sanctioned by established authority. It becomes necessary therefore, in the first place, to consider the character and extent of the presumption of a lost grant as applicable to easements generally, and then, in the second place, to see, in what respects, if any, a difference exists in regard to the particular easement claimed in this action.

And, first, as regards easements generally, the authorities cited in the court below establish that this presumption is not a "*presumptio juris et de jure*," or, to use other language, is not an absolute and conclusive bar. On the other hand, these same authorities lay down that the uninterrupted enjoyment of an easement for twenty years raises, to use the words of Lord Mansfield in *Darwin v. Upton* (¹), "such decisive presumption of a right by grant or otherwise, that unless contradicted or explained the jury ought

(¹) 2 Wm.'s Notes to Saund., 506.

to believe it:" and the corollary upon this proposition is stated by Bayley, J., in *Cross v. Lewis* ⁽¹⁾, where he says: "I do *not say that twenty years' possession confers [172 a legal right; but uninterrupted possession for twenty years raises a presumption of right; and ever since the decision in *Darwin v. Upton* ⁽²⁾ it has been held that in the absence of any evidence to rebut the presumption, a jury should be told to act upon it." What then is the nature of the evidence which would be held to "contradict," "explain," or "rebut" this decisive presumption? Proof of the mere origin of the easement within the period of legal memory is not sufficient for this purpose: it was to meet the hardship, which arose from such proof preventing the acquisition of a prescriptive title, that the legal fiction of a grant made and lost in modern times was invented; neither is it sufficient to prove such circumstances as negative an actual assent on the part of the servient owner to the enjoyment of the easement claimed, or even evidence of dissent short of actual interruption or obstruction to the enjoyment: see *Cross v. Lewis* ⁽³⁾, where Bayley, J., speaking of the case of opening windows says: "If his neighbor objects to them, he may put up an obstruction, but that is his only remedy, and if he allows them to remain unobstructed for twenty years, that is a sufficient foundation for the presumption of an agreement not to obstruct them." Again, proof that the dominant and servient tenement were originally in one ownership, and were separated under such circumstances as to negative the presumption of any reservation or grant of the easement claimed having actually been made at the time of the separation, would not be sufficient to prevent the presumption arising in a case where the enjoyment has been uninterrupted for twenty years: see *Livett v. Wilson* ⁽⁴⁾, where, although it was proved that the two tenements were separated by a deed containing no grant or reservation of the easement claimed, the court did not rely upon this fact as supporting the verdict of the jury negating the presumption of a lost deed, but took as their ground the contested character of the user. In harmony, as it appears to me, with the last proposition, is the further proposition, that the presumption cannot be rebutted by mere proof by the owner of the servient tenement, that no grant was in fact made either at the commencement or during the continuance of *the en- [173] joyment. I am not aware that this proposition has been in terms directly decided, but it is almost impossible to sup-

⁽¹⁾ 2 B. & C., 686.

⁽³⁾ 2 B. & C., 686, at p. 689.

⁽²⁾ 2 Wm.'s Notes to Saund., 506.

⁽⁴⁾ 3 Bing., 115.

1878

Angus v. Dalton.

pose that among the numerous cases in which easements have been held by the courts to have been acquired by uninterrupted user for twenty years only, there must not have been many in which the owner of the servient tenement at the time when the period commenced was alive when the action was tried to contradict, if such evidence had been admissible, the fact of a grant; and if such evidence were admissible, it is almost inconceivable that in the numerous cases, in which questions of easements have been discussed, no trace of an opinion to that effect should be found in the observations of the judges. The correct view upon this point I take to be, that the presumption of acquiescence and the fiction of an agreement or grant deduced therefrom in a case, where enjoyment of an easement has been for a sufficient period uninterrupted, is in the nature of an estoppel by conduct, which, while it is not conclusive so far as to prevent denial or explanation of the conduct, presents a bar to any simple denial of the fact, which is merely the legal inference drawn from the conduct. If, instead of its being a mere legal inference, the courts had considered that it was an inference of fact to be drawn by juries like other inferences of fact, and in respect of which the servient owner might be called as a witness to negative the fact by denial of a grant ever having been made, it is difficult to understand how judges could have systematically, as the Lord Chief Justice admits they did, directed juries to find grants "in cases in which no one had the faintest belief that any grant had ever existed, and where the presumption was known to be a mere fiction" ('). The case of *Campbell v. Wilson* (') lends support to my view upon this point, and illustrates to some extent my meaning when I speak of explanation of the conduct, which is relied upon as leading to the presumption of a grant. There, under an award made twenty-seven years before action, all rights of way in a particular locality, except those set out in the award, of which the way in dispute in the action was not one, had been extinguished. The facts of the case pointed so strongly to the use of the way in question having originated in a mistaken acting under the award, that the judge in his summing [74] up almost *assumed the fact; but, having ruled also, that notwithstanding it the proof of subsequent user as of right was sufficient to raise the presumption of a grant, and the jury having found in favor of the defendant, who claimed the way, the court supported both the ruling and the find-

(') 3 Q. B. D., 105; *ante*, p. 98.

(') 3 East, 294.

ing; and Le Blanc, J., said: "Unless the jury could, in the words of the report, refer the enjoyment for so long a time to leave, favor, or otherwise than under a claim or assertion of right, and indeed, unless it could be referred to something else than adverse possession, I think such length of enjoyment is so strong evidence of a right, that the jury should not be directed to consider small circumstances as founding a presumption that it arose otherwise than by grant." The direction of the Lord Chief Justice himself to the jury in the case of *Rogers v. Taylor* (¹), to which I shall have to refer again, still further supports my view. But while the cases, which I have cited, throw light upon the point, as to what circumstance will not negative the presumption of a grant arising from uninterrupted enjoyment for twenty years, still further light is thrown upon the subject by a consideration of cases cited in the court below, in which the presumption was held to have been properly rebutted. The case of *Barker v. Richardson* (²) was one in which the owner of the servient tenement, a rector, tenant for life, was incompetent to make a grant, and it was held therefore that a grant by him could not be presumed. In *Webb v. Bird* (³), which was the case of a claim, as stated in the declaration, to the enjoyment as of right of the "benefit and advantage of the streams and currents of air and wind which had used to pass, run and flow from the west unto a windmill," and which enjoyment was alleged to have been interrupted by the building of a school house twenty-five yards to the west of the windmill, Wightman, J., in delivering the judgment of the Court of Exchequer Chamber, said as follows (⁴): "In the present case it would be practically so difficult, even if not absolutely impossible, to interfere with or prevent the exercise of the right claimed, subject, as it must be, to so much variation and uncertainty, as pointed out in the judgment below, that we think it clear that no presumption of a grant, or easement in the nature of a grant, can *be [175 raised from the non-interruption of the exercise of what is called a right by the person against whom it is claimed, as a non-interruption by one who might prevent or interrupt it." Again, in *Chasemore v. Richards* (⁵), a claim was made to underground water, which merely percolated through the strata in no known channels, and it was held by the House of Lords that the claim could not be supported as a right of property, and that looking to the casual and uncertain, as

⁽¹⁾ 2 H. & N., 828.⁽²⁾ 4 B. & A., 579.⁽³⁾ 18 C. B. (N.S.), 841.⁽⁴⁾ Page 843.⁽⁵⁾ 7 H. L. C., 849.

1878

Angus v. Dalton.

well as secret character of the enjoyment of such water, no grant of an easement could be presumed.

These cases, therefore, as direct authorities go no further than to show that a legal incompetence as regards the owner of the servient tenement to grant an easement, or a physical incapacity of being obstructed as regards the easement itself, or an uncertainty and secrecy of enjoyment putting it out of the category of all ordinary known easements, will prevent the presumption of an easement by lost grant; and on the other hand indirectly, they tend to support the view, that as a general rule where no such legal incompetence, physical incapacity, or peculiarity of enjoyment, as was shown in those cases, exists, uninterrupted and unexplained user will raise the presumption of a grant, upon the principle expressed by the maxim, "*Qui non prohibet quod prohibere potest assentire videtur.*"

This maxim brings me, secondly, to the consideration, whether the easement of lateral support for buildings from adjoining soil differs, and if so, in what respects, from easements generally, and whether different principles or presumptions of law are to be applied to it. It is said by the Lord Chief Justice that this particular easement is one, the enjoyment of which it is practically impossible to resist. If that be so, then the maxim I have just quoted does not apply, and the proper inference would be that the easement comes within the authority of the cases of *Webb v. Bird* (1), and *Chasemore v. Richards* (2), and cannot by any period of user, however long, be acquired; but the Lord Chief Justice does not go so far as this: his language upon the point is as follows (3): "I am very far from saying that when [176] houses or *buildings have stood for many years, especially when they appear to be of equal age, the presumption of a reciprocal easement of lateral support ought not to be made. It may reasonably be inferred that they were built under any of the circumstances, from which, at the present time, a grant would properly be implied. Thus they may have been built by one owner, or under a common building lease, or if built by different owners, where some arrangement for mutual support was come to. Thus, had the plaintiffs' premises remained in their original condition, I should have been prepared to make the necessary presumption to uphold the right. Where land has been sold by the owner for the express purpose of being built upon, or, when, from other circumstances, a grant can reasonably

(1) 13 C. B. (N.S.), 841.

(2) 7 H. L. C., 349.

(3) 3 Q. B. D., 116; *ante*, p. 108.

be implied, I agree that every presumption should be made and every inference should be drawn in favor of such an easement, short of presuming a grant when it is undoubted that none has ever existed." The Lord Chief Justice appears therefore to place the easement of lateral support for buildings in some special class of its own, and while admitting that the doctrine of a lost grant may be, under certain circumstances, applicable to it, to make its application subject to conditions and limitations other than those which apply to easements generally. Is then the nature of the easement so anomalous as to justify this treatment of it? and even if in its nature it does present anomalous features, are they such as have at any time been considered by the courts to warrant distinctive treatment?

Upon the first of these two questions it may not unreasonably be urged that the physical impossibility of resistance to the enjoyment of the easement, if it exists at all, exists only in cases where, while the servient tenement has to bear the burden of the easement, it at the same time as a dominant tenement enjoys a corresponding benefit; that the tenement, from which support is claimed, must at the commencement of the period of enjoyment be land either in its natural state or built upon; if the former, that there is little, if any more, difficulty in physically resisting the enjoyment of the easement than there would be in obstructing the access of light to windows; if on the other hand the servient tenement be land built upon, that then the easement which the dominant tenement will obtain will be no other in kind than that *which the servient tenement must either [177 have already acquired or be in the course of acquiring. Notwithstanding this reasoning, I am not inclined to dispute that the easement of support for buildings from adjoining soil does possess physical features, which distinguish it materially from most other easements, except perhaps that of the access of light to ancient windows, to which it has a strong analogy; and, if the principles of law relating to easements were now to be settled for the first time, I might be disposed to limit this particular easement of support, and I may add that of light also, by conditions other than those which are applicable to affirmative easements. But the principles of law relating to easements are in the main settled, and the easement most analogous to the one in question here, namely, that of light, is found to be at common law placed as high as, and by the Prescription Act placed even higher than, affirmative easements, although one, the obstruction of which in many cases must be of the

greatest practical difficulty. Can it properly be said then, that the difficulty or practical impossibility of obstruction in the case of the easement of support for a building by soil is such as to place it at common law in an entirely different category from other easements, and to render it subject to any real legal distinctions? I think not. This very ground of difficulty and practical impossibility of obstruction was present to the minds of the judges, who took part in the judgment in the Court of Exchequer Chamber in *Webb v. Bird* (*), and whilst they decided against the easement claimed in that case on that ground, Blackburn, J., was careful to guard against the supposition, that the reasoning of the judgment extended to the easement of lateral support for buildings. His words were as follows (*): "I perfectly concur in the judgment, but wish, for myself, to guard against its being supposed that anything in the judgment affects the common law right that may be acquired to the access of light and air through a window, or to the right to support by an ancient building from those adjacent. I agree with my Brother Willes, in the court below, that the case of the right to light, before the statute, stood on a peculiar ground." But the question can only be fully answered by tracing down in a little more detail the authorities upon [178] the *subject. In *Palmer v. Fleshees* (*), which was a case of lights, the resolution of the judges put the right of support for an ancient house upon the same footing as the right to ancient lights. The fact alleged by the Lord Chief Justice (*) that the case does not say what length of time will constitute a house or lights "ancient," and does not touch the subject of presumption, does not affect the value of the case upon the point for which I cite it. Again, in *Slansell v. Jollard* (*), Lord Ellenborough in terms affirmed in respect of a building, which had stood for twenty years, the right to support, "or as it were of leaning to the adjacent soil," by analogy to the case of lights. It is true that this ruling of Lord Ellenborough was questioned by the Lord Chief Baron Pollock in the case of *Solomon v. Vintners' Company* (*). But the two cases were very dissimilar in their circumstances, and they may well stand together. In *Hide v. Thornborough* (*), Parke, B. (afterwards Lord Wensleydale), held at Nisi Prius that where the house of the plaintiff had been supported for twenty years to the

(*) 13 C. B. (N.S.), 841.

(*) Page, 844.

(*) Sid., 167.

(*) 3 Q. B. D., 114; *ante*, p. 106.

(*) 1 Selw. N. P., 457 (11th ed.).

(*) 4 H. & N., 585.

(*) 2 C. & K., 250.

knowledge of the defendant, it had acquired a right to the support, and the observations of the same judge in *Gayford v. Nicholls* ⁽¹⁾ are to the same effect. In *Brown v. Windsor* ⁽²⁾, there was evidence of express assent on the part of the owner of the servient tenement to the plaintiff's house being rested upon his wall; but at the same time the judges, who decided the case, appear to have been clearly of opinion that apart from the express assent the acquiescence for twenty-seven years in the enjoyment of the support afforded presumptive proof of the right to the easement claimed. This case, however, was so special in its circumstances as not to afford much assistance upon the point under consideration. The case of *Partridge v. Scott* ⁽³⁾ is a more important authority. There a house built more than twenty years before action stood upon land which had been excavated, according to the assumption of the court, within twenty years; and, if it had not been for the excavation of the land, the mining operation of the defendant on the adjacent soil would not have affected the house. The court in a considered judgment delivered by Alderson, B., decided that the right to lateral support for the house standing as it did upon excavated soil had not been acquired. But the judgment at the same time in substance affirmed these propositions, namely, first, that the house as an ancient house would, but for the excavation of the soil upon which it stood, have acquired an easement of support by virtue of an implied grant; secondly, that, apart from the Prescription Act, such a grant might have been inferred from an enjoyment of the house, although standing upon the excavated soil, for twenty years after the defendants might have been or were fully aware of the facts. The judgment, therefore, seems to assume that, in the case of a house standing upon soil in its ordinary condition, the servient owner has sufficient notice of the fact of support being enjoyed to raise the presumption of acquiescence, and the consequent implication of a grant by him, when the enjoyment has continued for twenty years. *Rogers v. Taylor* ⁽⁴⁾ was a case of sub-jacent support, in which there had been twenty years' enjoyment of the support, which, however, upon the trial was alleged on the part of the defendants to have been only a contentious enjoyment subject to acts negating any right of support; the Lord Chief Justice himself, as I have already mentioned, tried the case, and he told the jury that he thought at the end of twenty years after the house had

⁽¹⁾ 9 Ex., 702.⁽²⁾ 1 C. & J., 20.⁽³⁾ 3 M. & W., 220.⁽⁴⁾ 2 H. & N., 828.

1878

Angus v. Dalton.

been built the plaintiff would have acquired a right to support, unless in the meantime something had been done to deprive him of it; that the jury must presume that the additional burden was put upon the land by the assent of the owner of the minerals, and must presume a grant by such owner of a right to support. He thereupon left it to the jury to say whether the plaintiff had enjoyed the support for the foundations of his house for twenty years, and the verdict found for the plaintiff upon the direction was upheld by the court. *Humphries v. Brogden* ⁽¹⁾ was a case of subjacent support of soil by soil, but the considered judgment of the Court of Queen's Bench, delivered by Lord Campbell, C.J., while affirming the existence of the right as a natural right of property unaffected by a reservation of minerals, went at great length into the analogies to be derived from the principles of law relating to rights of lateral support, and treated as unquestionable law the proposition, that a right to lateral support of a house by the adjacent soil may be acquired like other easements by twenty years' uninterrupted enjoyment of such support. The language of the judgment upon this point is as follows: ⁽²⁾ "Where a house has been supported more than twenty years by land belonging to another proprietor, with his knowledge, and he digs near the foundation of the house, whereby it falls, he is liable to an action at the suit of the owner of the house: *Stansell v. Jollard* ⁽³⁾, and *Hide v. Thornborough* ⁽⁴⁾. Although there may be some difficulty in discovering whence the grant of the easement in respect of the house is to be presumed, as the owner of the adjoining land cannot prevent its being built, and may not be able to disturb the enjoyment of it without the most serious loss or inconvenience to himself, the law favors the preservation of enjoyments acquired by the labor of one man and acquiesced in by another who has the power to interrupt them; and as, on the supposition of a grant, the right to light may be gained from not erecting a wall to obstruct it, the right to support for a new building erected near the extremity of the owner's land may be explained on the same principle." The words "with his knowledge," used in the passage I have quoted, as well as in the ruling of Parke, B., in *Hide v. Thornborough* ⁽⁵⁾, must, I think, be referable to cases like *Partridge v. Scott* ⁽⁶⁾, which is cited in the judgment, and to any other cases, in which the circumstances of a house are

⁽¹⁾ 12 Q. B., 789.⁽⁴⁾ 2 C. & K., 250.⁽²⁾ Page 749.⁽⁵⁾ 3 M. & W., 220.⁽³⁾ 1 Selw. N. P., 457 (11th ed.).

of such a special character as to throw without the knowledge of the servient owner a greater than ordinary burden upon his tenement, and cannot be construed to mean that any special knowledge is required in the case of an ordinary house, which must, as a matter of course, and to the knowledge of every person, increase by its downward pressure the lateral thrust of the soil upon which it stands. The question of knowledge, however, as affecting the present case is a material one, and will be considered by me more particularly before the close of this judgment. Lastly, comes the case of *Bonomi v. Backhouse* (¹), the judgments and opinions in which certainly assume the right *of lateral support [181 to a building from adjacent land to stand as high as other easements, if indeed they do not treat it as one more nearly approaching a right of property, and as such more easily to be acquired than an ordinary easement.

The result of the authorities which I have cited is to show that in the opinion of a large number of judges, ranging over a period of 100 years, from 1761 to 1861, the grant of a right of support for buildings by adjacent soil is one subject to like conditions as, and which may be acquired in like manner with, easements generally by proof of uninterrupted enjoyment for twenty years. Against the consensus of dicta in support of this view no direct authority or even distinct dictum is produced. And under such circumstances I do not feel myself justified, even if I were so disposed, which I am not, in running counter to judicial views so long and so consistently entertained.

But the question still remains whether the right of support acquired by user is an absolute one attaching itself to any house, which has stood the requisite time, or whether any and what limitation is to be put upon the right in this respect. I have already incidentally touched upon this question, and its answer, as it appears to me, is to be found in a reference again to the rule, that a user which is secret raises no presumption of acquiescence on the part of the servient owner, and, as a consequence, no presumption of right in the dominant. If, therefore, a particular house were by reason of some intrinsic or extrinsic weakness of a serious character, or owing to some unreasonable method of construction, to require an amount of support greater than houses of its kind usually require, I think that the mere enjoyment in fact of that extra support would not raise the presumption of acquiescence on the part of the servient owner, or create after twenty years' user a right to that ex-

(¹) E. B. & E., 646; 9 H. L. C., 503.

1878

Angus v. Dalton.

tra support. If, on the other hand, a house is of ordinary stability and of reasonable construction, I think it equally clear that the owner of the adjacent soil must be assumed to know the amount of lateral support, which such a house must need, and is bound to afford it as a matter of right after the house has in fact enjoyed it for twenty years. This question was discussed but not decided in *Dodds v. 182] Holme*(¹). In **Partridge v. Scott*(²) the house was ancient, but the excavation which necessitated the additional support was assumed to be modern, and the judgment therefore in that case is not a direct authority upon the question ; but the dictum contained in the judgment, that a grant of the additional support ought not to be inferred from any lapse of time short of twenty years after the defendants might have been or were fully aware of the facts, is a distinct intimation of the opinion of the court upon the question. If the knowledge on the part of the servient owner is required to make effective the enjoyment of additional support for a house where it is rendered necessary by the soil under it having been excavated, it must equally be required where, by reason of some internal alteration of the house itself, some special support beyond what the general construction and character of the house would indicate becomes necessary.

This, as I have already said, I infer to have been the meaning of Parke, B., in *Hide v. Thornborough*(³), and of the Court of Queen's Bench in *Humphreys v. Brogden*(⁴), when they speak of knowledge as a necessary condition of the easement of support. It may be that in the case of the conveyance of one or both of two houses belonging to one owner, each of which is in fact enjoying, by virtue of some peculiarity of construction, a more than ordinary amount of support from the soil of the other, reciprocal grants of the right of support may be presumed without proof of notice or knowledge ; but such a case involves different considerations to those which belong to ordinary cases of easements claimed by user, and it appears to me that to hold that a house, whatever be its construction and whatever the amount of support it may need, acquires, merely by twenty years' enjoyment of such support, an absolute right to it, would be to run counter to well-established laws of easements as well as to offend against the principles of reason and justice, on which those laws are founded. Applying, then, these observations to the present case, I can-

(¹) 1 Ad. & E., 493.

(²) 3 M. & W., 220.

(³) 2 C. & K., 250.

(⁴) 12 Q. B., 739.

not concur in the ruling of Lush, J., at the trial, that where a building of any kind has stood for twenty years it has acquired an absolute right of support, without reference to the question of notice to the adjacent *owner; and [183 inasmuch as the effect of that ruling was practically to preclude the counsel for the defendants both from addressing the jury and, if they were so minded, from calling witnesses upon the question of notice, I feel a difficulty in seeing how, under such circumstances, a new trial can be refused to the defendants. But apart from what I hold to be the erroneous ruling of the learned judge, and assuming that his ruling had been founded upon the doctrine of an implied grant, I should still be forced to the conclusion that the defendants are entitled to a new trial. At the close of the plaintiffs' evidence the position of the case stood thus: the plaintiffs' witnesses had proved that the factory was of a construction reasonably stable, but had admitted at the same time that its construction was somewhat unusual. It was clear also that the result of the insertion into the chimney-stack of the girders supporting the upper floors was to concentrate a greater weight at one part of the building than would have been the case, if the girders had, on the side adjoining the defendants' soil, taken their bearings, as they did upon the opposite side, from a dividing wall; and the cross-examination upon this point had raised the issue of the reasonableness of such a method of construction; and lastly, although it was alleged on the part of the plaintiffs that the stack of brickwork would have fallen in consequence of the excavation upon the adjoining soil, without the extra weight of the upper floors of the factory upon it, the counsel for the commissioners distinctly intimated that he was prepared to negative by witnesses that allegation. This being the position in which the case stood, I cannot hold that the jury could be properly directed as a matter of law to presume a grant of the easement claimed upon the footing of its having been enjoyed with the knowledge of the defendants, and, as a consequence, with their acquiescence; and I think that the defendants' counsel were warranted in asking that the jury should determine, whether the weight which had been put upon the adjoining soil was such as the owner of the soil could, under the peculiar circumstances of the case, be reasonably expected to be aware of and to provide for.

One more point remains for consideration, namely, whether assuming the plaintiffs to be entitled to recover for the damages caused by the acts of the sub-contractors, the defendants are *responsible in law for those acts. Upon [184

1878

Angus v. Dalton.

that question I entertain no doubt. It is properly admitted by the defendants' counsel that the case of *Bower v. Peate* (*) is undistinguishable from the present, and I am of opinion that the law there laid down by the Lord Chief Justice in delivering the considered judgment of the court is correctly stated and placed upon proper principles, and that the defendants in the present case who have ordered work to be executed, from which in the natural course of things injurious consequences to the plaintiffs' factory might be expected to arise, unless means to prevent them were adopted are, if the plaintiffs are entitled to recover at all, responsible for the damage, which has in fact arisen owing to the means adopted having proved to be insufficient.

For the reasons given I am of opinion that the judgment of the court below should be reversed, and if the defendants desire it, that the case should go down for a new trial; otherwise that the judgment should be entered for the plaintiffs.

COTTON, L.J.: The plaintiffs have no right to recover in the action, unless they are entitled to have from the land, which was excavated, the lateral support required by their house. The majority of the judges in the Queen's Bench Division were of opinion that the plaintiffs under the circumstances had no such right, and the first question is, were they so entitled?

The plaintiffs in the first place contend that every owner of property is entitled independently of user or grant, and as a natural right of property, to have from the soil belonging to adjoining owners such support as any buildings on his own land require: in my opinion this cannot be maintained. In all cases, in which the right of lateral support for buildings has been considered, the judges have with one exception after-mentioned treated the right to lateral support for buildings as one to be acquired by enjoyment or grant, that is, as an easement. This is, I think, the correct view. Every owner of land must from the first have had as a necessary incident a right to the support from his neighbor, which the land in its natural state requires. This is a right, subject to which all property must be taken; but [185] independently *of grant or right acquired by enjoyment, no one can have a right to throw a greater burden on his neighbor by requiring him to support artificial erections. The one exception, to which I have referred to, was *Bonomi v. Backhouse* (*), where Lord Cranworth in the House of Lords speaks of the right of the plaintiffs in that case as a

(*) 1 Q. B. D., 321; 16 Eng. R., 374.

(*) 9 H. L. C., 503.

right of property. But I think the correct explanation is, that in that case the operations of the defendant would have let down the land of the plaintiffs, even if there had not been any buildings thereon. The right of the plaintiffs to support for their buildings must then be considered as an easement, and the question is whether they have under the circumstances acquired any such right. It is not an easement within the statute 2 & 3 Wm. 4, c. 71. In this I agree with the judges of the Queen's Bench Division. The plaintiffs must therefore make out their right in such way as is available for that purpose independently of the statute.

It was argued for the defendants that the easement was of such a nature that it could not be acquired except by express grant. Although there is not much decision as to the right of support for buildings, the view thus contended for by the defendants is opposed to the opinions expressed by many judges of the highest authority, who all treat the right of lateral support for buildings as capable of being acquired by use or enjoyment. I may refer to the decision of Lord Ellenborough in *Stansell v. Jollard* (*), to what is said by Willes, J., in *Bonomi v. Backhouse* (*), by Alderson, B., in *Partridge v. Scott* (*), by Parke, B., in *Gayford v. Nicholls* (*), by Bramwell, B., in *Rowbotham v. Wilson* (*), and by Lord Campbell, C.J., in *Humphries v. Brogden* (*). Though in none of these cases is there any express decision of the point, all the judges whom I have named assume that a right to lateral support for buildings is an easement capable of being acquired by any means, by which independently of the act of 2 & 3 Wm. 4, c. 71, an easement may be acquired. These means are either an enjoyment beyond living memory, from which in the absence of evidence to the contrary enjoyment before the time of legal memory *would be presumed, or by enjoyment for such a [186 time as would be sufficient in the absence of evidence to the contrary to justify a presumption of a modern grant which has been lost. In the present case the building had been for twenty-seven years in the state, in which it was, when the act of the defendants, which is the foundation of the action, was done.

The question of enjoyment beyond the time of living memory does not arise, but there had been upwards of twenty years' enjoyment, and this is sufficient to raise a presumption that the enjoyment has been under a modern

(*) 1 Selw. N. P., p. 457 (11th ed.).

(*) E. B. & E., 655.

(*) 3 M. & W., 220, at p. 228.

(*) 9 Ex., 702, at p. 708.

(*) 8 E. & B., 123, at p. 140.

(*) 12 Q. B., 749.

lost grant. This is, no doubt, liable to be rebutted, and in my opinion the real question on this part of the case is, what evidence is sufficient to rebut the presumption. On this point there is very little authority, but as stated by Lord Chief Justice Cockburn in this case (¹), it is not necessary that the jury should come to the conclusion, that in fact there was such a grant. The easement is analogous to that of a right to light before the statute 2 & 3 Wm. 4, c. 71, and in *Cross v. Lewis* (²), Bayley, J., lays it down, and in my opinion correctly, that in such case mere dissent by the owner of the alleged servient tenement will not be sufficient to rebut the presumption. If, therefore, the parties at the trial, as stated by the Lord Chief Justice, admitted that there was not in fact any grant, this, in my opinion, was not sufficient to rebut the presumption arising from twenty years' enjoyment, or to justify a judgment for the defendants. But it may be urged this is contrary to what is said in many cases, namely, that twenty years' enjoyment raises a presumption only, and that the opinion which I have expressed will make such enjoyment confer an absolute right; but this is not so. The presumption may be rebutted by showing that the owner of the servient tenement was not capable of making a grant, as for instance, that he was tenant for life, or of unsound mind; and the principal case, except *Webb v. Bird* (³), and *Chasemore v. Richards* (⁴), referred to by Lord Chief Justice Cockburn, where the presumption arising from twenty years' enjoyment was rebutted is *Barker v. Richardson* (⁵), where the owner of the alleged [87] *servient tenement was incapable of making a grant. The cases of *Chasemore v. Richards* (⁴), and *Webb v. Bird* (³), turned on the peculiar character of the rights claimed, and in the latter case Blackburn, J., expressly distinguished the right then in question from that on which the plaintiffs rely. An admission therefore or evidence, that in fact there was no grant, would not, in my opinion, rebut the presumption, and notwithstanding such evidence or admission, unless there was any other evidence to rebut the presumption (as for instance, evidence that the adjoining owner was incapable of making a grant), the jury ought to be directed to find that there had been a grant which has been lost.

This, however, does not decide the case in favor of the plaintiffs. Enjoyment does not confer a right, unless the enjoyment has been open. Twenty years' enjoyment of

(¹) 3 Q. B. D., 105; *ante*, 98.

(²) 2 B. & C., 686.

(³) 13 C. B. (N.S.), 841.

(⁴) 7 H. L. C., 349.

(⁵) 4 B. & A., 579.

lateral support only gives a right to such support as the actual construction of the house, if known to the adjoining owner, requires, or to such support as is reasonably required by a house of the dimensions and construction known or apparent to the adjoining owner. In my opinion, therefore, though on the evidence in this case the jury ought to have been directed to find that the plaintiffs by enjoyment had acquired a right to some support, the question of the degree of support to which they had acquired a right still remained. There was no evidence that the owner of the adjoining house knew of the particular construction of the plaintiffs' house; and, in my opinion, the question ought to have been left to the jury to find whether the support required for the plaintiffs' house was more than reasonably required by a house of the apparent dimensions and character of the house of the plaintiffs, if used for the purpose for which the house was used. If this question had been answered in the affirmative, the verdict would have been for the defendants, but if answered in the negative, for the plaintiffs. Lush, J., entirely withdrew the case from the jury, and, in my opinion, there must be a new trial if the defendants desire it.

I think it unnecessary to enter at length into the question whether, assuming the contractor, Dalton, to be liable to the plaintiffs, the defendants, the commissioners, are answerable for the injury caused by the acts of their contractors. On this point *I agree with the decision in *Bower v. Peate* (¹), that where a defendant has employed a contractor to do work, which in its nature is dangerous to a neighboring property, and damage is the result of the work done, the employer is liable, though he has employed a competent contractor and given him directions to take precautions in executing the work.

BRETT, L.J.: In this case it seems to me very desirable, in order to express exactly my view of the law, to commence by stating what I understand and assume to have been those facts, which were material to the decision which were in evidence at the trial. I collect them from the judgments: it was not in any way, as I apprehended, argued before us, that they had been misunderstood by the judges of the Queen's Bench Division. As collected from the judgments of Lush, J., and the Lord Chief Justice, they were, that there had been before 1849 two dwelling houses adjoining each other, each built to the extremity of the soil belonging to its owner, but each independently built, so that they were with-

(¹) 1 Q. B. D., 321; 16 Eng. R., 374.

1878

Angus v. Dalton.

out any party-wall. In 1849 the plaintiffs altered the dwelling house then belonging to them into a coach factory, and so altered the structure as to make it, as a building, different from what it had been before, but the same as it was when it fell. It was, as I apprehend, at the trial and on the argument in the Queen's Bench Division taken as a fact, proved or admitted, that they made the alteration without any grant from the owner of the adjoining premises of any right of lateral support, unless his assent is necessarily to be inferred from his taking no steps to resist the acquisition and enjoyment of such support. This is what I gather from the express statement of the Lord Chief Justice ('); and Lush, J., says ("): "Nothing is shown except that the adjoining owner was not asked for and did not give his assent to the alteration of the house into a factory." The adjoining owner was never in fact asked for and never in fact gave his assent to the alteration of the house into a factory; the adjoining owner, however, must have known that the building was in and from 1849 used as a coach factory in [189] stead of a house, but there was no *evidence that he knew the nature or extent of the structural alterations made in the building. The work complained of was done by one Dalton, a builder, under contract with the commissioners: it was done according to the plans he was instructed to carry out without negligence on his part; the plans did not disclose any danger to the plaintiffs' building; work done according to them might have been reasonably deemed to be sufficient to prevent any damage to it. But by exposure to the air the thick pillar of clay, left by Dalton according to the plans, between his workings and the plaintiffs' building cracked and gave way, and so the plaintiffs' factory was brought down. The pillar of clay left might have supported the plaintiffs' land in its natural state, but did not support the land with the factory on it.

Upon this evidence, Lush, J., directed the jury, as matter of law, to find a verdict for the plaintiffs, leaving them to move for judgment. Upon a motion to that effect, Lush, J., gave judgment that the direction was right, and that the plaintiffs were entitled to judgment; the Lord Chief Justice and Mellor, J., gave judgment that the verdict ought to have been directed to be entered for the defendants, and that they were entitled to judgment.

It was contended before us, on appeal, that the judgment ought to be for the plaintiffs, or that there ought to be a new trial.

(') 3 Q. B. D., 101; *ante*, 94.(") 3 Q. B. D., 94; *ante*, 88.

The learned judges of the Queen's Bench Division seem to have been agreed on many propositions; as that the right to lateral support from the adjacent soil of an adjacent owner necessary for buildings in addition to the support necessary for the soil on which they stand, is not a right of property; that such a right may exist, but if it does, it is a right which exists as the result of an easement; that such an easement can, in consideration of law, only have its origin in grant; that such an easement is not within the Prescription Act (2 & 3 Wm. 4, c. 71); that upon proof of twenty years' enjoyment after knowledge by the adjoining owner of the support given by his soil, and absence of any other evidence, a jury ought to be directed to find for the claimant a right, as if there had been a grant in the nature of an easement.

The points of difference were, that Lush, J., held, that where there has been in fact an enjoyment of lateral support to a building for twenty years without physical obstruction, the jury are to be directed, as matter of [190 law, to find for the right, and no evidence is admissible to show that there never was a grant, or that the defendant had no knowledge of the nature or extent of the support given by his soil or premises, or that he objected otherwise than by physical obstruction. And he deduced this doctrine as a necessary consequence, not of the Prescription Act (2 & 3 Wm. 4, c. 71), but of the Limitation Act (3 & 4 Wm. 4, c. 27). The other learned judges held that enjoyment for twenty years, with other circumstances, may be *prima facie* evidence of an original reservation or grant, but that such *prima facie* evidence may be met by evidence arising either in the plaintiff's or defendant's case, showing that no such reservation or grant was ever in fact made; that if the evidence on the latter points be questionable, the whole evidence must be left to the jury; but if such evidence be not questioned or questionable, the jury should be directed to find that there never was any reservation or grant, and therefore that there never was any right. They further held, that as in this case the fact of there never having been any real grant or reservation was not questioned or questionable, the jury ought to have been directed to find for the defendants.

As to the question raised by reason of the employment of Dalton as an independent contractor, all the judges were agreed that the case of *Bower v. Peate* (') was applicable and binding, so that if the plaintiffs were entitled to the support

(') 1 Q. B. D., 321; 16 Eng. Rep., 374.

1878

Angus v. Dalton.

they claimed, they were entitled to judgment both as against the commissioners and Dalton, whether there was or was not negligence on the part of Dalton, or, if there was negligence by Dalton, whether they had or had not the right to support.

On the argument before us it was contended, on behalf of the plaintiffs, that the right to lateral support from the adjacent soil of an adjacent owner necessary for buildings in addition to the support necessary for the support of the soil on which they stand, is a right of property; that such a right, if only an easement, is within the Prescription Act; that if not, and though the right be only an easement, yet a user for twenty years without physical obstruction gives a legal right on which a judge is bound to direct in favor of the plaintiff, and in derogation of which no evidence is admissible; *that at all events a user for twenty years without any evidence to explain the origin of it entitles the person in possession to a direction to the jury to find a right as if by grant, and that in this case there was no evidence to explain the origin, and that the plaintiffs were therefore entitled to the direction which was given at the trial; and that there was evidence, which at least ought to have been left to the jury, for them to say whether they would find that there had been a grant; and that there was evidence of negligence, which ought to have been left to the jury.

The first question, then, to be determined is, whether the right claimed is a right of property, for if it is, it is unnecessary to inquire further in this case, the plaintiffs being clearly entitled to succeed. If such a right is admitted, it existed *ex necessitate* from the moment the factory was constructed. It must be, if it exists, a right wholly independent of the consent or knowledge of the defendants, created solely by the will and acts of the plaintiffs. The questions of twenty years' user, of knowledge by the defendants, of negligence, are all immaterial. It is contended that this right is a right of property, first, as the result of reasoning from principle, and, secondly, as being settled by authority.

As to the first, it is said that the right claimed is in strict analogy with rights which have been admitted to be rights of property, as the right of support of land not built upon, the right to the use of the light and air where adjacent soils are both unincumbered. The validity of this argument depends on whether the alleged analogy exists. It exists, if the reasons for which the right has been recognized in those cases are applicable to the claim now under discussion, but not otherwise: *Cessante ratione, cessat lex*. The reason

given in those cases has been, that such rights must be admitted if the owner of land is to enjoy it, if he so pleases, as it must have been always in nature from the beginning. They are attributes of nature given for the common benefit of mankind. "They are," (says Parke B., in *Embrey v. Owen* (*)), "bestowed by Providence for the common benefit of man." And he relies upon the elaborate judgment of Mr. Justice Story in *Tyler v. Wilkinson* (*), in which the right is founded on *this reason. The support to [192 land in its natural state by adjacent land in its natural state must necessarily have existed from the beginning, so must the run of water, so must the passage of light and air over lands unincumbered by buildings. Unless each owner is entitled, as of natural right, to enjoy unmolested his land with all those attributes given to it by nature, he has not a free and absolute use of it. Such a right "stands on natural justice, and is essential to the protection and enjoyment of property:" *Humphreys v. Brogden* (*). The reason, then, why the right is admitted in all those cases is, that without such a right the owner cannot enjoy his land, if he so pleases, in the condition in which it was given for the enjoyment of man by nature. It is obvious that the reason is not applicable to a claim of support necessary for such a building as any one may according to his fancy erect, requiring more or less support according to the size or form which he has given to the particular structure, but requiring by the hypothesis more support than is necessary for the support of the soil on which it stands. Not only is the reason given for allowing the right to be a right of property in those cases inapplicable to the case now under discussion, but to allow the present claim would be inconsistent with that reason, because the exercise of the claim by the one owner would prevent the enjoyment by the other of his land as nature gave it. As the result of logical reasoning or deduction from admitted principles, therefore, the present claim cannot be maintained.

Then follows the question, whether authorities by which we are bound have decided otherwise. The first on this subject is the passage in Rolle's Abridgment, citing a case of *Wilde v. Minsterley* (*). It is an authority which has been so frequently cited and acted upon, that it is certainly binding. But it consists of two parts, and it seems difficult to say with propriety that it is to be treated as a binding

(*) 6 Ex., 353, at p. 372.

(*) 4 Mason, 397.

(*) 12 Q. B., 744.

(*) 2 Roll. Abr., Trespass (I), pl. 1. The passage is translated in a note to *Wyatt v. Harrison*, 3 B. & Ad., 871, at p. 873.

1878

Angus v. Dalton.

authority as to one, and as wrong as to the other; more especially, as the part which has been distinctly adopted, namely, that with regard to land unbuilt upon, is that which is introduced by the term "semlé," whilst that, which it [193] *is now said should be rejected, is the cited decision of the court. That decision is clearly that the claim to support for a house is not a right of property. The distinction taken is between the right of support to land in its natural state, and the right to support of buildings upon the land, and the right of the latter in the case of a new house is distinctly denied. But if the right be a right of property, it must exist in the case of a new house just as much as in the case of an old house: as the right of the land itself to support is just as absolute the day after the two ownerships are called into existence, as twenty years or any number of years afterwards. The judgment of Lord Tenterden in *Wyatt v. Harrison* (1) is distinct. "Whatever the law might be, if the damage complained of were in respect of an ancient messuage possessed by the plaintiff at the extremity of his own land, which circumstance of antiquity might imply the consent of the adjoining proprietor at a former time to the erection of a building in that situation, it is enough to say in this case that the building is not alleged to be ancient, but may, so far as appears from the declaration, have been recently erected; and if so, then, according to the authorities, the plaintiff is not entitled to recover. It may be true that if my land adjoins that of another, and I have not by building increased the weight upon my soil, and my neighbor digs in his land so as to occasion mine to fall in, he may be liable to an action. But if I have laid an additional weight on my land, it does not follow that he is to be deprived of the right of digging his own ground, because mine will then become incapable of supporting the artificial weight which I have laid upon it. And this is consistent with 2 Rolle's Abridgment." The whole of this passage is necessarily wrongly conceived, and the decision of the case is wrong, if the right now claimed is a right of property: because it must be always remembered that, if the right is a right of property, the length of time since the house in respect of which the claim is made was built, is immaterial. The judgment of Alderson, B., in *Partridge v. Scott* (2), is also against the claim as a right of property. "Rights of this sort, if they can be established at all, must, we think, have their origin in grant. If a man builds his house at the [194] extremity of his land, he does not *thereby acquire

(1) 3 B. & Ad., 871, at p. 875.

(2) 3 M. & W., 221.

any right or easement for support, or otherwise, over the land of his neighbor. He has no right to load his own soil so as to make it require the support of that of his neighbor, unless he has some grant to that effect. *Wyatt v. Harrison* (*) is precisely in point as to this part of the case, and we entirely agree with the opinion there pronounced." This discussion is without meaning, if the claim could be supported as of a right of property. The statement of the law as to lateral support in the judgment in *Humphries v. Brogden* (†) is the same. The principle is deduced by Lord Campbell from the passage in Rolle, and stated to be settled by *Wyatt v. Harrison* (*). After stating that the right of land in its natural state to support from adjacent land is a right of property, he goes on to say: "This right to lateral support from adjoining soil is not, like the support of one building upon another, supposed to be gained by grant, but is a right of property passing with the soil." It must in fairness be observed that the contrast he draws is in terms between the support given to a building by a building; but the reasoning is surely equally applicable to the support given to a building by land. *Gayford v. Nicholls* (‡) seems directly against the claim. There it was decided that the plaintiff had no right to support for his building from the defendants' adjacent soil. "This is not a case," says Parke, B., "in which the plaintiff has the right of the support of the defendants' soil, either by virtue of a twenty years' occupation, or by reason of a presumed grant, or by a presumed reservation, where both houses were originally in the possession of the same owner; for unless a right of support by some such means can be established, the owner of the soil has no right of action against his neighbor, who causes the damage by the proper exercise of his own right." Here again in one branch of the sentence he no doubt speaks of a right by virtue of a twenty years' occupation; but if he had intended that such an occupation of itself gave an indefeasible right, he would not have introduced the next phrase as to a right by a presumed grant, which would be wholly unnecessary; for in order to found that presumption there must be a twenty years' occupation. By the former phrase, therefore, he must have alluded, *although only in [195 general terms, to the user for twenty years, from which unexplained a prescriptive user may be inferred. He speaks also of two houses, but that is in the phrase relative to a right by reservation. It was suggested, however, that the

(*) 3 B. & Ad., 871.

(†) 12 Q. B., 739.

(‡) 9 Ex., 702, at p. 708.

1878

Angus v. Dalton.

case of *Bonomi v. Backhouse* (') is to the contrary, and is binding. But the first observation to be made is, that there is no reference in the facts stated by the arbitrator to any distinction between the support necessary for the land, if it had been unbuilt on, and that necessary for the buildings. It is consistent with the statements and findings, that the workings complained of would have let down the plaintiff's land, if there had been no buildings on it. This is easily accounted for, if the workings would in fact have let down the land itself of the plaintiff, because the arguments appear to have been confined to the question of what is the cause of action in such cases, and what is the time at which a cause of action accrues. The want of reference, either in the statement of facts by the arbitrator or in the arguments, to the distinction between the support to buildings and that to mere land is natural and right, if the workings would have let down the land, though there had been no buildings on it, but is inexplicable otherwise. The judgments then are to be applied to excavations which would let down the plaintiffs' land, though not built upon. In that view it was right to say that "in such cases as the present the right claimed by the plaintiff was not a right founded upon the presumption of a grant or easement, but the common right of the owner of land not to be injured in his property," &c. If the excavations in that case would not have let down the land as mere land of the plaintiff, the judgment of Willes, J., in the Exchequer Chamber, the reasoning of which is adopted as correct in the House of Lords, could not have been given without inquiring as to the origin of the admitted right in that case of the plaintiff to support. "The right to support of land and the right to support of buildings stand," he says, "upon different footings *as to the mode of acquiring them*, the former being *prima facie* a right of property analogous to the flow of a natural river or of air, &c.; whilst the latter must be founded upon prescription, or grant express or implied. . . . But the character," he [196] says, "of the *rights, when acquired, is in each case the same. The question in this case depends upon what is the character of the right." The question, therefore, was not what is the origin of the right, that is to say, the mode of acquiring it, but what is the character of the right when acquired. There was no question as to how the right in that case had been acquired; it was admitted to exist; but the statement in the judgments of the law as to the origin of such a right is directly contrary to the argument urged on

(') E. B. & E., 622; in Ex. Ch., E. B. & E., 646; 9 H. L. C., 503.

behalf of the plaintiffs in the present case. The right to support of buildings *must*, it is said, be founded on prescription, or grant express or implied; if so, it cannot be, and it is stated not to be, a right of property. I am therefore of opinion that, both on reason and authority, the right to support from the adjacent soil of an adjacent owner, necessary for buildings in addition to the support necessary for the soil on which they stand, is not a right of property.

The next question is, whether there can be such a right given by means of an express grant; and if yes, what is the character of such a grant? In order to answer this question, the character of the right, if it can exist, should be considered. It has been pointed out in the case of the right to the advent of light to windows or other openings in a building, that no grant is required of leave to a man to build a house with windows or other openings at the extremity of his own land; he has the right without a grant. Such a grant would be futile and inoperative; but the erection of the building gives its owner no right to prevent his neighbor from building on his land so as to obstruct the light which would otherwise come across his land to the windows or openings of the first builder. The owner of the adjacent land may, however, by grant covenant that no building on his land shall interrupt the free use of light from across his land to the building erected or to be erected by the grantee on his land. This is the judgment of Littledale, J., in *Moore v. Rawson*(¹), and such a grant imposes a servitude on the adjacent land of the grantor: see per Cresswell, J., in *Smith v. Kenrick*(²); which servitude, as pointed out in a note to p. 320 of Gale on Easements, must be a servitude like that of the Roman "*Ne facias*," affecting the grantor's land by burdening *it with a negative easement, "*Ne facias*." So, in the [197 present case, that is to say, in the claim of right to support now under discussion, a grant to the claimant of permission to build his house at the extremity of his own land, and so as to require support from the defendants' soil, would be futile. The claimant of such a right has an absolute inherent right to build any house requiring any support at the extremity of his own soil; but there seems to be no valid reason why the adjacent owner should not by grant impose upon his own adjacent soil the servitude, that it shall not be so dealt with as to leave the grantee's building without support from it, or an equivalent support provided by the owner of such servient soil. The analogy is perfect between this grant and that admitted to be legal and binding in the

(¹) 3 B. & C., 332.

28 ENG. REP.

(²) 7 C. B., 565, 566.

1878

Angus v. Dalton.

case of light. Suppose such a grant made for a valuable consideration: there is no principle of law which can forbid its being binding any more than in the case of a similar grant with regard to light. Such an easement, therefore, can be created by express grant.

If there could be an express grant, imposing by its legal effect such a servitude on the grantor's land, can such a servitude be prescribed for at common law? Subject to the well recognized conditions of the evidence upon which such a prescription may be founded, there seems to be no legal reason why it should not. If evidence were given of the existence, as long as living memory could reach, of a building situated at the extremity of the owner's soil, of such a size or form of construction that it requires support from the soil of the adjacent owner, and if no evidence could be or were given by reason of the style or materials of the building or otherwise, that the building was or must have been erected within the time of legal memory, there seems to be, and in my opinion there is, no legal reason why the owner should not, on controversy, be entitled to prescribe for a right to the necessary lateral support; but in point of fact there can hardly arise any such case; the origin of the building at a time later than the time of legal memory could, by scientific or other evidence, invariably be proved. The difficulty of maintaining the right, as by prescription at common law, is a difficulty of fact and not of law.

Is the case within the Prescription Act? I agree with the unanimous decision of the judges of the Queen's Bench Division [1898] vision *that it is not. One reason alone is decisive. Such a negative easement as this is clearly not within the statute.

The next question is, can such an easement be supported by the application of what has been called the doctrine of a lost grant? Such a right might be created by an express grant; it is a right of easement; it is an easement strictly analogous to those in which it is admitted that, upon certain evidence, a jury should be directed to find a right in the plaintiff as arising upon a lost grant, or in which, upon other evidence, it should be left to a jury to say whether they would infer such a lost grant. Unless, therefore, it is justifiable in the courts of the present day to say that they will no longer apply this doctrine even to cases to which it has before been applied, or that they will not apply this principle to a case strictly analogous to the cases to which it has hitherto been applied, it must be applied to such a case as this. But I am of opinion that no court has the

power legally to set aside a principle of law which has been established as law by the highest tribunal or tribunals, to whose decision this court must bow, or to refuse to apply it to any case brought within the proposition enunciated in and by the principle. Moreover, it has been repeatedly recognized by many judges that this principle is applicable to this very right. The statement in Selwyn's *Nisi Prius* of the direction of Lord Ellenborough in *Stansell v. Jollard* (*), although it may not go further, does at least go the length of affirming that upon proof of a twenty years' user, and no evidence which proves the contrary, a grant may be inferred, and the right thereupon found and established by the jury. The rule of Parke, B., in *Hyde v. Thornborough* (*) also affirms this proposition: "If there were twenty years' enjoyment by the plaintiff of the support of the house from the defendant's land, and it was known that the defendant's land supported the plaintiff's house, that is sufficient to give him a right of support." That is, at least, to say, that upon such evidence a jury may find that he has such a right. But the origin of such a right must be a grant express or implied. This is, therefore, an authority that the jury may upon such evidence infer a grant. The passage before quoted from the judgment of Parke, B., in *Gayford v. Nicholls* (*), does of necessity also import, at least, *this same [199] proposition. The phrase "either by virtue of a twenty years' possession," imports, at least, that evidence of twenty years' possession is material evidence; but, if material, it must at least be evidence from which a grant may be inferred; and in the next phrase he says in plain terms, "or by reason of a presumed grant." So Bramwell, B., in *Rowbotham v. Wilson* (*): "But after a house has stood in such a position twenty years, it acquires a right to support from the adjoining land." This must at least mean that it is evidence from which, if uncontradicted or unexplained, a grant may be inferred. In the judgment of Lord Campbell, in *Humphreys v. Brogden* (*), he says: "Where a house has been supported more than twenty years by land belonging to another proprietor with his knowledge, and he digs near the foundation of the house, whereby it falls, he is liable to an action at the suit of the owner of the house." He cites as authorities *Stansell v. Jollard* (*) and *Hyde v. Thornborough* (*), and the judgment of Willes, J., in *Bonomi v. Backhouse* (*), where speaking of the right of support to

(*) 1 Selw. N. P., 457 (11th ed.).

(*) 8 E. & B., 140.

(*) 2 C. & K., 250.

(*) 12 Q. B., 749.

(*) 9 Ex., 708.

(*) E. B. & E., 655.

1878

Angus v. Dalton.

buildings as distinguished from the right of support to land, he says: "It must be founded upon prescription or grant, express or implied." It is impossible that these passages could have been written unless those who wrote them were of opinion that a right to support of a building from the adjacent soil of an adjacent owner might be inferred from evidence of twenty years' user. I am thus brought to acquiesce in all the propositions in which the learned judges of the Queen's Bench Division were agreed, and to have only further to give my opinion upon the proposition on which they differed.

Unless we are controlled by authority, we ought not, as it seems to me, to take what I will respectfully venture to call the bold step taken by Lush, J. He deprecates that which, he affirms, was an assumption of legislative power by the judges, who introduced the fiction of a lost grant; but, with deference, I think he exercises the power of legislation, and does not confine himself to the duty of declaration, when he holds that a twenty years' user without physical 200] obstruction shall, of itself, as matter of law, confer a right, not because such facts bring the case within the Prescription Act, or the Limitation Act, but by judicial authority, because the Statute of Limitations has fixed twenty years as the limit, after which under certain conditions an action cannot be maintained for the recovery of real property. I incline to agree that the judges of former times did encroach upon the legislative function in what they held with regard to the doctrine of a lost grant, and to the effect they gave, in support of that doctrine and of the doctrine of prescription, to a user of twenty years. Yet so far as their ruling has been affirmed by courts, to whose decisions we owe obedience, we are, in my opinion, bound to accept and apply their ruling. But I do not think that any judges now should, in order to overcome a different apparent hardship or difficulty, follow their example. This then being the doctrine which is to be applied, a question has been raised whether, in applying it, it is necessary to find formally that there has been a grant which is lost, or whether it is sufficient without going on to find the inference that there has been a grant and that it is lost, to find the fact of an uninterrupted user for twenty years after knowledge of the burden imposed on the adjacent land. That must depend on whether the inference is to be treated as a necessary legal consequence or as an inference of a fact. If it is an inference merely of law, I can see no distinction, not even the slightest, between the doctrine or application of the doc-

trine of a lost grant, and the doctrine of prescription under the Prescription Act. If we were to hold that it is a mere inference of law, it seems to me that we should be doing in an analogous form precisely what was done by the judgment of Lush, J., which I think cannot be supported. Such a decision is legislation and not declaration. The forms of expression used by Lord Ellenborough, by Parke, B., and Bramwell, B., in the passages I have cited, are relied upon as showing, it is said, that in their opinion a twenty years' user, uninterrupted in fact, gives an absolute right, and therefore a right which cannot be contradicted, and therefore a right on the part of the plaintiff who has proved such user to a judgment thereupon that he has established his right. But those expressions are consistent with the view that those learned judges were speaking of the effect of evidence of user for *twenty years *without any other* [201 *evidence*, and as laying down that in such case in a trial before a judge and jury, the judge would be bound to direct the jury to find the existence of a lost grant. They seem to me, when read with their context, to be only consistent with that interpretation of them. I do not believe that any one of those learned judges meant to say that in the case of a trial by judge and jury the plaintiff could succeed without a finding by the jury under direction, or upon consideration, of the existence of a lost grant: none of them meant to say that a special verdict would have been good which did not in terms find the existence of a grant. No case, I am sure, can be found in which on a trial with a jury the judge has not either directed the jury to find, or left to them to find, the fact as a fact whether there has been a grant. No judge could have called this doctrine a revolting doctrine, unless he had been of opinion that the jury must be asked to find the fact as an existing fact. If it were only an inference of law, there is nothing which can be called revolting in it. In order therefore to support such a claim, the existence of a lost grant must be found as a fact. If the case is tried before a judge without a jury, he must find such fact, though he may not do so in terms; if it is tried before a judge and jury, inasmuch as the judge cannot in such case determine any fact, it is the jury which must find the fact. This raises another question, namely, whether the judge may under certain circumstances direct the jury as matter of law to find the fact; and if he may, what are the circumstances under which he may or must do so. It is admitted by every one, I think, that he is bound to do so, where there is evidence of twenty years' uninterrupted user after knowl-

1878

Angus v. Dalton.

edge of the facts and no other evidence. Now arises another question, which is, what other evidence is admissible or may be acted on? Is it only evidence of acts of interruption? or, although no act of interruption has been done, may evidence be given tending to show that no grant was in fact ever made? If the parties are alive, may they be called to prove conclusively that there never was a grant? If the question, whether there ever was a grant, is one of fact to be found by the jury, I know of no principle of law which can exclude evidence tending to show that there never in fact was such a grant. The Legislature might forbid such evidence to be given, but there the Legislature would in 202] reality enact with *regard to a right to lateral support a Prescription Act similar to that which they have enacted with regard to lights and rights of way. To introduce into the common law proposition as to a lost grant the limitation of interruption only by acts, is to introduce a limitation which it required an act of Parliament to introduce in the case of lights and ways. The limitation as to them has been held to be an inference from the statute. The Legislature has not done so. The doctrine of inferring a lost grant was brought forward and applied, because there is no prescription. The distinction between the two doctrines and the legal mode of applying the latter seem to me to be clearly laid down by Lord Mansfield in the *Mayor of Hull v. Horner* (¹). In that case the question was left to the jury, "whether they would not consider the usage from the year 1441 to the time of action brought" (i.e., in 1774) "sufficient ground to presume a grant of the duties between the 5th Richard 2 (anno 1382) and the year, 1441." There had therefore obviously been an uninterrupted user for more than 300 years, and yet the question was left to the jury. "Now with regard to admitting evidence to satisfy a jury that a charter did exist within time of memory which is not produced by record, my opinion is this, that all evidence is according to the subject-matter to which it is applied. There is a great difference between *length of time which operates as a bar* to a claim, and *that which is only used by way of evidence*. A jury is concluded by length of time that operates as a bar; as where the Statute of Limitations is pleaded in bar to a debt, though the jury is satisfied that the debt is due and unpaid, it is still a bar. So in the case of prescription, if it be time out of mind, a jury is bound to conclude the right from that prescription, if there could be a legal commencement of the right. But any written evi-

(¹) Cowp., 102.

dence showing that there was a time when the prescription did not exist, is an answer to a claim founded on prescription. But *length of time used merely by way of evidence may be left to the consideration of the jury to be credited or not, and to draw their inference one way or the other according to circumstances.*" And afterwards: "In questions of this kind possession goes a great way; but there is no positive rule which says that 150 years' possession, or any length of time within memory is a *sufficient [203 ground to presume a charter." He must, by the context, mean, "to presume as a *presumption of law*." Again: "Under circumstances it may be left to the consideration of a jury or of a court of equity if the case comes properly before them, whether there is not a sufficient ground to presume a charter." The cases of *Campbell v. Wilson* ⁽¹⁾, *Darwin v. Upton* ⁽²⁾, and *Cross v. Lewis* ⁽³⁾, are precisely, as I understand them, to the same effect, namely, that although the user is for twenty years without interruption, the inference must be left to the jury.

I am, therefore, of opinion, in conclusion, that the right to lateral support from the adjacent soil of an adjacent owner necessary for buildings in addition to the support necessary for the soil on which they stand, is not a right of property; but that such a right may be established; that where it exists, it consists of a negative easement, by which the land of the adjacent owner is burdened with the servitude that it cannot be so used as to deprive the building of the adjacent owner of the support acquired by virtue of the easement, unless an equivalent support is supplied; that such an easement might be given at once by express grant of the owner of the servient property, and the servitude so imposed would pass with the land; that such a servitude might, as matter of law, be proved as by prescription at common law; but could hardly be so proved, as matter of fact, in accordance with the legal conditions of evidence as to such a prescription; that such an easement is not within the Prescription Act (2 & 3 Wm. 4, c. 71); that such an easement, if it exist in a particular case, must, in contemplation of law, have originated in a grant; that the claim to it may be supported by evidence complying with the legal doctrine of an alleged lost grant; that if in any particular case evidence be given of the existence for twenty years, without interruption, of a building which for that period has required and had support from the soil of the adjacent owner, and the building is of such a nature or in such a

(1) 3 East, 294.

(2) 2 Wm.'s Notes to Saund., 506.

(3) 2 B. & C., 686.

1878

Angus v. Dalton.

position that it must have been apparent to any observant person that it required such support, or if the adjacent owner in fact had notice that it required such support, and if no evidence be given tending to show that there could not [204] have originally been *or that there was not and never had been a grant, the plaintiff would be entitled to a direction, as matter of law, to the jury to find for the plaintiff a right to support, as if he had a grant which is lost. If the existence of the building for twenty years be proved, but there is contradictory or doubtful evidence as to the question whether it must have been apparent that it required support, or whether the adjacent owner had notice that it required support, or of circumstances tending to show that there could not have been and was not and never had been any grant or the like, then the evidence must be left to the jury for them to say, whether they will or will not find for the plaintiff a right to support in respect of a grant which is lost. If there be no evidence of the existence of the building for twenty years, or if there be undisputed or necessarily conclusive evidence, or if it be admitted, that there was no grant and never had been any grant, then the defendant is entitled to a direction, as matter of law, in his favor.

Upon the present occasion it seems to me that the case was at the trial treated by all the parties upon the footing that there was conclusive evidence, or an admission, that there never had been a grant. I am of opinion that there was no evidence of negligence in excavating. I am, therefore, of opinion that all the defendants were entitled to a decision in their favor, that the plaintiffs had no right to the support they claimed, and that they had given no evidence of negligence, and that therefore the plaintiffs had made no case against any of them. The point raised with regard to *Bower v. Peate* (*) does not therefore become material. I, therefore, give no opinion upon it. The judgment should, in my opinion, be affirmed.

Judgment reversed (*).

Solicitors for plaintiffs: *Shum, Crossman & Crossman*, for Stanton & Atkinson, Newcastle-upon-Tyne.

Solicitors for commissioners: *The Solicitor for the Treasury, Hare & Fell*, agents.

Solicitors for defendant Dalton: *Prior, Bigg, Church & Adams*, for T. Dalton, Leeds.

(*) 1 Q. B. D., 321; 16 Eng. R., 374.

(*) The order of the Court of Appeal directed that the defendants should elect within fourteen days whether they would

take a new trial, and if they did not so elect, that judgment should be entered for the plaintiffs for the amount of damages assessed by the special referee.

As to right to support, see *ante*, p. 122 note.

As to the liability of one for the acts or the negligence of a contractor employed by such owner, see 20 Eng. Rep., 343 note; 17 Eng. R., 380 note; 27 Am. R., 702 note; 2 Thompson on Neg., 899-916, Same, 5 Southern L. Rev. (N.S.), 258-285, 27 Am. R., 648 note; 14 Western Jurist, 55.

The true test by which to determine whether one who renders service for another does so as a contractor or not, is to ascertain whether he renders the service in the course of an independent occupation in which he represents the will of his employer only, as to the result of the work, and not as to the means by which it is accomplished: *Cunningham v. Railroad Co.*, 51 Tex., 503.

If one renders service in the course of an occupation representing the will of his employer only, as to the result of his work, and not as to the means as to which it is accomplished, it is an independent employment: *Harrison v. Collins*, 86 Penn. St. R., 153, 27 Am. R., 699, 702 note.

The employment of one who carries on an independent business, and who, in doing his work, does not act under the direction and control of his employer, but determines for himself in what manner it shall be carried on, does not create the relation of master and servant; and the employer would not be responsible for the negligence of a person thus employed nor that of his servants: *McCarthy v. Portland*, 71 Maine, 318, 11 Reporter, 703.

The fact that a contractor is paid by the day does not destroy the independent character of his employment: *Harrison v. Collins*, 86 Penn. St. R., 153, 27 Am. R., 699.

A slater by trade, who carried on the business of slater in Portland, and had done so for more than twenty years, keeping a shop and a slate on which to receive orders, and men constantly in his employ to assist in executing such orders as he should receive, was held to be carrying on what the law denominates an independent business: *McCarthy v. Portland*, 71 Maine, 318, 11 Reporter, 703.

An ironfounder who manufactures and places in position the girders and other supports of a roof, under a contract in which it is stipulated he is not

responsible for the design, and who executes his work according to the plans and specifications furnished him by the architect employed by the proprietor, is not liable for any damage caused by the falling of the roof in consequence of the insufficiency of the designs, plans and specifications of such girders and other iron supports: *St. Patrick's, etc., v. Gilbert*, 23 L. C. Jur., 1.

A person employed and paid by a contractor as driver of a horse and wagon, which, together with the driver, the contractor lets by the day to a city to be used in the paving of a street, and who has the entire management of the horse as to the manner of driving him, and whose duty it is to see that he is properly shod, is the servant of the contractor in so driving the horse and having him shod; and for an injury to a third person, caused by his negligence in these respects, the contractor is liable: *Huff v. Ford*, 126 Mass., 24.

Defendants, or the firms of which some of them were members, severally cut and placed on the ice, in the R. river, saw logs, to be floated down the river to their respective mills during the high water in the spring. They or their firms severally entered into a written contract with S. & D., by which the latter agreed to take the logs, drive them down and put them in the booms of the respective owners. Other parties also placed logs in the river to be floated down, and employed servants to drive them. The logs of all the parties, mingled together, were driven down, and, in consequence of the negligence of those driving them, a large number lodged and formed a jam against plaintiff's bridge, by which it was carried away and destroyed. It did not appear whose logs in particular did the injury. In an action to recover the damages, held, that S. & D. did not stand in the relation of servants to the defendants, but were contractors exercising an independent employment, and that defendants were not answerable for their negligence; also that, in the absence of findings to that effect, it could not be held that the undertaking in itself was dangerous to third parties: *Pierrepont v. Loveless*, 72 N. Y., 211.

A steamship company made a special

1878

Angus v. Dalton.

contract with a stevedore to unload and load its vessels at New Orleans. Neither the master of the vessel nor his crew had anything to do with the work, which was in the exclusive charge of the stevedore, who employed his own men and used his own machinery and cargo planks. A seaman on one of the company's steamers, while on duty as a night watchman, having stepped on one of these planks, which tilted, he was thrown overboard and seriously injured. He brought suit against the company for damages, which he alleged was occasioned by the negligence of the company's servants. Held, that the questions whether the stevedore was an agent of the company or an independent contractor, and whether the plaintiff was a fellow servant in a common employment, were properly submitted to the jury: *Hass v. Philadelphia, etc.*, 88 Penn. St. R., 269.

A railroad company is not responsible in damages to a person injured by an accident to a train passing over a portion of the road not completed, when said train is solely under the charge of the contractors building the road and receiving all the profits thereof, that portion of the road still being unaccepted by the company. If any one is liable for damages it is the contractors, and not the railroad company: *Union, etc., v. House*, 1 Wyoming, 27; *Cunningham v. International, etc.*, 51 Tex., 508.

One not personally interfering or giving directions respecting the manner of work, but contracting with a third person to do it, is not responsible for a wrongful or negligent act in the performance of the contract, if the act agreed to be done is legal: *Harrison v. Collins*, 86 Penn. St. R., 153, 27 Am. R., 699, 702 note; *Schweickhardt v. St. Louis*, 2 Mo. App., 571.

A city employed a contractor to construct a sewer in one of its streets. By the contract, power was reserved to the city engineer to direct changes in the time and manner of conducting the work, and the contractor was held responsible to indemnify the city for any damages it should be subjected to in consequence of his neglect; and the contractor executed a bond to the city for such indemnity. The plaintiff was injured by falling into the excavation carelessly left unguarded. Held, that

the city was not liable to the plaintiff therefor: *Erie v. Caulkins*, 85 Penn. St. R., 247, 27 Am. Rep., 642, 648 note.

In an action against the owner of a certain lot, fronting upon a sidewalk of a public street in a city, and one who had contracted with him to erect a building thereon, to recover damages for a physical injury received by the plaintiff through the alleged negligence of the defendants in leaving open an excavation made by them in the ground theretofore covered by the sidewalk, wherein the complaint alleged that the excavation was made in the course of the erection of such building, and that the defendants had negligently covered a part of the excavation in such manner as to constitute a continuation of the sidewalk, but had left open the other part, into which the plaintiff, without fault, had fallen while passing along such sidewalk in the night time, the owner answered, admitting the injury received by the plaintiff, but alleging that such lot and its appurtenances, at the time of the injury, were in the exclusive possession of the contractor, a skilful, reliable and competent builder, pursuant to a written contract between them for the erection of such building, and that, at that time, neither the owner nor any agent, servant or person in his employ or under his control had any charge, management or control of the premises, and that the acts charged as the cause of the injury were not the acts of either the owner, his agents, servants or employees.

Held, on demurrer, that the answer was sufficient.

Held, also, that unless the work contracted for is a nuisance *per se*, the owner is not liable for the negligence of the contractor: *Ryan v. Curran*, 64 Ind., 345, overruling in part *Silver v. Nerdinger*, 30 Ind., 53.

Where, by statute, one intending to excavate upon his own land was required to preserve from injury, and to support any wall upon adjoining land standing upon or near the boundary line, "if afforded the necessary license to enter on the adjoining land, and not otherwise," the fact that the owner has contracted with another to make an excavation upon his land, does not exempt him from the performance of the duty imposed by the act; he is the

party "causing such excavation to be made," within its meaning: *Dorrity v. Rapp*, 72 N. Y., 308.

A public body authorized by statute to do certain work, which would otherwise be a public nuisance, for public purposes, without any private or corporate benefit to itself, is yet under an absolute obligation to protect the public from injury by the execution of such work, and cannot relieve itself of this obligation, by committing the work to a contractor: *O'Brien v. Board*, etc., 6 Victorian L. R. (Law), 204; *Shea v. Bride Drainage Board*, 6 L. R., Ireland, 179.

If a city employs a person to do work which is intrinsically dangerous, such as the blasting of rock in a street for a sewer, and the contractor uses all due care, and damage results to another from a stone thrown by the blasting, the city will be liable to respond in damages for the injury: *Joliet v. Harwood*, 86 Ills., 110, 29 Am. R., 17, 18 note; *Ellis v. Sheffield*, etc., 2 Ell. & Bl., 767, 2 Com. Law Rep., 249; *Gray v. Pullen*, 5 Best & S., 970; *Pickard v. Smith*, 10 C. B. (N.S.), 470.

Where a contractor, while erecting a building for a city, left rubbish in the street, from which one was injured, it was held that the city was liable for such injury, and could recover of the contractor the amount recovered against it: *Rochester v. Montgomery*, 72 N. Y., 65.

Where a builder is allowed the privilege of inclosing a part of the street with a hoarding, for deposit of building materials, he is absolutely responsible for the use of the same, and of a gate into it, in such a way as to prevent injury to passers-by: he is liable in damages for injury occasioned by a negligent use of the gate by an independent sub-contractor supplying him with materials: *Evans v. Martin*, 6 Victorian L. R. (Law), 176.

Where the owner of a house, which has been burned, leaves the walls

thereof standing in an unsafe and tottering condition, he is guilty of negligence, and is liable to an adjoining proprietor for damages resulting from the fall of such walls upon the buildings of the latter; and it is no defence to allege that the injury occurred while his premises were in the sole charge of a skilful contractor, under a contract to rebuild the house: *Sessengul v. Pozey*, 67 Ind., 408.

In a suit against a city to recover for personal injury received, caused by permitting blasting in the street by individuals, and thereby frightening and causing a team to run away with plaintiff, it is error to refuse evidence on the defence that the persons in charge of work were expressly told by an alderman of the city not to do any blasting.

When blasting of stone is done in a city, not by the city, but for and under a contract with a private citizen, and such blasting is done in violation of express directions given by city officers, or done without their knowledge, the city will not be responsible for any injury caused by it. Municipal corporations are not responsible for every unauthorized act that may be done by any one, resulting in injury, directly or indirectly, to persons travelling the streets: *Joliet v. Seward*, 86 Ills., 402.

A railroad company, by whose direction a contractor for the construction of its road, enters and builds the road upon land which it has acquired, subject to an existing lease, is liable as a joint tortfeasor with the contractor and his servants, for damages done by them, in the prosecution of the work, to the crops of the lessee: *Ullman v. Hannibal*, etc., 67 Mo., 118.

Where a city gave its contractor notice of a suit against it arising from the acts or negligence of such contractor, and an opportunity to defend, it was held the contractor was bound by the result of the action against the city: *Rochester v. Montgomery*, 72 N. Y., 65.

[4 Queen's Bench Division, 228.]

March 25, 1879.

228] *TAYLOR, Appellant; GOODWIN, Respondent.

*Highway—Furious driving on—Highway Act (5 & 6 Wm. 4, c. 50), s. 78—
“Carriage”—Bicycle.*

A person, riding a bicycle on a highway at such a pace as to be dangerous to the passers-by, may be convicted of furiously driving a carriage, under 5 & 6 Wm. 4, c. 50, s. 78.

CASE stated by justices under 20 & 21 Vict. c. 43.

An information had been preferred by a police inspector against the appellant, under 5 & 6 Wm. 4, c. 50, s. 78, for furiously driving a carriage on a highway. It appeared that the appellant had been riding a bicycle on a highway at a furious pace on the occasion in question. It was objected before the justices that a bicycle was not within the provisions of the section. The justices convicted the appellant, and the question was raised whether they were justified in convicting him under the circumstances.

Rose, for the appellant: A bicycle is not a “carriage” within the meaning of the act, nor can it be said to be “driven” in the ordinary sense of the term. Bicycles were unknown when the act was passed. The act refers to carriages drawn by horses or other animals. See the preamble and ss. 24 & 76. A person is never said to “drive” a bicycle. The fact that a bicycle has wheels does not make it a carriage. A bath-chair or a wheelbarrow would not be a carriage within the act. It would be far too wide a construction to hold that every apparatus by which a man is carried is a “carriage.” Wheeled skates would be a carriage under such a construction. [He cited *Reg. v. Bacon* (1); *Williams v. Evans* (2); *Reg. v. Mathias* (3).]

Gorst, Q.C., for the respondent: The words of the section are “any sort of carriage.” The person propelling the bicycle “drives” it. He guides the machine and regulates its pace. Such a machine is clearly within the mischief of the act.

MELLOR, J.: I am of opinion that the decision of the 229] magistrates *was right. The words of the section are, “if any person riding any horse or beast, or driving any sort of carriage, shall ride or drive the same furiously so as to endanger the life or limb of any passenger.” The expressions used are as wide as possible. It may be that

(1) 22 L. T. (N.S.), 627.

(2) 1 Ex. D., 277.

(3) 2 F. & F., 570.

bicycles were unknown at the time when the act passed, but the legislature clearly desired to prohibit the use of any sort of carriage in a manner dangerous to the life or limb of any passenger. The question is, whether a bicycle is a carriage within the meaning of the act. I think the word "carriage" is large enough to include a machine such as a bicycle which carries the person who gets upon it, and I think that such person may be said to "drive" it. He guides as well as propels it, and may be said to drive it as an engine driver is said to drive an engine. The furious driving of a bicycle is clearly within the mischief of the section, and seems to me to be within the meaning of the words, giving them a reasonable construction.

LUSH, J.: I am of the same opinion. The mischief intended to be guarded against was the propulsion of any vehicle so as to endanger the lives or limbs of the passers by. It is quite immaterial what the motive power may be. Although bicycles were unknown at the time when the act passed, it is clear that the intention was to use words large enough to comprehend any kind of vehicle which might be propelled at such a speed as to be dangerous.

Conviction affirmed.

Solicitor for appellant: *S. F. Langham.*

Solicitor for respondent: *Solicitor to the Treasury.*

See 23 Eng. R., 129 note.

The care required of one using dangerous articles must be commensurate with the danger: *Bradley v. Andrews*, 51 Verm., 530; *Smith v. Boston*, etc., 129 Mass., 318; *Butcher v. Providence*, etc., 12 R. I., 149.

The law affords a party a remedy by civil action to recover damages for an injury to his person or property, caused either directly or consequentially by the negligence, inadvertence or want of proper precaution on the part of another, although such injury may have been purely accidental and unintentional. To constitute an available defence in such cases, it must appear that the injury was unavoidable, or the result of some superior agency, without the imputation of any degree of fault to the defendant; but the mere lawfulness of the act, from which the injury resulted, is no excuse for the negligence, unskilfulness or reckless incaution of the party: *Talley v. Ayres*, 3 Sneed's R., 677.

Where the whistle of an engine is

improperly or wantonly blown so as to frighten the horse of one driving, so that such person is injured, he may recover his damages from such injury: *Voak v. Northern*, etc., 75 N. Y., 320.

A railroad company is not liable for damages resulting from the ordinary, legitimate and lawful use of their road.

A part of a railroad company's track ran alongside of and below the grade of part of a public road. A person was driving along said portion of the road with a horse who, though not considered dangerous, disliked locomotives. The company's servant stationed a locomotive on the part of their track above described, and as the horse approached, allowed steam to escape, whereby the horse was frightened, shied, overthrew the vehicle he was drawing, killed himself, and caused other damage. In an action against the railroad company to recover damages:

Held, that there was no evidence of negligence on the part of the company defendant, and that a nonsuit was rightly awarded: *Dayton v. The North*

1879

Taylor v. Goodwin.

Penn., etc., 28 Pittsb. L. J., 444, to appear in 93 or 94 Penn. St. R.

Where one was injured by fireworks negligently discharged by a boy thirteen years old in a public street, he may recover of the person guilty of such negligence: *Bradley v. Andrews*, 51 Verm., 530.

The kind and amount of care which the law imposes on one who transports articles over a highway is to be determined by the character of the article transported, and its liability, by frightening horses or otherwise, to endanger the lives or the property of travellers.

One transporting unusual machinery should employ a sufficient number of men to warn travellers of their danger, and, if necessary, to assist them in passing it: *Bernnett v. Lovell*, 12 R. L., 166.

Where a turnpike company placed beside the travelled part of its road a pile of stones for the purpose of making repairs, which had a tendency to, and did, frighten horses travelling upon the road, of which it had notice and neglected to remove the stones; held, that it was liable for damages to a traveller upon the road, occurring after the lapse of a reasonable time (in this case four or five days) after such notice, occasioned by his horse having been frightened: *Eggleston v. Columbia Turnpike Co.*, 82 N. Y., 278, reversing 18 Hun, 146.

The plaintiff's horse took fright at the carcass of a horse which had been lying in one of the streets of the city of Allegheny for about twenty-four hours, and becoming unmanageable, ran away, inflicting severe injuries upon plaintiff: Held, that the question whether the city was guilty of negligence in not removing the nuisance was for the jury: *Fritsch v. Allegheny*, 91 Penn. St. R., 226.

A city is not liable for damages for injuries inflicted upon a person by the fall of a market house caused by a wind storm of unprecedented force and violence: *Flori v. St. Louis*, 69 Mo., 341; *Pittsburg, etc., v. Brigham*, 29 Ohio St. R., 374.

The duty of the corporation of the city of New York to keep the streets of the city in such repair that they may be safely travelled, is not limited to the roadbed.

A permanent wooden awning or roofing covering the sidewalk of a street, and resting for support upon posts bedded in the street, if insecurely supported so as to be dangerous to persons using the street, is a defect in the street which the city is bound to repair; and if the city has notice of the danger, or if it has existed so long, and is so easy to be observed that notice may be inferred, the city is liable for damages resulting therefrom; and this, although the structure was not made by authority of the city, or under the supervision of any of its officers.

Such a structure, made for private purposes, if unauthorized, is an encroachment upon the public street, and a nuisance which it is the duty of the city officers, after notice express or implied, to remove. This is especially true as to those streets the fee of which is in the city.

If such a structure exists by authority of the city, the city is liable for any defect arising from want of proper supervision, or from negligence in its construction, although there be no external indication of imperfection: *Hume v. Mayor*, 74 N. Y., 264, 57 How., 359.

See *Shearman & Redfield on Neg.; Whart. on Neg.*, tit. "Real Property;" *Merrill v. Portland*, 4 Cliff., 138.

A city is not liable for an injury caused to a foot passenger on a sidewalk which the city is bound to keep in repair, by the falling of an overhanging mass of snow and ice from the roof of a building not owned by the city, although it had so overhung the highway for more than twenty-four hours before the accident: *Hixon v. Lowell*, 13 Gray, 59; *Lazarus v. Toronto*, 19 U. C. Q. B., 9.

The owner of a building adjoining a street or highway is under a legal obligation to take reasonable care that it is kept in proper condition, so that it shall not fall into the street or highway and injure persons lawfully there.

From the happening of such an accident, in the absence of explanatory circumstances, negligence will be presumed, and the burden is upon the owner of showing the use of ordinary care: *Mullen v. St. John*, 57 N. Y., 567; *Murray v. McShane*, 52 Md., 217, 9 Reporter, 178.

[4 Queen's Bench Division, 230.]

March 27, 1879.

TOMLINSON, Appellant; BULLOCK, Respondent. [230]Statute, Construction of—Time of coming into Operation—Bastardy—35 & 36 Vict., c. 65, s. 3; 36 Vict. c. 9, s. 3.*

The 35 & 36 Vict. c. 65, s. 3, provides for an application for an order of affiliation by any single woman who may be delivered of a bastard child "after the passing of this act." The act, which came into immediate operation, received the royal assent on the 10th of August, 1872:

Held, that an order of affiliation might be made under the act in respect of a child born at any time of the day on the 10th of August, 1872, inasmuch as the act in contemplation of law for this purpose came into effect from the commencement of the day on which it received the royal assent.

CASE stated by justices under 20 & 21 Vict. c. 43.

The facts sufficiently appear from the judgment.

March 25. *Lockwood*, for the appellant, contended that the statute 35 & 36 Vict. c. 65 must be taken to have come into force from the commencement of the day on which it received the royal assent, and therefore that the child was in contemplation of law born after the passing of the act. He cited Maxwell on Statutes, p. 311; *Combe v. Pitt*⁽¹⁾; *Campbell v. Strangeways*⁽²⁾.

Crompton, for the respondent, contended that the statute did not come into effect until the day after it received the royal assent. He cited 33 Geo. 3, c. 13.

Cur. adv. vult.

March 27. The judgment of the Court (Mellor and Lush, JJ.) was delivered by

LUSH, J.: This is an appeal from the decision of justices dismissing an application for an order under the Bastardy Acts. The application was made on the 5th of September, 1872, but by reason of the absence of the respondent from England the summons was not taken out till the 26th of July, 1878. It appeared on the hearing that the child was born on the 10th of August, 1872, being the day on which 35 & 36 Vict. c. 65 received the royal assent. That [231] act, which came into operation immediately on its passing, repealed 7 & 8 Vict. c. 101, and enacted other provisions in lieu thereof. The 3d section enacts that "any single woman who may be delivered of a bastard child *after the passing of this act* may either before the birth, or at any time within twelve months from the birth of such child, or at any

⁽¹⁾ 3 Burr., 1424, at p. 1434.

⁽²⁾ 3 C. P. D., 105.

1879

Tomlinson v. Bullock.

time thereafter, upon proof that the man alleged to be the father of such child has within the twelve months next after the birth of such child paid money for its maintenance, or at any time within the twelve months next after the return to England of the man alleged to be the father of such child upon proof that he ceased to reside in England within the twelve months next after the birth of such child make application," &c.

The repealing clause excepted anything theretofore duly done under the repealed act, and kept the latter act alive for the purpose of supporting and continuing any proceeding taken before the passing of the act in question, but it made no provision as to children born before its passing, and in respect of which no proceeding had been taken, consequently the mother of a child born on the 9th of August, 1872, had no remedy under the act then in force (7 & 8 Vict. c. 101), because that act was repealed on the following day, and no remedy under the repealing act, because that applied only to children born after its passing. To supply this defect another act was passed at the commencement of the following session, the act 36 Vict. c. 9. The 3d section of that act enacts that "any woman delivered of a bastard child on or before the 10th of August, 1872 (the day on which the repealing act was passed), who but for the repeal by the last mentioned act would have been entitled to apply for a summons against the putative father of such child, shall be entitled to apply for such summons as follows: In any case in which she would have been entitled to apply at any time within twelve months from the birth of the child she shall be entitled to apply at any time within six months next after the passing of this act." If 7 & 8 Vict. c. 101, had not been repealed, the applicant would have been entitled to apply for a summons within twelve months from the birth of the child. She might, therefore, have availed herself of the amending act by applying *within six months after its passing, but she did not do so; and although that act in the 8th section rendered valid all orders made in respect of children born before the 10th of August, 1872, it says nothing of pending applications, nor does it say anything in respect of children born not before but on the day on which the act of 1872 passed. It seems to have been assumed on all hands that a child born on the 10th of August was not within the act of 1872, and the justices upon this assumption considered that, as the applicant had not brought herself within the remedial act of 1873, she had

no *locus standi*. If this assumption were well founded we should be of opinion that the decision was right. But we think that it is an erroneous assumption.

At common law all statutes passed in a session of Parliament had relation back to the first day of the session, unless some other day was appointed for the act coming into operation. This relation was productive of most serious consequences, many instances of which are found in the books; and in the 33d year of the reign of Geo. III, an act was passed which required the clerks of the parliaments to indorse on every act, the day, month, and year, when the same received the royal assent, and enacted that such indorsement should be taken as part of the act, and should be the date of its commencement where no other commencement was provided.

The only point of time which this act makes material is the day on which the royal assent was given. It thus recognizes the well known maxim that the law takes no notice of the fractions of a day, and except where there are conflicting rights between subject and subject, for the determination of which it is necessary to ascertain the actual priority, such is the universal rule—an act which comes into operation on a given day becomes law as soon as the day commences.

By the operation of the repealing clause of the act of 1872, the act 7 & 8 Vict. c. 101, was repealed, and the new act came into effect at the first moment of the 10th of August, 1872. Every event which occurred during that day was in contemplation of law an event which took place after the passing of the act. The same maxim it is true applies to the birth of a child. In computing the age of a person, the day and not the hour of his birth *is regarded where no con- [233] flicting right is in question. A person born on the 3d of September was held to be of age on the 2d of September, twenty-one years afterwards, without regard to the fractions of the days⁽¹⁾. But on the other hand a fiction of law is not allowed to prevail against the plain intent of an act. Now, it is clear that the act of 1872 was not intended to deprive the mother of a child born *on* the day on which it passed of all remedy against the putative father. It intended to substitute another remedy for that which it took away, and if that intent can be effectuated without violence to its language, our duty is so to construe the act as to carry out that intent. We do no violence to its language by hold-

(1) 1 Ld. Raym., 480.

ing that a child born at any time during the 10th of August, was born "after the passing of the act," which in contemplation of law took place as soon as the clock began to strike twelve in the night of the 9th of August.

We are, therefore, of opinion that the decision of the justices was erroneous, and we remit the case to them to be determined upon the merits.

Case remitted to justices.

Solicitor for appellant: *G. B. Wheeler.*

Solicitor for respondent: *Backhouse.*

The general rule is, that judicial proceedings and acts of the legislature take effect, in law, from the earliest period of the day upon which they are respectively originated and come into force: *Converse v. Michie*, 16 Up. Can. Com. Pl. R., 167, and numerous cases cited; *Wright v. Mills*, 4 H. & N., 488.

The law does not usually regard fractions of a day: *Marvin v. Marvin*, 75 N. Y., 240; *Blydenburgh v. Cotheal*, 4 id., 418; *Clute v. Clute*, 3 Den., 263; *Pulling v. People*, 8 Barb., 384; *Jones v. Porter*, 5 How. Pr., 286; *Phelan v. Douglass*, 11 id., 193, 195; *Judd v. Fulton*, 4 id., 298; *Cornell v. Moulton*, 3 Den., 12; *Haden v. Buddensick*, 49 How. Pr., 241, 246.

Where a party to a suit had died at an earlier hour of a day than the perfecting of a judgment or the issuing of a *fi. fa.*, as the law does not take notice of fractions of a day, the judgment or the issuing of the *fi. fa.* is legal: *Wright v. Mills*, 4 H. & N., 488, overruling *Chick v. Smith*, 8 Dowl., 337.

Where notice of appeal was served an earlier hour than the perfection of judgment, the appeal was held to be regular: *Blydenburgh v. Cotheal*, 4 N. Y., 418.

So where an execution was delivered before the judgment was perfected: *Clute v. Clute*, 3 Den., 263; see *S. C.* 4 id., 241.

So, serving a declaration before it was filed: *Hughes v. Patton*, 12 Wend., 234; *Columbia, etc., v. Haywood*, 10 id., 422.

In Upper Canada a *fi. fa.* was delivered to the sheriff and a levy made at eleven o'clock in the forenoon. A statute approved in the afternoon which declared levies made within thirty days void as against proceedings in insolv-

ency, but that it should not apply to any writ *theretofore* issued and delivered to the sheriff: Held, the statute took effect at the earliest portion of the day and cut off the levy: *Converse v. Michie*, 16 U. C. Com. Pl., 167, citing many authorities.

Though where a *sale* has actually taken place before the insolvency proceedings are commenced, the sale is legal: *Whyte v. Treadwell*, 17 U. C. Com. Pl., 488, distinguishing *Converse v. Michie*, 16 id., 167.

The maxim that in law there are no fractions of a day, does not apply to proceedings in bankruptcy, where the exact time when the event occurred is made certain by record. Thus, where a debtor's property was attached at seven o'clock in the afternoon of March 8, and his petition in bankruptcy under the U. S. Bankruptcy Act of 1867 was filed at two o'clock and fifty minutes in the afternoon of the 8th of July next succeeding; held that, under sec. 14, the attachment was dissolved, the time between the two events falling short of four months by four hours and ten minutes: *Westbrook Manuf'g Co. v. Grant*, 60 Maine, 88.

See also *Golden v. Blaskopf*, 126 Mass., 523.

The general rule that by fiction of law fractions of a day are not regarded, is subject to numerous exceptions: *Tufts v. Carradine*, 3 La. Ann., 430.

In determining which levy under an attachment or execution, or which lien takes precedence from the docketing of a judgment, etc., the law takes notice of fractions of a day: *Lemon v. Staats*, 1 Cowen, 592; *Clute v. Clute*, 4 Den., 241, 243; *People v. Central City, etc.*, 53 Barb., 412; *Golden v. Blaskopf*, 126 Mass., 525; *Bigelow v. Wilson*, 1 Pick.,

Hoyle v. Hitchman.

1879

495-7; *Tufts v. Carradine*, 3 La. Ann., 430. act may be done "after" a certain number of days, four full days must elapse:

Where the statute is explicit that an *Marvin v. Marvin*, 75 N. Y., 240.

[4 Queen's Bench Division, 233.]

March 28, 1879.

HOYLE, Appellant; HITCHMAN, Respondent.

Sale of Food and Drugs Act, 1875 (38 & 39 Vict. c. 68), s. 6—"Prejudice of the Purchaser"—Purchase of Sample for Analysis by Officer.

Where an article of food, which was not of the nature, substance, and quality of the article demanded, was sold to an inspector of nuisances, who purchased for the purpose of analysis under s. 13 of the Sale of Food and Drugs Act, 1875, with money belonging to the authority by whom he was employed:

Held, that such sale was "to the prejudice of the purchaser" within the meaning of the Sale of Food and Drugs Act, 1875, s. 6.

CASE stated by a metropolitan police magistrate under 20 & 21 Vict. c. 43, the facts of which were in substance as follows:

An information had been preferred against the respondent for *an offence under the 6th section of the Sale of [234 Food and Drugs Act, 1875, by the appellant, an inspector of nuisances for the district of St. Giles, who had been duly authorized to act in the execution of the act. The appellant had gone to the respondent's shop and asked for half a pint of milk, for which he paid 1½d., out of money provided for the purpose by the local authority, for which he had to account. On being served, he informed the shopman that he was an inspector of nuisances, and had purchased the milk for analysis. The various provisions of the act with regard to the mode of procedure in such cases having been previously complied with, the milk supplied was analyzed by the public analyst. It was found to contain 24 per cent. of water added to the milk after it had come from the cow.

The appellant, in cross-examination, stated that he was not prejudiced, nor was any injury done to him personally, and it was thereupon submitted that there was no offence because the milk was not sold to the prejudice of the purchaser. The magistrate found that the appellant demanded milk, that the article sold was not of the nature, substance and quality of milk, and that the appellant had no knowledge or notice that the milk the respondent sold was adulterated. He also stated that if the purchaser had been one of the respondent's ordinary customers the offence mentioned in the act would, in his judgment, have been com-

1879

Hoyle v. Hitchman.

mitted. But he declined to convict, on the ground that the sale was not "to the prejudice of the purchaser" within the meaning of the 6th section of the act. The question for the opinion of the court was whether he was right in so declining to convict, and if not the case was to be remitted to him to deal with in accordance with the judgment of the court.

March 26, 27. *Poland*, for the appellant: It is quite obvious, on consideration of the provisions of ss. 13-17 of the act, that the inspector is authorized by the act to purchase for the purpose of analysis, and to prosecute, if on such analysis the article is found to be adulterated. The prejudice intended is not necessarily pecuniary or personal prejudice. The Legislature never intended an inquiry into the purposes for which a purchase is made, or the question with whose moneys it is made, in order to see whether prejudice exists. The words "to the prejudice of the purchaser" are introduced to prevent the sale of an article superior to that demanded being an offence. [He cited *Sandys v. Markham* (*).]

Morton Smith, for the respondent: The contention for the appellant gives no real effect to the words "to the prejudice of the purchaser." In the case of *Davidson v. McLeod* (*)—the majority of the High Court of Justiciary in Scotland decided a similar case in accordance with the present contention on behalf of the respondent. [He also cited *Sandys v. Small* (*).]

Cur. adv. vult.

March 28. MELLOR, J.: This is an appeal from the decision of the chief magistrate at Bow Street, and the question raised is whether an offence had been committed within the provisions of the 6th section of the Sale of Food and Drugs Act.

The magistrate dismissed the summons on the ground that there was no prejudice to the purchaser. This gives rise to the question whether the prejudice contemplated by the statute must be pecuniary prejudice. Such a reading would almost nullify the beneficial effect of the statute, for it would very much diminish the possibility of bringing home offences against the act to those who are guilty of them. This to my mind affords a strong argument against such a contention. So far as authority is concerned, I do not think

(¹) 41 J. P., 52.

(*) Cases decided in the High Court of Justiciary, 4th Series, vol. v, p. 1.

(*) 3 Q. B. D., 449; *ante*, 380.

that there is any distinct authority on the point to be found in any case that has been decided in the English courts. The cases to which we have been referred in these courts are two in number. One is the case of *Sandys v. Markham* ⁽¹⁾, which came before my Brother Lush and myself. The court remitted the case to the magistrate, and it can hardly be treated as a decision. But undoubtedly during the argument my Brother Lush expressed an opinion that if an article, the value of which had been diminished by adulteration, were sold, prejudice was to be presumed. To that view I must have assented, because otherwise it would have been useless to have sent the case back to the magistrate, as the objection that the sale was not to the prejudice *of the [236 purchaser would have been fatal if it could have been sustained. The other case is that of *Sandys v. Small* ⁽²⁾. It was stated that during the argument of that case observations fell from the Lord Chief Justice favorable to the respondent's contention in the present case. I think those observations if they were made were rather in the nature of a query than a dictum. There was no further discussion on the point, and the judgment turned on an altogether different point. There is nothing whatever in the observations contained in the judgment that gives any color to the notion that either the Lord Chief Justice or myself entertained an opinion that the objection so taken was a good one. Such, therefore, is the state of the English authorities. There is nothing that supports the respondent's contention, and there is a dictum against it. We have been referred to a case in the Scotch courts, viz., that of *Davidson v. MacLeod* ⁽³⁾, where the High Court of Justiciary were sitting as a Court of Appeal from the decision of an inferior court. Had the opinion of the judges in that case been uniform, and had there not been a considerable difference of opinion on this particular point, I should have been very reluctant to decide contrary to the authority of that case. The judgments deal with two points, the first being what the nature of the adulteration is that constitutes an offence under the act. Some of the judges were of opinion that the admixture of some foreign substance was necessary to constitute an offence, and that mere weakness of quality would not do so. The sheriff had held that the clause might be read disjunctively, and that it was sufficient if the article sold was not of the "quality" demanded. The majority of the judges were not of this opinion. It is not necessary to de-

⁽¹⁾ 41 J. P., 52.

⁽²⁾ 3 Q. B. D., 449; *ante*, 380.

⁽³⁾ Cases decided in the Court of Justiciary, 4th Series, vol. v, p. 1.

1879

Hoyle v. Hitchman.

cide this point, and I do not wish to be considered as expressing any binding opinion upon it, but as at present advised, I am disposed to think that on this point the majority of the learned judges were right. The second point raised was as to the prejudice to the purchaser. On that point there was a very great difference of opinion among the different members of the court. The Lord Justice Clerk undoubtedly was of opinion that the sheriff was wrong on both points. Lord Deas expresses very great doubt with 237] *regard to the second point. Two of the judges, Lord Craighill and Lord Adam, dissented from the opinion of the majority, and thought that the decision of the sheriff-substitute was right. The Lord Justice General's judgment on the second point seems to me rather in favor of the view we are now taking. He says that the sale must be proved to be to the prejudice of the purchaser, but that he is not prepared to say it must be to his pecuniary prejudice. There being this diversity of opinion, I am not so much pressed by the authority of the case as I otherwise should be, and with very great respect to the learned judges who formed the majority of the court, I cannot treat the case as a conclusive decision on the point now before us. We must, therefore, consider the language of the statute, and it seems to me, I must say, from some of the expressions let fall by the Scotch judges that they took too narrow a view of the scope of the 6th section. It is perfectly general in its terms, and is not in any way confined to cases where there has been an admixture of a deleterious character. In the 13th, 14th, and 17th sections express provisions are made whereby the officer appointed for the purpose may compel a sale to him for the purpose of analysis, in order that offences may be detected and prosecuted. The appellant in the present case acted under those sections, and it seems to me that we must look upon a purchase by an officer so proceeding precisely in the same manner as a purchase by any other individual. If a person comes to a shop and asks for some article of food, and receives something adulterated so as not to be of the nature, substance, and quality of the thing demanded, surely an offence is committed, and it cannot matter with regard to the commission of such an offence whether the money with which the purchase was made is public money found for the purpose of the purchase or not. If a purchaser, whoever he may be, and with whosoever money he may purchase, gets an article inferior to that which he demands and pays for, it seems to me that he is necessarily prejudiced within the meaning of the section. The statute

never intended the fact that a person purchases with another's money to be material. The real offence is the fraudulent sale of an article adulterated so as to be of an inferior nature, substance, and quality to that which is demanded and paid for. The necessity *for the words, "to the [238 prejudice of the purchaser" is this. But for these words various absurdities might arise on the words of the section. The sale of an article of a superior nature or quality to that demanded would be an offence. For these reasons I am of opinion that the decision of the magistrate was wrong, and that the case must go back to him to be dealt with in accordance with our opinion.

LUSH, J.: The language of the 6th section of the Sale of Food and Drugs Act has unfortunately given rise to a diversity of opinion, which I fear has to some extent crippled the operation of a very beneficial act. The learned magistrate certainly had the sanction of high authorities for the view he took. The majority of the judges of the High Court of Justiciary in Scotland took the same view. An impression has also gone abroad that the Lord Chief Justice, in the case of *Sandys v. Small* ⁽¹⁾, threw out a similar view. The only reports of the case that I am aware of contain no trace of such an opinion on the Lord Chief Justice's part. In the report, at p. 451, the Lord Chief Justice is reported as asking, as an interlocutory question, whether the purchaser can be said to be prejudiced when he knows of the adulteration; and the question in the case was whether the purchaser had notice of the admixture of other ingredients, and, if so, whether he was prejudiced. The judgment wholly turned on this point, which is quite distinct from the point now before us. On the other hand, my Brother Mellor and myself, in the case of *Sandys v. Markham* ⁽²⁾, obviously considered it quite immaterial for what purpose the article was bought, and with whose money. If we had not thought so, it would have been useless to send the case back to the magistrate. These are the only cases that have occurred in the English courts. Our attention was directed yesterday to the judgments of the High Court of Justiciary in Scotland in the case of *Davidson v. MacLeod* ⁽³⁾. I have studied those judgments with attention and deference, but I am unable to concur with the opinion of the majority on this point. The decision itself seems to me to be correct. The article there demanded and supplied *was cream. It was admit- [239 ted that it contained no foreign admixture or adulteration,

⁽¹⁾ 8 Q. B. D., 449; *ante*, 380.

⁽²⁾ 41 J. P., 52.

⁽³⁾ Court of Justiciary, 4th Series, vol. v, p. 1.

1879

Hoyle v. Hitchman.

but it was cream of an inferior quality to that ordinarily sold in Glasgow. Cream is not an article having any standard of quality. It varies with the character of the cows from which the milk comes, and the food on which they are fed. This was genuine cream, though of inferior quality. It appears to me that the sale in such a case was not an offence within the act at all. In the present case the article demanded was milk; that supplied was milk and water. It was an adulterated article. The magistrate says that if the purchase had been made by an ordinary customer he should have had no hesitation in convicting. The question therefore is whether it can make any difference that the person purchasing was an official person, authorized to purchase for the purpose of testing the character of the article sold at the respondent's shop. The learned magistrate thought that the section could not apply to an official purchaser who bought for analysis only, because he was not prejudiced. I cannot in any way concur in that opinion. In construing the 6th section we must bear in mind the object of the act. This object was to prevent the public from being imposed upon by the sale of adulterated articles, and to provide a mode of ascertaining whether such adulteration exists. For this purpose a machinery is provided for the purchase and analysis of samples, and for taking proceedings thereon. The 13th section provides for the purchase of samples by an official personage. Provision is there made for what is to be done if it is intended to submit the sample for analysis. The 17th section makes it an offence to refuse to sell any article to the official person. All this is done in the interests of the public, the object being to ascertain what kind of article is supplied at the particular shop to the customers. The officer is to go and purchase a sample like any other customer. The 20th section provides what is to be done afterwards. The officer being the person directed by the act to procure the sample and to have it analyzed, and to whom the seller is bound to sell for the purpose of analysis, the 20th section provides that the person causing the analysis to be made may take proceedings for *such* offence. What offence? Clearly the offence of selling the article which on analysis has proved 240] to be adulterated. It is obvious to my mind that the officer is a purchaser within the meaning of the 6th section, for he is the person who is directed to purchase, and procure an analysis, and to prosecute. I confess I cannot follow the reasoning on behalf of the respondent.

The Lord Justice Clerk appears to have thought that the 13th and 16th sections only applied to sales contrary to the provisions of the 3d and 4th sections. They apply no doubt to sales within those sections, but their terms are quite general, and they apply also to sales within the 6th section. They authorize a purchase by the officer for the purpose of analysis, in order to ascertain whether there has been any violation of the act whatever. It appears to me to be clear to demonstration that the official purchaser is within the 6th section. What is the meaning of "prejudice" here? It cannot be confined to pecuniary prejudice, or prejudice arising from the consumption of unwholesome food. The prejudice is that which the ordinary customer suffers, viz., that which is suffered by any one who pays for one thing, and gets another of inferior quality. The official purchaser is to purchase by way of testing whether the prejudice is suffered by the ordinary customer, and he is prejudiced in the same manner. The words "to the prejudice of the purchaser" are necessary, because if they had not been inserted a person might have received a superior article to that which he demanded and paid for, and yet an offence would have been committed. The words are intended to show that the offence is not simply giving a different, but giving an inferior, thing to that demanded and paid for. It appears to me that the prejudice the act intends is the general prejudice done to customers. The official personage is made, as it were, an official customer to test what the course of business at the particular shop is. I regard with the highest respect the judgment of the Scotch judges, but I am irresistibly led to the conclusion that every part of the 6th section is intended, as well as the 3d and 4th sections, to apply to a person authorized to buy samples for analysis. I am anxious to guard myself from being supposed to express any opinion that the Scotch judges were right in holding that the 6th section applies only to an admixture of foreign ingredients. The question whether that is so does not arise here. There is a difference of character in various articles, such as rice or arrow-root,*according to the [24] country from which they come, and other circumstances. I do not decide whether if a person sold Indian rice when he was asked for Carolina rice, such a case as that would be within the section. The section, it must be observed, is not in terms confined to cases of admixture. I entertain no doubt, however, that by the word "purchaser" the 6th section intended to include an official purchaser authorized to purchase for analysis. The magistrate was therefore wrong,

1879

The Queen v. Hermann.

and the case must be remitted to him to be further dealt with in accordance with our decision.

Case remitted to magistrate.

Solicitor for appellant: *J. H. Jones.*

Solicitor for respondent: *W. T. Ricketts.*

See ante, page 385.

[4 Queen's Bench Division, 284.]

March 22, 1879.

[CROWN CASES RESERVED.]

284]

*THE QUEEN V. HERMANN.

Coin, False or Counterfeit—Statute 24 & 25 Vict. c. 99, s. 9—Uttering Counterfeit Coin.

A genuine sovereign had been fraudulently filed at the edges to such an extent as to reduce the weight by one twenty-fourth part, and to remove the milling entirely, or almost entirely, and a new milling had been added in order to restore the appearance of the coin:

Held, by Lord Coleridge, C.J., Pollock and Huddleston, BB. (Lush and Stephen, JJ., dissenting), that the coin was false and counterfeit, within 24 & 25 Vict. c. 99, s. 9.

THE following case was stated by the Recorder of Liverpool for the opinion of this court:

"The prisoner Robert Hermann was convicted before me at a sessions held on the 7th of January, 1879, on an indictment under 24 & 25 Vict. c. 99, s. 9, 'An Act to consolidate and amend the Statute Law of the United Kingdom against offences relating to the Coin,' for uttering and putting off two false and counterfeit sovereigns, knowing them to be false and counterfeit.

"The evidence of uttering and of guilty knowledge was complete, but I desire to submit to the court the question whether the coins which were uttered could properly be held to be false and counterfeit coins within the meaning of the statute in question. They were, or had been, real sovereigns coined at the mint. They were both of Her Majesty's reign, one dated 1872, and the other 1875.

"They had been fraudulently filed at the edges to such an extent as to reduce the weight by one twenty-fourth part. The effect of the filing was to remove the milling entirely, or almost entirely. In order to restore the appearance of the coins, a new milling had been made on each coin with tools. It appeared to me that this was a counterfeit milling, and that a coin upon which any part of the impression was counterfeit was a counterfeit coin. The jury convicted the prisoner. The prisoner had previously been tried under the

fourth section of the same act, and acquitted for want of evidence that the act of lightening or diminishing had been done by himself."

*No counsel appeared for the prisoner. [285

Eyre Lloyd, for the prosecution: The question is whether the coins uttered by the prisoner can be considered false or counterfeit within s. 9 of 24 & 25 Vict. c. 99, which is as follows: "Whosoever shall tender, utter, or put off any false or counterfeit coin resembling, or apparently intended to resemble, or pass for any of the Queen's current gold or silver coin, knowing the same to be false or counterfeit, shall in England . . . be guilty of a misdemeanor," &c. By s. 1 of the same statute it is enacted that, "In the interpretation of, and for the purposes of this act, the expression 'the Queen's current gold or silver coin' shall include any gold or silver coin coined in any of Her Majesty's mints, or lawfully current, . . . and the expression 'false or counterfeit coin resembling, or apparently intended to resemble or pass for, any of the Queen's current gold or silver coin' shall include any of the current coin which shall have been gilt, silvered, washed, colored, or cased over, or in any manner altered so as to resemble, or be apparently intended to resemble or pass for, any of the Queen's current coin of a higher denomination; and the expression 'the Queen's current coin' shall include any coin coined in any of Her Majesty's mints." If the question is one of fact it has been decided by the jury against the prisoner. The conviction therefore should stand, unless it can be said that as a matter of law coins such as the present are not false or counterfeit within the above act.

The coins, by the filing, were reduced below current coin (under 33 & 34 Vict. c. 10), and then, by the adding of the new milling, made to resemble current coin. "Counterfeit" means unreal, "something made so as to be other than that which it pretends to be." The words of 24 & 25 Vict. c. 99, s. 1, do not cut down the operation of s. 9. The object of s. 1 is to extend the meaning of expressions used in the act, not to prevent such expressions having their natural effect. This is evident from the use of the phrase "shall include" in the section. In *Reg. v. Kershaw* (') the effect of an interpretation clause somewhat analogous to the one now in question is dealt with, and it is there pointed out by Erle, J., that the word "include" is used by way of extension.

*[STEPHEN, J.: Does every one knowingly passing a light coin utter a counterfeit coin?] [286

(') 6 E. & B., 999, 1007; 26 L. J. (M.C.), 19.

No; nor is it necessary to contend so, because here something has been done to the coins which were light to conceal their lightness and to make them resemble true coins of full weight.

STEPHEN, J.: I have arrived at the conclusion that these were not counterfeit or false coins. The interpretation clause of the statute (s. 1) says that the expression which is used in the section creating the offence, "false or counterfeit coin resembling, or apparently intended to resemble or pass for, any of the Queen's current gold or silver coin," shall include genuine coin treated in various ways, of which the present is not one, and it also says that the expression "the Queen's current coin" shall include any coin coined in any of Her Majesty's mints. Now the coins in question were coined in one of such mints; they were not made to imitate; they were fraudulently lightened. I find no section making it a crime to pass a light sovereign with a knowledge that it is light, though I do find a section (s. 4) making it a crime to lighten such a coin, so that it may pass in its lightened state as current coin, and another section (s. 5) which deals with unlawful possession of clippings or filings of a coin so lightened.

When the prisoner passed the light coins, knowing them to be light, he committed, so far as I can see, no offence under the statute in question. Then arises the question whether the fact that some one had put a new milling upon the coins before the prisoner passed them, as stated in the case, alters the matter. What the prisoner did was this, he knowingly passed light sovereigns, upon which some one had put a new milling for the purpose of concealing the lightness, he passed genuine coins which had been fraudulently dealt with, not false or counterfeit coins.

HUDDLESTON, B.: The conviction in this case was under s. 9 of 24 & 25 Vict. c. 99. The case finds that the milling was in the first instance entirely, or almost entirely, removed. This prevented the coins having the appearance of current coins; then, to restore the appearance, a false milling was added. Without the milling the coins would not have been current coin; but, to make them pass and resemble perfect coins, a counterfeit milling was added. The case is, in my judgment, within the section.

POLLOCK, B.: I think the prisoner was properly convicted. It is sufficient to say that the section contains clear affirmative language within which the facts bring the present case. The coins were false or counterfeit coins intended to pass for current coins, for a sovereign from which the mill-

ing has been fraudulently removed ceases to be current coin, but is something else intended to resemble current coin. It is like the case of a man taking part of the gold out of a sovereign, and filling up the hollow left with alloy, and then passing it as genuine. It is substantially a passing of a false and counterfeit coin.

LUSH, J.: I cannot, I regret to say, agree in the conclusion arrived at by the majority of the court. I think to hold the present case to be within the section would be to strain the meaning of the word "counterfeit." The coins were issued by the Queen; they were current coins before they were clipped. Coins only clipped remain current coin within the statute. The expression "the Queen's current coin" includes any coin coined in any of Her Majesty's mints. The word "counterfeit" involves the idea of spuriousness. A counterfeit is a spurious imitation intended to resemble something which is not. The act, by definition, makes genuine coins tampered with in certain specified ways "counterfeit" within the section, but for that definition such coins would not be counterfeit, and, but for s. 1, a farthing gilded to represent a sovereign would not be a counterfeit coin. There is nothing in this section which extends the words "false or counterfeit" to the present case. There is another section as to lightening any of the Queen's current coin, but there is no section as to passing coin so lightened. Cutting off gold does not make a coin counterfeit. But it is said adding a milling to a coin makes it counterfeit. I do not think it does. The whole coin is still one that issued from the mint. It is not like adding alloy to counterbalance gold abstracted from the coin.

*LORD COLERIDGE, C.J.: I am clearly of opinion [288 that the present case is within the 9th section of the statute. The coins were counterfeit in the strict and grammatical sense of the word, they were made other than that they ought to be, they were made to resemble that which they were not.

They were not perfect and whole sovereigns; they were imperfect coin, milled so as to conceal their imperfections. It may be that it is wrong to place too much reliance upon strict or grammatical meanings in construing words in an act of Parliament. I therefore desire to say that if the word "counterfeit" is to be taken in its ordinary or popular sense these coins seem to me to be counterfeit. In the ordinary sense of this word the idea of imitation is conveyed. These sovereigns had been filed, and then a new milling added to make them imitate current gold coin, to

1878

Fowler v. Knoop.

"restore the appearance" as the case states. Before the milling was put on they were not perfect sovereigns, then by milling they are made to look like current sovereigns. The interpretation section (sect. 1) adds strength to my view. The words "shall include" are not identical with, or put for, "shall mean." The definition does not purport to be complete or exhaustive. By no means does it exclude any interpretation which the sections of the act would otherwise have, it merely provides that certain specified cases shall be included. It is to include taking a farthing and gilding it, though the farthing is a coin with an obverse and reverse differing from a sovereign, so that the eye by looking would detect the difference, and where there can scarcely be said to be imitation, or more than a mere surface change of the farthing, without any resemblance to a genuine sovereign. These coins were passed for whole sovereigns, and made so to pass by the operation of giving them false millings. The conviction must be affirmed.

Conviction affirmed.

Solicitor for prosecution: *Solicitor to the Treasury.*

An indorsement of payment upon the back of a money bond is no part of the bond. It is not, therefore, forgery to erase an indorsement of payment from

the back of such a bond: *Dennis v. Ryan*, 63 Barb., 145, 5 Lana., 350, 65 N. Y., 385.

[4 Queen's Bench Division, 299.]

Dec. 10, 1878.

[IN THE COURT OF APPEAL.]

299]

*FOWLER V. KNOOP.

Ship and Shipping—Bill of Lading, implied Obligation in, to unload Ship in reasonable Time—Bills of Lading Act, 1855 (18 & 19 Vict. c. 111).

By a charterparty entered into between the plaintiff and G. it was agreed that the plaintiff's vessel should at the port of discharge be unloaded as fast as the custom of the port would allow. By the bill of lading, signed by the master, the cargo was stated to have been shipped by G. and was to be delivered to the defendant or his assigns, he or they paying freight for the goods as per charterparty. No time for the discharge of the cargo was mentioned in the bill of lading. At the port of discharge there was no custom as to unloading vessels, but a delay occurred in unloading the ship. The defendant never assigned the bill of lading, but before the arrival of the ship he sold the cargo, and the ultimate purchaser took delivery of it upon an order signed by the defendant:

Held, 1. That, as there was no custom of the port of discharge as to unloading vessels, the charterparty did not by its terms vary the implied contract contained in the bill of lading to deliver the cargo within a reasonable time; 2. That the defendant, although he had parted with the beneficial interest in the cargo, was when the delay occurred a "consignee" within the Bills of Lading Act, 1855.

ACTION by the plaintiff, owner of the ship Claudine, against the defendant, consignee of cargo under a bill of lading, for not discharging the plaintiff's ship in a reasonable time on an implied obligation in the bill of lading, whereby the plaintiff lost the use of his ship for several days.

At the trial at the London Trinity Sittings, 1877, before Field, J., the following facts were proved. The plaintiff was the owner of the ship Claudine, and the defendant was a merchant in London carrying on business under the style of "W. Berkefeld & Co." On the 11th of September, 1875, a charterparty was made at Valparaiso between Gildemeister & Co. of the one part, and G. Jamieson, master of the Claudine, acting on behalf of the plaintiff, of the other part, which contained, amongst others, the following terms: that the ship should take in at the port of Iquique a full and complete cargo of nitrate of soda in bags, her cargo not to exceed 16,000 quintals Spanish weight, for conveyance to Queenstown or Falmouth. "Bill of lading to be signed by the master, weight and quality unknown: all on board to be delivered. For the loading of the cargo twenty working lay days *shall be allowed to be reckoned from the [300 day the master gives notice in writing to the charterers' agents of being ready to receive cargo. And should the vessel be detained by the charterers, or by their agents beyond the time before specified for loading or discharging the cargo in the aforesaid ports, demurrage shall be paid daily to the master or his order as shall become due at the rate of £10 sterling or equivalent per day for each and every day's detention, afterwards such detention not to exceed ten running days. And should the vessel be unnecessarily detained by the master beyond the time herein specified demurrage shall be paid by him at the same rate and in the same manner to charterers or to their agents." "After receiving on board the cargo, the vessel shall proceed with all convenient speed to Queenstown or Falmouth for orders to discharge in a safe port in the United Kingdom; charterers by their agents to give the captain such orders within forty-eight hours of the receipt by them of written notice of the vessel's arrival, and shall in such discharge port, as ordered, deliver the whole of her cargo as fast as the custom of the port will allow, and so end the voyage. The parties of the first part agree to pay to the parties of the second part for freight of the vessel on a true and right delivery of the cargo in a safe port in the United Kingdom, according to the bills of lading and charterparty for each and every ton of 20 cwt. gross at the rate 62s."

1878

Fowler v. Knoop.

Gildemeister & Co. shipped 5,290 bags of nitrate of soda on board the *Claudine*, for which the master on the 19th of November signed a bill of lading as follows: "Shipped in good order and condition by Gildemeister & Co. on board the British bark called the *Claudine*, whereof G. Jamieson is master, now lying in the port Iquique and bound for Queenstown or Falmouth for orders, 5,290 bags of nitrate of soda, weighing 15,586 quintals . . . and are to be delivered at the port of her final destination (the act of God, &c., excepted) unto W. Berkefeld & Co., London, or to their assigns, he or they paying freight for the goods as per charterparty and average accustomed."

On the 27th of September, 1875, a copy of the charter was sent by Gildemeister to the defendant, and on the 13th of October Gildemeister drew a bill of exchange on the defendant for *£5,000 at ninety days' sight against the cargo, and also forwarded to them the bill of lading. On the 26th of November the defendant sold the cargo by the *Claudine* to be delivered at a safe port to the London Banking Association, who sold it to H. Bath & Co., who subsequently sold it to Gibbs & Co.

The *Claudine* sailed on her voyage, and on her arrival at the port of call was ordered to proceed to Plymouth; she arrived at the Great Western Docks at that port on the 7th of April, 1876. On the 8th of April, 1876, she was ready to discharge her cargo, the delivery of which began on that day, and was completed on the 27th of April, 1876. The cargo was delivered to Gibbs & Co. under delivery orders signed by the defendant. Gibbs & Co. never had the bill of lading indorsed to them, the defendant having sold the cargo before he received the bill of lading.

On these facts the jury found, in answer to questions left to them by the learned judge, that the defendant had taken an unreasonable time to discharge the vessel, and that there was no special custom of the port as to the rate and time at which cargo should be delivered, and they assessed the damages at £52 10s.

The learned judge reserved the case for further consideration, and decided that, notwithstanding the provisions contained in the charterparty as to discharging the vessel, there was a contract by the defendant, the consignee, under the bill of lading to take delivery of the cargo, and that the shipowner, the plaintiff, could sue the defendant for not taking delivery of it; and that this liability to take delivery arose as against the defendant by virtue of the Bills of

Lading Act, 1855 (18 & 19 Vict. c. 111), s. 1⁽¹⁾, and directed judgment to be entered for the plaintiff for £52 10s.

The defendant appealed.

Nov. 15. *Butt*, Q.C., and *J. C. Mathew*, for the defendant: First, it is quite clear that under the bill of lading there is no express contract to pay demurrage. Here there is a charterparty, and it *is the guiding instrument [302 between the shipper and the shipowner; there being an express stipulation in the charterparty as to the mode of unloading, no contract as to this can be implied in the bill of lading. If the charterparty had specified a certain number of days to unload, and the bill of lading had been silent or had stipulated for something different, the binding contract would have been that to be inferred from the charterparty. In ordinary cases the charterparty does contain the time allowed for unloading, and the charterparty must be the ruling document. If the charterparty mentioned twenty days for unloading and the bill of lading was silent as to the time, and ten days was a reasonable time in which to unload, could it be said that the law would imply a quicker rate of discharge than that mentioned in the charterparty? The court, therefore, cannot imply from the bill of lading a term by the defendant, that he shall accept delivery within a reasonable time. Suppose A. charters a ship and stipulates she shall be discharged in twenty days; because he indorses the bill of lading does a different contract arise to unload the vessel? If the plaintiff is held to be entitled to recover, it will follow as matter of law that wherever there is a bill of lading in this form which has been transferred either to a consignee or an assignee, whether or not a charterparty exists, a contract by him to accept delivery within a reasonable time must be always implied. Secondly, it is for the plaintiff to show that the defendant is a consignee within the Bills of Lading Act, 1855. That act has no application to the present case, because "consignee" means a person who has the property in the goods vested in him. What the statute contemplates is, that the rights and liabilities under the bill of lading are to pass to those who have the bill of lading and the property in the goods at the same time. Here the defendant had sold the goods before he re-

(1) By 18 & 19 Vict. c. 111, s. 1: "Every consignee of goods named in a bill of lading, and every indorser of a bill of lading to whom the property in the goods therein mentioned shall pass, upon or by reason of such consignment or indorse-

ment, shall have transferred to and vested in him all rights of suit, and be subject to the same liabilities in respect of such goods as if the contract contained in the bill of lading had been made with himself."

1878

Fowler v. Knoop.

ceived the bill of lading, and Gibbs took delivery under a delivery order. The defendant is not a consignee within the Bills of Lading Act. In *Smurthwaite v. Wilkins* (*) it was held that the assignee of a bill of lading is liable on it only until he parts with it; here the defendant had sold the goods represented by the bill of lading, and he was only the nominal holder, therefore the principle of that case applies. 303] *Further, the Bills of Lading Act, 1855, does not apply to cases where there is a charterparty.

November 16. *Cohen, Q.C.*, and *Wood Hill*, for the plaintiff: This case strongly resembles *Domett v. Beckford* (*). In each case the defendant's goods were shipped, and carried to the port of discharge for his advantage, and it is only right that he should pay a consideration for the benefit thus accruing to him. The shipowner, no doubt, is bound to discharge within a reasonable time after arrival, and the consignee is bound by a correlative duty to accept delivery within a reasonable time, for the unloading of a vessel imposes concurrent liabilities upon both shipper and shipowner, *Ford v. Cotesworth* (*); and this obligation the consignee is bound to perform, although before he can take delivery it is necessary for him to obtain the authority of the governing powers at the port: *Hill v. Idle* (*). The bill of lading is the contract under which the goods are shipped, per Blackburn, J., in *Fraser v. Telegraph Construction Co.* (*). The provision in the charterparty as to unloading has no effect, and may be considered as insensible, and the charterparty cannot vary the implied contract in the bill of lading which was that the ship should be discharged within a reasonable time.

Formerly, although the property in goods might pass upon a transfer of the bill of lading, yet the terms of the contract were not transferred, but under the Bills of Lading Act the contract for the carriage of the goods is to be deemed to have been made with the consignee. If, therefore, there is a breach, the shipowner is entitled to sue him on the contract. This case falls within the very words of the Bills of Lading Act, 1855, s. 1.

Nov. 19. *Butt, Q.C.*, in reply.

Curr. adv. vult.

Dec. 10. The judgment of the Court (Bramwell, Brett, and Cotton, L.JJ.) was delivered by

(*) 11 C. B. (N.S.), 842; 31 L. J. (C.P.), 215.

(*) 5 B. & Ad., 521.

(*) Law Rep., 4 Q. B., 127.

(*) 4 Camp., 327.

(*) Law Rep., 7 Q. B., at p. 571.

BRAMWELL, L.J.: The defendant contended that as the charterparty contained a clause providing that the cargo should be *delivered as fast as the custom of the port 304 would allow, the bill of lading and the implied contract in it to deliver within a reasonable time, were not binding upon him; for the bill of lading was to be read subject to the terms of the charterparty, and that the meaning of the parties was to be gathered from the two documents. The plaintiff disputed this view. We do not think it necessary to determine which of these contentions is correct, for the plaintiff further contended that under the circumstances of this case, he was entitled to succeed, because the charterparty did not vary the implied contract contained in the bill of lading, and we are of that opinion. The implied contract is that the ship shall be discharged within a reasonable time, and the charterparty stipulates that the custom of the port shall be observed. The jury have found that there was no custom, and therefore, even under the charterparty, reasonable dispatch should be used. The defendant, in any point of view, committed a breach of the contract for shipment, when the plaintiff's vessel was detained for more than a reasonable time. It was also contended that the defendant, at the time of discharge, was not a consignee within the Bills of Lading Act, 1855, because he had parted with the beneficial interest in the cargo. He had sold the goods, the property in which had ultimately rested in Gibbs & Co.; but I think the facts fall within the provisions of the statute. As against the plaintiff, the defendant retained all the rights of owner; he gave a delivery order for the cargo, by force of which the cargo was obtained by Gibbs. I think he was a consignee within the meaning of the Bills of Lading Act, 1855.

Judgment affirmed.

Solicitors for plaintiff: *Stibbard & Cronshay.*

Solicitors for defendant: *A. Crump & Son.*

[4 Queen's Bench Division, 305.]

April 2, 1879.

305] *THE QUEEN, on the prosecution of HINTON, Appellant; THE SWINDON NEW TOWN LOCAL BOARD, Respondents.

Public Health Act, 1875 (38 & 39 Vict. c. 55), ss. 150, 257—Expense of sewerage and paving Street—Liability of Owner of Premises—Change of Ownership before completion of Works—Owner "in default."

Under the Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 150, which enables the urban authority to give notice to the owners of premises abutting upon a street (not being a highway repairable by the inhabitants at large), to sewer, level and pave it, and upon default to execute the works and recover the expenses from the owners in default, according to the frontage of their respective premises, such expenses cannot be recovered from any one who, though the owner of premises when notice was first given by the urban authority, has ceased to be owner before the completion of the works.

UPON appeal to the Wiltshire Sessions against an order of justices for the payment by the appellant of £27, 19s. 4d., being the amount of certain expenses incurred by the respondents under the Public Health Act, 1875⁽¹⁾; the sessions quashed the order subject to a case, of which the following is the material part.

(¹) 38 & 39 Vict. c. 55, s. 150. Where any street within any urban district (not being a highway repairable by the inhabitants at large) or the carriage-way, footway, or any other part of such street, is not sewered, levelled, paved, metalled, flagged, channelled, and made good, or is not lighted to the satisfaction of the urban authority, such authority may, by notice addressed to the respective owners or occupiers of the premises fronting, adjoining, or abutting on such parts thereof as may require to be sewered, levelled, paved, metalled, flagged, or channelled, or to be lighted, require them to sewer, level, pave, metal, flag, channel, or make good, or to provide proper means for lighting the same within a time to be specified in such notice. . . . If such notice is not complied with the urban authority may, if they think fit, execute the works mentioned or referred to therein; and may recover in a summary manner the expenses incurred by them in so doing, from the owners in default, according to the frontage of their respective premises, and in such proportion as is settled by the surveyor of the urban authority or (in case of dispute),

by arbitration in manner provided by this act; or the urban authority may, by order declare the expenses so incurred to be private improvement expenses.

Sect. 257. Where any local authority have incurred expenses for the repayment whereof the owner of the premises for or in respect of which the same are incurred is made liable under this act or by any agreement with the local authority, such expenses may be recovered together with interest at a rate not exceeding five pounds per centum per annum from the date of service of a demand for the same till payment thereof, from any person who is the owner of such premises when the works are completed for which such expenses have been incurred, and until recovery of such expenses and interest the same shall be a charge on the premises in respect of which they were incurred. In all summary proceedings by a local authority for the recovery of expenses incurred by them in works of private improvement, the time within such proceedings may be taken shall be reckoned from the date of the service of notice of demand.

*The respondents, who were the urban sanitary authority of Swindon New Town, on the 22d of March, 1875, gave the appellant notice that his premises fronted upon part of a street which was not levelled, channelled, curbed, sewered, and lighted to their satisfaction, and requiring him to execute the necessary works within twenty-eight days. Upon his default, the board made an agreement with a contractor for the completion of the works, but the whole were not completed till the 16th of May, 1876. On the 21st of June, the appellant received notice that the amount of the expenses had been apportioned between him and the owners of the adjoining premises according to the frontage, and stating the proportion payable by him, and on the 13th of December he received notice of demand of the amount, after which the order appealed against was made. It appeared that at the time when the works were completed, the appellant was not the owner of the premises nor the person receiving the rent for them, one Deacon, having purchased them from him, and having since May, 1876, been rated in respect of them. [306

J. W. Mellor, Q.C. (G. P. Goldney, with him), for the appellant: There is no liability to the expenses in question until the works are completed and demand made. The demand is to be made upon the person who is at the time owner of the premises, that is, the person who derives benefit from the works in respect of which the payment is required.

[He was then stopped.]

A. Charles, Q.C. (Ravenhill, with him), for the respondents: The argument as to benefit is inapplicable, inasmuch as the owner who disposes of the premises obtains a larger price for them on account of the improvements which are in progress. "Owner in default," must be taken to mean the owner who has failed to comply with the notice. The succeeding owner has not failed to comply with it. It is to be observed that the Public Health Act, 1875, [307 is merely a re-enactment of two previous acts, 11 & 12 Vict. c. 63, and 21 and 22 Vict. c. 98. The first act, 11 & 12 Vict. c. 63, contains in s. 69, a precisely similar provision as that in s. 150, of the Public Health Act, 1875. But it is clear that under the earlier act, "owner in default," did not mean owner when the works were completed, for subsequently, in 21 & 22 Vict. c. 98, s. 62, a provision identical with that in s. 257, of the act of 1875, is inserted, making the owner, when the works are completed, liable, which, if the appellant's construction is correct, was wholly unnecessary. The Legislature intended that there should be a

cumulative remedy against the past and the present owner, as under the Metropolis Management Acts, which are in *pari materia*: *The Vestry of Bermondsey v. Ramsey* (').

Mellor, Q.C., in reply.

COCKBURN, C.J.: I think there cannot be the slightest doubt that common sense and justice require that, where the person to whom the notice was given—the then owner of the premises—has adopted the alternative which the statute gives him of leaving the local authority to do the work instead of doing it himself, and has afterwards ceased to be the owner, he cannot under the 150th section be deemed to be an “owner in default,” at the time when the money becomes due to the local authority by reason of the work having been executed. The 257th section, which at first seemed to me to throw a difficulty in the way of Mr. Mellor’s argument, I think may be brought in to supplement what would otherwise be a different state of things if the 150th section stood alone. We have the words “owner in default,” that is to say, the person who as owner is required to do the work, and is in default by reason of not having done it, but it must be a person who continues to be owner at the time the work is completed, and when the money laid out upon it is demanded from him. I cannot think it was ever intended by the Legislature that when the owner has parted with his property, and somebody else is in possession of it, and therefore getting the benefit of the work done, and who ought therefore to pay the expenses incurred; it should be 308] competent for *the local authority to follow him up wherever he may have gone, and hold him personally liable. I think that defect is remedied by the 257th section, which treats owners upon whom notice was originally served, and who are the owners at the time the work is completed, and the expenses demanded, as the persons upon whom the local board shall be able to come for the expenses. I cannot suppose it was intended that both should be liable—the owner who made default originally in not doing the work, and the owner who is the person who has become the owner at the time the work is completed. What was meant was this; if the owner who is called upon to do the work and who makes default in doing it, continues the owner at the time the work is executed and when the money laid out upon it is demanded, then he is liable under the 150th section, but if in the meantime he has ceased to be owner, he cannot be said to be the owner in default at the time the money is demanded, and when another has stepped into his shoes and

(') Law Rep., 6 C.P., 247; 6 Eng. R., 205.

become the owner. I think that in that way the different provisions relating to this work and the payment for it may be brought into harmony, and as I said before, common sense and justice will be sufficiently satisfied, because the person who gets the permanent benefit of the work will be called upon, as he ought to be called upon, to contribute towards the expenses that are incurred upon the work.

MELLOR, J., concurred.

Order confirmed.

Solicitors for appellant: *Clarke, Woodcock & Ryland.*

Solicitor for respondents: *W. Moon*, for Townsend.

[4 Queen's Bench Division, 313.]

April 25, 1879.

***THE PHARMACEUTICAL SOCIETY OF GREAT BRIT- [313
AIN V. THE LONDON AND PROVINCIAL SUPPLY ASSOCIA-
TION, Limited.**

Pharmacy Act, 1868 (31 & 32 Vict. c. 121), ss. 1, 15—Corporation acting as Chemist and Druggist—Liability to Penalties—"Person."

In sects. 1, 15, of the Pharmacy Act, 1868 (31 & 32 Vict. c. 121)—which prohibit under a penalty any person, not being a duly registered pharmaceutical chemist, &c., from keeping open shop for the sale of poisons or using the name of chemist or druggist . . . —the word "person" includes a corporation, and the penalty may be recovered from an incorporated company for keeping a chemist's shop as described in the act, although the business of such shop is managed by duly registered chemists as servants of the company.

APPEAL by the plaintiffs from the decision of the judge of the Bloomsbury County Court in an action for a penalty under 31 & 32 Vict. c. 121. The facts are fully stated in the judgment of Cockburn, C.J.

*March 5; April 5. *Sir J. Holker, A.G. (Lumley [314 Smith with him]*, for the plaintiffs: The fact that the defendants are a corporation does not exclude them from the operation of the act. The word "person," in ss. 1, 15, ought to have its natural legal meaning, which includes "corporation": 2 Inst., p. 722. And although in some acts of Parliament the interpretation clause expressly makes the word "person" include corporation, this does not prove that *prima facie* the word would not have the same meaning, the clause being usually inserted to leave no room for doubt. The mischief which the act meant to provide against was the selling of poison by unqualified persons, but to exclude

corporations from its restrictions will prevent it from having full effect.

A. Wills, Q.C. (Finlay with him), for the defendants: There is no ground for inferring that the Legislature, by 31 & 32 Vict. c. 121, intended to prevent a corporation from carrying on the business of chemists and druggists; Apothecaries Hall and other corporations having always carried on such business. The word "person" does not *prima facie* include a corporation. If the Legislature had meant to include corporations within the scope of the act, they would have made special provisions with regard to them, whereas under the plaintiff's construction corporations will be prevented from carrying on the business of chemists and druggists altogether. He referred to 7 & 8 Geo. 4, c. 28, s. 14.

Lumley Smith, in reply.

Cur. adv. vult.

April 25. The following judgments were delivered.

COCKBURN, C.J.: This was an appeal from the decision of the judge of the Bloomsbury County Court, in favor of the defendants, in an action brought in that court by the plaintiffs to recover from the defendants a penalty under 31 & 32 Vict. c. 121, for having sold poisons, and kept an open shop for the sale of poisons in contravention of that act.

By the 1st section of the statute it is enacted that, "It shall be unlawful for any person to sell or keep open shop for retailing, dispensing, or compounding poisons, or to assume or use the title chemist and druggist, or chemist or druggist, or pharmacist, or dispensing chemist, or druggist, 315] in any part of Great Britain, *unless such person shall be a pharmaceutical chemist, or a chemist and druggist within the meaning of this act, and be registered under this act." And by the 15th section, "any person who shall sell or keep an open shop for the retailing, dispensing, or compounding poisons, or who shall take, use, or exhibit the name or title of chemist and druggist, or chemist or druggist, not being a duly registered pharmaceutical chemist, or chemist or druggist, or who shall take, use, or exhibit the name or title of pharmaceutical chemist, pharmacist, or pharmacist, not being a pharmaceutical chemist, shall for every such offence be liable to pay a penalty or sum of five pounds, and the same may be sued for, recovered, and dealt with, in the manner provided by the Pharmacy Act for the recovery of penalties under that act." By the Pharmacy Act (15 & 16 Vict. c. 56), s. 12, the penalty recoverable under that act is to be recovered in England or Wales "by

plaint under the provisions of any act in force for the more easy recovery of small debts and demands."

The defendants are a company registered under the Companies Act, 1862 and 1867, as a limited company, with a nominal capital of £10,000, divided into 1,000 shares of £10 each. Of these, one William Mackness holds 564 shares fully paid up. Six persons (one of whom was Henry Edward Longmore) hold five shares, with £2 10s. paid on each share. Three persons hold one share each, with £2 10s. paid on each share; the remaining shares are unallotted.

The defendants' company was registered on the 29th of January, 1878, and was formed "to purchase or acquire the trade or business of a wholesale and retail grocer and general warehouseman," then carried on by William Mackness at 113 Tottenham Court Road. Mackness is the managing director of the company. He is not a duly registered pharmaceutical chemist, or chemist and druggist, within the meaning of the Pharmacy Act, 1868. Henry Edward Longmore is a pharmaceutical chemist, or chemist and druggist, within the meaning of the act, but no other shareholder is so.

The business of the company is carried on, as that of Mackness was before the company was formed, at 113 Tottenham Court Road, and includes, amongst other departments for the sale of *various goods, a chemist's and [316 druggist's shop or drug department, which is an open shop for the retailing, dispensing, and compounding poisons, within the meaning of the Pharmacy Act, 1868.

Longmore, as has been stated, is, and at the time of the sale of the poisons in question was, a duly registered chemist and druggist within the Pharmacy Act, 1868, and the business of the drug department was conducted by him with the aid of two qualified assistants. He, with the two assistants, attended regularly to the drug department, and to nothing else. He and his assistants were the servants of the company, and were paid by salary or wages.

Upon this state of facts, the question presents itself whether the defendants' company, as such, is amenable to the penal enactments of the statute. It was fully admitted on the argument, nor could it be contested, that if this had been an ordinary partnership, the individual partners—at all events, such of them as were not qualified under the statute—would have incurred the penalties it imposes. The intention of the Legislature appears clearly to have been to prevent any shop or establishment to exist for the sale of poisons, except under the immediate superintendence and

control of a duly qualified proprietor. It is not enough that the proprietor employs a qualified person to manage the business. The master must himself be duly qualified. Two parties could not combine to carry on the joint business of grocer and chemist, though the one attending to the latter department of the business might be a qualified chemist. There would be nothing to insure in such a case that in the absence of the qualified partner, the other might not take upon himself to act in his stead, and thus the security against future mistakes in the dispensation of medicines, which the statute was intended to insure, might be seriously compromised.

The defendants are therefore within the scope of this legislation. The case comes within the evil against which the statute was intended to provide a remedy. But they are said not to be within the statute as being an incorporated company; the main ground on which this contention rests being that the act in question, in its prohibitory as well as penal clauses, uses the term "person," a term which it is contended cannot be properly applied to a corporate body.

317] *The objection thus founded on the use of the word "person" in the penal clauses of the act would seem at first sight, to present some difficulty; but, when the scope and purpose of this legislation are taken into account, the difficulty does not appear to be insuperable.

Reliance was placed by the Attorney-General in his argument, in support of the appeal, on the enactment of the 14th section of 7 & 8 Geo. 4, c. 28, that whenever any statute relating to any offence whether punishable by indictment or summary conviction, in describing the offence or the offender uses words importing the singular number or the masculine gender only, it shall be understood to include several matters as well as one matter, several persons as well as one person, males as well as females, and bodies corporate as well as individuals, unless it be otherwise specially provided, or there be something in the subject or context repugnant to such construction. But that act is expressly confined to proceedings on indictment or summary conviction, and therefore cannot apply here, where the proceeding is by civil action. It shows no doubt, the disposition of the Legislature to include corporations under the general designation of "person" or "individual" in penal statutes. But the terms of the act will not admit of its application to the present case.

To solve the question we must therefore confine our attention to the statute itself on which this action is brought.

That an incorporated company is within the mischief against which the legislation was directed is, I cannot help thinking, quite obvious. If a company, by reason of its being incorporated, is not within the provisions of the act and amenable to its penalties, and effect is to be given to the argument of Mr. Wills, it necessarily follows that such a company might openly carry on the business of chemists and druggists, and sell poisons, without a single member of the company, or even the person employed to conduct this portion of their business, being qualified. The person actually selling the poisons might be amenable—and it was probably with a view to avoid this that in the present instance a qualified person was employed to manage this department of the defendants' business—but the company employing him would enjoy complete immunity. A person desiring to combine the business *of a chemist and druggist with [318 that of a grocer would have only to get one or two persons to join him, providing them with a share or two, as appears to have been done in the formation of this company, and so forming an incorporated company, to set the statute at defiance. It cannot be supposed that the Legislature can have contemplated a result so entirely at variance with the policy and purpose of the act, or intended to place incorporated companies on a different footing in this respect from that of ordinary partnerships or individuals.

It is no doubt possible that, although joint stock companies existed at the time this statute was passed, the formation of such companies for the purpose of combining trades hitherto carried on singly—and among other things for that of superadding the business of the chemist to that of the grocer or provision merchant—may not have been present to the minds of those who framed and passed this statute. Still, if the case, although unforeseen, is within the mischief which the Legislature had in view, and the enactment is large enough to embrace it without any forced or strained construction being put on the language of the act, it is our duty to advance the remedy intended to be afforded.

It is true that the term used in the 1st section of the act is "person," and that, ordinarily speaking, this word would not be applicable to a corporation. But when the meaning and effect of the enactment is looked at without too close an adherence to its precise phraseology, it amounts to no less than a general prohibition to every one not qualified according to the act from dealing in poisons or carrying on the business of a chemist and druggist. The fallacy of the argument urged on behalf of the defendants is that it assumes

1879

Pharmaceutical Society v. London Supply Association.

that the prohibition is addressed to individual persons. But the provision, being universal, must extend to all persons, whether acting in an individual or corporate capacity. The defendants, it is true, in thus infringing the law, are not acting in their individual capacity, and may not—but on this it is unnecessary to pronounce any opinion—be liable individually. But in their aggregate or corporate capacity they are breaking the law; and, being in the latter capacity, as well as individually, within the prohibition, they must, if capable of being sued for it, be also amenable 319] to the penalty, and must, for this *purpose, be taken to be sufficiently persons within the meaning of the statute. The fact so strenuously insisted on by Mr. Wills, that in other sections of the act the word “person” is applicable to individual persons only, and not to a corporate body, only tends to show that the adoption of the business of chemists and druggists by incorporated companies like the present was not contemplated when the act was passed. It by no means shows that—the prohibition being general, and the mischief clearly within the statute, the company, though as such they may be incapable of complying with some of its requirements—as, for instance, to undergo examinations under s. 6—ought not to be held to be within the penal clauses of the act, or should be allowed openly to break the law under the belief that they are beyond its reach.

In the present case, it so happens that a member of the company, and who manages the chemical department of its business, Mr. Henry Edward Longmore, is a qualified chemist. But it is not as a member of the company that he so acts, but as the paid servant of the company. It is clear, therefore, that his being qualified will not exonerate the other members of the company who are not so. Nor would it be otherwise even if it were as a member of the company that he so acted. So long as any of the company are disqualified, the body is disqualified; and the one who, though himself qualified, acts for the body becomes a party to their offence, and becomes liable conjointly with them. The qualified chemist who, in partnership with a grocer, carried on the business of grocer and chemist, would be as liable to the statutory penalty, as his unqualified partner.

The county court judge was therefore wrong in holding that, because the chemical department of the defendants' business was managed by a qualified person, the defendants were not liable to the penalty.

Being thus of opinion that a company though incorporated is none the less within the prohibition of the statute, I come

to the remaining question whether such a company is capable of being sued for the penalty provided by the 15th section.

Upon this point the authorities referred to by the Attorney-General in his argument appears to me to afford a satisfactory answer. Although it is true that a corporation cannot be indicted *for treason or felony, it was es- [320
tablished by the case of *Reg. v. Birmingham and Gloucester Railway Company* (1), that an incorporated company might be indicted for nonfeasance in omitting to perform a duty imposed by the statute—such as that of making arches to connect lands severed by the defendants' railway. It was further held in *Reg. v. Great North of England Railway Company* (2), that an incorporated company could be indicted for misfeasance—as in cutting through and obstructing a highway though they could not be indicted for treason, or felony, or offences against the person.

In the present instance we are dealing not with an indictment or information but with an action in a civil court. Though the sum to be recovered is no doubt a penalty for the infraction of the statute, the means to be resorted to for its recovery are of a purely civil character.

If a corporation can be indicted for misfeasance, I am wholly at a loss to see why it may not be proceeded against in a civil suit for the recovery of a penalty which it has incurred by disobedience of a statutory prohibition.

I am therefore of opinion that this appeal must be allowed, the decision of the late judge of the county court reversed, and judgment entered for the plaintiffs.

MELLOR, J.: I have come with considerable hesitation to the conclusion that our judgment should be for the plaintiffs, and that both questions submitted to us must be answered in their favor.

I was for some time inclined to think that the circumstances of the defendants' case were not within the contemplation of Parliament when the Pharmacy Act, 1868, was passed, and that, although clearly within the mischief intended to be provided against, words sufficiently comprehensive had not been used in framing the act to include the acts of the defendants, and that consequently it became a *causus omissus*. A fuller consideration of the provisions of the act, 31 & 32 Vict. c. 121, has, however, brought me to the same conclusion as that expressed by my Lord Chief Justice in his judgment in this case.

I think that the great object of the Legislature was to pre-

(1) 3 Q. B., 223.

(2) 9 Q. B., 815.

321] vent *the sale of poisonous or dangerous drugs by persons not qualified by skill or experience to deal in such commodities. It therefore proposed to form into one association all persons who for the future should alone be deemed qualified to deal in the same, and who should be registered under the provisions of the act which we are now considering. It accordingly provided for the interests of all chemists and druggists who had been in business as such previously to the passing of the act, but with regard to the future, it made careful provision for the examination and registration of all persons who should in future form the only qualified body of persons who should be permitted to keep open shop for the retailing or compounding of poisons; and I now think that the sections which mainly embarrassed me as to the extent of the prohibitive sections, are really when carefully considered only the provisions regulating the steps which in future are to be taken by all persons who desire to obtain the privilege of keeping open shop, and retailing, dispensing, or compounding the poisonous drugs in question, and who, upon being registered as pharmaceutical chemists, or chemists and druggists within the provisions of the act, will become qualified so to do. To incorporate such a society to whose members in future the sole privilege of keeping open shop as chemists or chemists and druggists for the sale or dispensing or compounding poisons, should be intrusted, rendered it necessary to prohibit all other persons, not so registered or qualified, from keeping open shop or retailing, dispensing, or compounding such drugs for sale, and from assuming the title of pharmaceutical chemist, or chemist and druggist; and therefore, whilst one set of sections are qualifying and intended to regulate for the future the mode in which persons should become qualified as members of the association, and to provide for the government of the body incorporated, the sections 1 and 15 of the act, which contain the prohibitory words upon the meaning of which we have to decide, have an entirely distinct effect. The object of those sections is absolutely to prevent the danger assumed to be likely to arise to the public, by the keeping open shop for the retailing, dispensing, or compounding poisons by any persons not being qualified pharmaceutical chemists, or chemists and druggists, and the 322] intention and scope *of those sections, and the general object of the act, is absolutely to exclude, from the time of the passing of the act, all persons other than the registered members of the Pharmaceutical Society from

keeping open shop, or retailing, dispensing, or compounding of poisons.

Now, before the passing of the act of 1868, all persons whether "natural persons" or "artificial persons" constituted by incorporation for trading purposes, might either as individuals or as corporations, have kept open shop and retailed, dispensed, or compounded poisons. It was essential, therefore, to the effectuating the objects of the act, that all persons whether natural or artificial should for the future be prevented from dealing as before in the prohibited matters, and the cases cited by the Attorney-General in his argument, show that an incorporated company may commit an offence either of nonfeasance or misfeasance, and may be punished by indictment for the same, as if the act had been done by a natural person. We may well, therefore, interpret the word "person" in the 1st and 15th sections so as to include not only any natural person, but any artificial person created by the law, which would be capable of committing the offence referred to in the 15th section, as having committed it by the course of proceeding actually adopted by the defendants, and we are authorized upon the principle of decided cases to say not only that the "offence" has been committed by the defendants, but that they are liable to be punished for it under the provisions of the 15th section.

Judgment for the plaintiffs.

Solicitors for plaintiffs: *Flux & Co.*

Solicitors for defendants: *Crouch & Spencer.*

The word "person" in a statute includes a corporation, unless the contrary appears from the statute: *People v. May*, 27 Barb., 238; *People v. Utica Ins. Co.*, 15 Johns., 381-3; *United States, etc., v. Western, etc.*, 56 Barb., 47; *People v. Rector, etc.*, 22 N. Y., 44; *Olcott v. Tioga, etc.*, 20 id., 210; *Northwestern, etc., v. Hyde Park*, 8 Biss., 480; *British, etc., v. Commissioners, etc.*, 31 N. Y., 32; *Sedg. Stat. and Const. Law* (2d ed.), 372 note.

It includes the state in a statute providing for the punishment of fraud against "any person:" *Martin v. State*, 24 Texas, 61.

But a statute providing for proceed-

ings against a defendant abroad does not apply to a corporation: *Belloni v. Sydney, etc.*, 2 Nova Scotia Dec., 73.

A statute does not apply to a municipal corporation where the statute creates an offence against "any *private* person:" *Coates v. People*, 22 N. Y., 245.

See *People v. Bennett*, 57 N. Y., 117.

A corporation is not a "person" within the meaning of the act of April 15, 1857, to prevent nuisances, and therefore is not liable, as such, to be indicted and punished for violation of the provisions of said act: *State v. Cincinnati, etc.*, 24 Ohio St., 611.

1879

The Queen v. Milledge.

[4 Queen's Bench Division, 332.]

May 15, 1879.

332] *THE QUEEN on the prosecution of **G. W. BETTS & Co. v. MILLEDGE** and Others, Justices of Weymouth.

Justices of the Peace—Interest Disqualifying—Public Health Act, 1875—Town Council—Urban Sanitary Authority.

Complaint having been made to the local government board of a nuisance upon premises belonging to B., in the borough of W., the board communicated with the town council of W., who were the urban sanitary authority under the Public Health Act, 1875, and required them to abate the nuisance. The council having made inquiries, passed a resolution that steps should be taken for the removal of the nuisance, and took out a summons against B. At the hearing an order for the abatement of the nuisance was made. Two justices who were present were members of the town council when the resolution was passed:

Held, that the councillors who were justices had such an interest as might give them a bias in the matter, that consequently they ought not to have sat as justices upon the hearing of the summons, and that a rule for a certiorari to quash the order must be made absolute.

RULE calling on J. Milledge, and J. E. Robens, and others, justices of the borough of Weymouth, to show cause why a writ of certiorari should not issue to remove into this court an order that G. W. Betts & Co. should abate a nuisance.

The ground of the rule was that one or more of the justices were interested in the matter of the order.

The following facts appeared on the affidavits. Complaint having been made to the local government board of a nuisance arising from a piece of water in which were certain timber pounds belonging to G. W. Betts & Co., the board communicated with the town council of Weymouth who were the urban sanitary authority for Weymouth and Melcombe Regis, under the Public Health Act, 1875, and required them to abate the nuisance. The town council instructed a medical man to examine and report upon the matter, and after receiving his report, passed a resolution that the necessary steps should be taken against Messrs. Betts & Co. for the removal of the nuisance, which it was suggested arose from their timber pounds. A summons was accordingly taken out upon which the order in question was made. Both Milledge and Robens were members of the council when the resolution was passed, and they denied by their affidavit that they had taken active part in the proceedings. By ***the affidavits** in support of the rule it was sworn that they had taken an active part in discus-

sions on the same question. They were on the bench of justices when the summons came on for hearing, and the solicitors for the defendants objected to their sitting, on the ground that they were the prosecutors. The defence was that the nuisance was caused by the sanitary authority themselves sending the drainage of the town into the piece of water in question. The justices objected to refused to retire, and an order was made by a majority of four against two justices, the two objected to being two of the four.

G. Pitt-Lewis, showed cause: The town council were compelled to take out the summons by the action of the local government board. Such of the council as were justices had, therefore, no possible bias with regard to the proceedings. By the Public Health Act, 1875, s. 258, no justice of the peace shall be deemed incapable of acting in cases arising under the act by reason of his being a member of any local authority.

Channell, in support of the rule, was not heard.

COCKBURN, C.J.: The mere fact that some of the council who passed resolutions for this prosecution were borough justices might have been no objection to the order, if these justices had not assisted at the hearing of the summons. But I cannot see how we can get over the fact of their presence when the order was made. They practically made an order in a case where they were prosecutors. The rule must be made absolute.

MELLOR, J., concurred.

Rule absolute.

Solicitors for applicants: *Combe & Wainwright*.

Solicitors for justices: *F. J. & G. J. Braikenridge*.

See Moak's note to *Jewett v. Albany City Bank*, Clarke's Chancery Rep. (ed. 1869), pp. 188-192, and numerous authorities there cited; *Queen v. Mayer*, 16 Eng. Rep., 264.

A public company which is incorporated, filed a bill of equity against a landowner in a matter largely involving the interest of the company. The Lord Chancellor had an interest as a shareholder in the company to the amount of several thousand pounds, a fact which was unknown to the defendant in the suit. The cause was heard before the Vice-Chancellor, who granted the relief sought by the company. The Lord Chancellor, on appeal, affirmed the order of the Vice-Chancellor.

Held, that the Lord Chancellor was disqualified, on the ground of interest, from sitting as judge in the cause, and that his decree was therefore voidable and must consequently be reversed.

Held, also, that the Vice-Chancellor is, under the 53 Geo. III, c. 24, a judge subordinate to but not dependant on the Lord Chancellor, and that, consequently, the disqualification of the Lord Chancellor did not affect him, but that his decree might be made the subject of appeal to this house: *Dimes v. Grand Junction Canal*, 8 House of Lords Cas., 759; S. C. below, 2 Macnaghten & Gordon, 285.

A search warrant issued by a justice of the peace, commanding search to be made for certain property of such jus-

tice, alleged to have been stolen, is void, and the fact that the property to be searched for is the property of the justice appearing upon the face of the warrant, the warrant furnishes no protection to the constable who executes the same: *Jordan v. Henry*, 22 Minn., 245.

Where a special proceeding is pending before a county court, the county judge whereof is disqualified from acting, he cannot make an order directing it to be continued before a justice of the Supreme Court, but should make a file with the county clerk a certificate of the fact of his disqualification according to Code, § 342: *Matter of Rhinebeck*, 19 Hun, 346.

At the hearing of a summons for an offence under the fishery acts, one of the magistrates, Sir H. D. M., was interested in the decision, and sat on the bench. He stated openly in court that he should take no part in the decision of the case, but made an observation in the course of the case, that he could prove a material fact in controversy. He also remained and was present at the consultation of the magistrates. Sir H. D. M. stated that he took no part in the matter save as above stated, and that he did not vote upon the decision of the case. Held, that notwithstanding the disclaimer, he took such a part in the hearing as invalidated the conviction: *Reg. v. O'Grady*, 7 Cox's Cr. Cas., 247.

The managers of a common are disqualified from adjudicating upon a complaint for trespassing upon the common, although the penalties go into the consolidated revenue: *Regina v. Horsfall*, 4 Victorian L. R. (Law), 58.

So of a local board of health: *Regina v. Lloyd*, 1 Victorian L. R. (Law), 120.

At the time of the adjudication in bankruptcy, the circuit judge was a creditor of the bankrupt, and he afterward made the necessary proof of his claim in the usual mode. After proof of the claim, he sold and assigned his claim against the bankrupt to another creditor and received the consideration, and thenceforth ceased to have any interest in the matter. A petition by a party claiming to be a creditor, having been presented to the circuit judge under section 2 of the bankrupt act, praying a review of an order of the district court, and the proper orders to

appear having been made on the application of the petitioner when the cause was called for hearing, the petitioner's counsel raised the objection that the circuit judge was disqualified: Held,

1. That the circuit judge was not disqualified.

2. That there being no legal disqualification, and practically no other judge who could act for a long time to come, the circuit judge could not properly decline to act, on a point of delicacy, and thus obstruct or delay the due administration of justice for an indefinite period of time, to the injury of a large number of creditors: *Matter of Sime*, 2 Sawyer (U.S.), 320.

The interest which at common law disqualifies an officer from acting in a judicial inquiry must be direct and certain, and not merely remote or contingent; and the same principle must be applied to section 39 of the Lands Clauses Consolidation Act.

Where, therefore, at the time of the summoning of a jury and the taking of an inquisition before the sheriff as to the amount of compensation to be paid for land taken by a railway company under their powers of their act of parliament, there was an executory agreement not yet carried out, by which that company would ultimately become amalgamated with another railway company, and the sheriff was a shareholder in the latter company: Held, that the sheriff was not "interested in the matter in dispute" within the above section, so as to invalidate the proceedings: *The Queen v. Manchester S. & L. R. Co.*, L. R., 2 Queen's Bench, 336.

Though any pecuniary interest, however small, in the subject-matter, disqualifies a justice from acting in a judicial inquiry; the mere possibility of bias in favor of one of the parties does not *ipso facto* avoid the justices' decision; in order to have that effect, the bias must be shown at least to be real.

The corporation of B. were the owners of waterworks, and were empowered by statute to take the water of certain streams, without permission of the millowners, on obtaining a certificate of justices that a certain reservoir was completed, of a given capacity, and filled with water. An application was made to justices accordingly, which was opposed by the millowners; but

after due inquiry the justices granted the certificate. Two of the justices were trustees of a hospital and friendly society respectively, each of which had lent money to the corporation on bonds charging the corporate fund. Neither of the justices could by any possibility have any pecuniary interest in these bonds; but the security of their *cestui que trusts* would be improved by anything improving the borough fund, and the granting of the certificate would indirectly produce that effect, as increasing the value of the waterworks. There was no ground to doubt that the justices had acted *bona fide*:

Held, that the justices were not disqualified from acting in the granting of the certificate; and the court refused a *certiorari* for the purpose of quashing it: *The Queen v. Rand*, L. R., 1 Queen's Bench, 229, 7 Best & Smith, 297.

The remote and minute corporate interest which a judge of a police court has in intoxicating liquors forfeited to the city of which he is an inhabitant, does not disqualify him from taking cognizance of cases of libelled liquors seized within such city.

The legislature may constitutionally provide that such interest shall not be a legal objection to such judge's jurisdiction: *State v. Intoxicating Liquors*, 54 Maine, 564.

Where a judicial officer has not such an interest in a cause or matter as that the result must necessarily affect his personal or pecuniary interest, or where his interest is minute and he has so exclusive a jurisdiction by constitution or statute, that his refusal to act in the cause or matter will prevent any proceeding in it, he may act so far as that there may not be a failure of remedy.

The provision of the statute (2 R. S., 275, § 7) declaring that no judge shall sit in a case where he is interested, is as much affected by the necessity existing or created by the conferment of exclusive jurisdiction by another statute as is the similar rule of the common law.

Accordingly, held, that prior to the passage of the amendatory act of 1871 (§ 4, chap. 303, Laws of 1871), vesting in the county court the powers conferred by the original act upon the county judge, a county judge was not disqualified from making an order ap-

pointing commissioners under said act although it appeared by the petition that he was interested in the matter as owner of lands to be affected. The authorities as to disqualification of judges because of interest both at common law and under the statute collated and discussed: *Matter of Ryers*, 72 N. Y., 1.

The city of Marysville brought an action to abate a nuisance and for an injunction.

Defendants moved for a change of venue, on the ground, among others, of disqualification of the presiding judge to sit in the case, by reason of being an interested party. It appeared that the nuisance alleged consisted in the dumping of tailings and debris into a river from mines worked by the hydraulic process, whereby debris was deposited on plaintiff's lands, and the river was caused to overflow its banks to the injury of plaintiff; that levees had been constructed at great expense by plaintiff, and that, unless defendants were restrained, irreparable injury would follow to plaintiff. The judge of the court (respondent herein) owned land opposite the city, similarly situated, and similarly affected by the nuisance complained of, and the injunction, if obtained by the city, would relieve the lands of the judge from the evils complained of in precisely the same manner and to the same extent as if he had joined with the city as a plaintiff in the action, or had instituted a separate action in his own name against the same defendants for the same purpose. Held, that respondent was disqualified to sit in judgment in the cause by reason of interest.

It is an ancient maxim, and one founded in the most obvious principles of natural right, that no man ought to be a judge in his own cause.

Section 170 of the C. C. P. relating to disqualification of a judge, should not receive a technical or strict construction, but rather one that is broad and liberal. The court ought not to be astute to discover refined and subtle distinctions to save a case from the operation of the maxim embraced in the statute, when the principle it embodies bespeaks the propriety of its application.

The immediate rights of litigants are not the only subjects of the rule as to

disqualification of a judge. A sound public policy, which is interested in preserving every tribunal appointed by law from discredit, imperiously demands its observance: *North Bloomfield Grand Mining Co. v. Keyser*, 8 Pacific Coast L. J., 287, Sup. Court, Cal.

A judge of probate is not disqualified from granting probate of a will, approving the executor's bond, issuing letters testamentary, or accepting the resignation of the executor, by reason of the fact that one of the executors of the estate is his father-in-law, if such creditor is not a party to the proceedings before him: *Matter of Aldrich*, 110 Mass., 189.

The surveyor of the roads directed trestles to be put at intervals on either side of a road on which fresh granite had been laid, to confine the traffic to a particular part of it. A. drove his carriage against the trestles to knock them down, in alleged assertion of a right, he deeming the surveyor to have no power so to put the trestles for this object. One of the trestles was injured, and on a summons against A., under the Malicious Trespass Act, the justices convicted and fined A. 1s.

By a local act the justices were made vestrymen, and became interested in the property in the trestles and also in the fine.

Held, first, that the justices had jurisdiction to convict; and, secondly, that in order to obtain a certiorari to quash the conviction on the ground of the justices being interested, the party should show on the face of his affidavits that neither he nor his advocate before the justices knew of the objection at the time of the hearing: *Regina v. Justices, etc.*, 8 Cox, 314.

Where justices of the quarter sessions inaugurated proceedings in the name of the county treasurer against the clerk of the peace for having misdeemed himself in his office, it was held that the justices in quarter sessions being a competent tribunal to hear and determine the charge, and having determined it, they had no such interest as to disqualify them from acting as judges in the matter: *Wildes v. Russell*, L. R., 1 C. Pl., 723, 739-741, 745-6, 746-7.

In a suit by a member of a church society on behalf of himself and all other members, three of the judges in

appeal being members of the church society, they held themselves disqualified to sit as judges, except *ex necessitate*, though no objection was taken to their setting at the bar; but there not being a *quorum* without them, they heard the case with the other judges in order that a judgment, legal in point of form, might be given by the court: *Bolton v. Church, etc.*, 15 Grant's (U.C.) Chy., 450.

The fact that the commissioners to hear claims against the estate, allowed an account in favor of the judge of the circuit court in which the appeal was pending; held, not to disqualify the judge thereof from hearing the appeal, where he certified that he was not a creditor of the estate and claimed no interest in it: *Perkins v. Shadbolt*, 44 Wisc., 574.

The guardian *ad litem* is not a party to the action, and the relationship of a judge of the court, in which the action is pending, to such guardian, does not disqualify him from sitting thereon: *Bryant v. Livermore*, 20 Minn., 314.

The provisions of the Revised Statutes (2 R. S., 275, § 2), and the rule of the common law prohibiting a judge from sitting in a cause in which he is interested, apply simply to judges *eo nomine*, or to justices or other persons holding courts; they cannot be extended to administrative officers in the performance of acts requiring deliberation and sound judgment.

A commissioner of highways, therefore, is not prohibited thereby from acting in the laying out of a highway by the fact that he is the owner of lands through which the projected highway runs.

In a case where such prohibition applies at common law, the acts of the officers are not void but voidable, and the only remedy is to set the proceedings aside; neither the officer nor those acting under the authority of his decision, can be held liable therefor in an action of trespass: *Foot v. Stiles*, 57 N. Y., 399.

The governor of a colony may give his official consent to a legislative measure there in which he is individually interested: *Phillips v. Eyre*, L. R., 4 Q. B., 225, 9 Best & Smith, 343; affirmed in *Exchequer Chamber*, L. R., 6 Q. B., 1.

In *Williams v. Smith*, 6 Cow., 166,

a suit in debt for a penalty by one against the keeper of a toll gate for illegally taking toll after the gate had been ordered open by commissioners, it was held that the fact that one drawn as a juror was a stockholder in the turnpike company employing the keeper of the gate, was not a disqualification on the ground that "the company, of which he was a stockholder, are not responsible, in any event, on account of a recovery against the toll gatherer."

Where two, only, of several of the justices adjudicating upon an alleged encroachment on a highway, were also members of the shire councillors, the prosecuting body, it was held the remedy, if any, was by certiorari and not by writ of prohibition: *Matter of Scott*, 2 Victorian L. R. (Law), 70.

The statute (Gen. Statutes, tit. I, sec. 78,) provides that every decree made by a judge of probate, who is disqualified by any of the provisions of the act, shall be valid, unless an appeal shall be taken to the next term of the superior court. A judge of probate appointed A. administratrix of an estate, and no appeal was taken to the next term of the superior court. About two months thereafter the judge, finding that he was disqualified by reason of being a stockholder in a bank, which presented a claim against the estate, made a further order, reciting the fact that he was thus disqualified, and citing in a judge of an adjoining district to act in his place, and the judge so cited in appointed B. administrator: Held, 1. That the appointment of A. not having been appealed from was valid. 2. That the order of the judge reciting his disqualification and calling in another judge had no effect whatever upon the administration granted to A. 3. That the appointment of B. as administrator was of no effect, as there was no vacancy to be filled: *Ames' Appeal from Probate*, 39 Conn., 254.

Where a party stipulates by contract to be bound by the decision of the "principal engineer of the company," he is bound by his decision though he be a stockholder, no fraudulent concealment being alleged: *Ranger v. Great Western, etc.*, 3 H. L. Cas., 72.

By statute, damage done to a road by a railroad company or as to the repair thereof by them in making the railway, were to be referred to two

justices, who may "direct such repairs to be made in the state of such road, in respect of the damage done by the company, and within such period as they think reasonable, and may impose on the company, for not carrying into effect such repairs, any penalty not exceeding £5 per day, as to such justices shall seem just. Section 3 enacted that the word "justice" shall mean justice of the peace acting for the county borough, etc., or place where the matter requiring the cognizance of any such justice shall arise, and who shall not be interested in the matter. Held, 1. That the definition in section 3 did not render a justice of the peace who was interested, incompetent to act, if the party knowing that he was interested assented to his acting. 2. That the penalty for disobedience of an order to repair must be imposed by the same justices who made it. 3. *Semble*, that the objection to one of the justices on the ground of interest having been waived on the hearing of the original information, he might act in enforcing an order then made: *Reg. v. Rawson*, 6 Best & Smith, 794, 118 Eng. C. L.; S. C., 10 Cox's Crim. Cas., 162.

A justice of the peace, related within the sixth degree to one of the parties to a cause, is disqualified to take a deposition therein, and is liable in trespass for committing a witness for refusing to testify in such case: *Call v. Pike*, 66 Maine, 350.

An assignment of a partition fence by fence-viewers, one of whom is a brother-in-law of one of the owners, is void: *Conant v. Norris*, 58 Maine, 451; *Sanborn v. Fellows*, 22 N. H., 473.

The mother of a bastard child is a party to the proceedings taken under the bastardy act for indemnifying the township.

If one of the justices, making the order of affiliation, is a cousin of the mother of the bastard, the proceedings will, on certiorari, be quashed: *State v. Overseer of Walpack*, 38 N. J. Law, 200.

To exclude a judge from sitting in a cause by reason of kinship, under the provision of the Revised Statutes (2 R. S., 275, § 2), prohibiting him from sitting in any cause "in which he is interested, or in which he would be excluded from being a juror by reason of

consanguinity or affinity to either of the parties," such kinship must exist between him and some person who is actually a party; it is not enough that he is related to some person not a party who is, or may be, interested in the cause.

The fact, therefore, that a stockholder in a corporation, which is a party, is a relative of a judge within the prohibited degree, does not disqualify the judge from sitting, as the stockholder, although interested, is not a party.

Consanguinity was not a disqualification at common law: the disability rests wholly upon the statute, and cannot be extended beyond its terms.

It seems that where a judge is interested in any matter brought before him, it will be deemed a "cause" within the intent of the provision of said statute disqualifying him because of interest. But the provision disqualifying because of kinship is only applicable to a case where there are parties adverse to each other, or where some question is to be determined between two or more parties.

Upon petitions of the trustees and creditors of D. & S. M. Co., a manufacturing corporation, organized in Cayuga county, an order was granted *ex parte* appointing a receiver of said company in pursuance of the provisions of the acts relating to such corporations in Herkimer and Cayuga (§ 3, chap. 861, Laws of 1852, made applicable to Cayuga county by chap. 179, Laws of 1853), and on motion of the receiver an order was granted by the same judge directing an assessment upon the stockholders. These orders were set aside, upon the ground that the judge who granted them was related by marriage within the ninth degree to several of the stockholders of the company. Held, error: that the stockholders were not parties to the proceedings: *Matter of Dodge*, etc., 77 N. Y., 102, reversing 14 Hun, 440, commenting on *Place v. Butternuts*, etc., 28 Barb., 503, questioning *Wash. Ins. Co. v. Price*, *Hopk. Chy.*, 1, and *Footo v. Morgan*, 1 Hill, 654, and distinguishing *Baldwin v. McArthur*, 17 Barb., 415, *Rivenburgh v. Hennessy*, 4 Lans., 208.

That a judge is not disqualified from being related to a stockholder of a cor-

poration, see also *Matter of Albany*, etc., *v. Cramer*, 7 How. Pr., 164.

See *Jackson v. Rathbone*, 3 Cow., 296; *Peck v. Mayor*, 3 N. Y., 489.

When an action pending in the county court is called for trial, and it is by the consent of the parties sent to a referee to hear and determine, the fact that the county judge is disqualified from sitting, by reason of relationship, to one of the parties, does not render such order void, or the judgment entered upon the report of the referee invalid: *Bell v. Vernoy*, 18 Hun, 125.

The relationship which is formed by marriage is not dissolved by the death of one of the parties without issue, so that a husband whose wife died childless cannot afterwards act as a judge in a case to which her nephew is a party: *Beckquet v. Lempriere*, 1 Knapp P. C., 876.

Where a cause was tried by a jury before a justice, who was half-uncle to the plaintiff's wife, the relationship was held too remote to disqualify him from acting.

The relationship, to amount to a disqualification, must be so near as to afford of itself evidence of partiality and fraud: *Eggleston v. Smiley*, 17 Johns., 133.

That the defendant married the sister-in-law of the judge's wife, does not disqualify the latter from presiding: *Fort v. West*, 53 Geo., 584.

A new trial will not be granted on account of the relationship of one of the jury, provided the party had an opportunity to object at the trial and neglected to do so: 2 *Graham & Wat. New Trials*, 238; *Hilliard on New Trials* (1st ed.), 153; *Eggleston v. Smiley*, 17 Johns., 133.

Whenever the judge of a court is notified in any manner, whether by affidavit or by the mere suggestion of a party, that a cause in which he has acted as counsel is pending before him, it is his privilege, as well as his duty, to refuse to try such cause, and to set the same for trial before some other judge: *Joyce v. Whitney*, 57 Ind., 550.

The statute (Comp. L., § 4066,) forbids a circuit judge, after having called another judge to hold the court and preside at the trial, from appearing in a criminal prosecution and taking charge of the case as the assistant of the prosecuting attorney.

The fact that such judge had previously sent in his resignation, which was to take effect five days thereafter, and that he intended to act no more officially, does not affect this question. The statute is imperative, and does not depend at all upon any other circumstance than the present possession of the office.

It cannot be said that this error was one which could not injure the prisoner; or that, in legal contemplation, it could make no difference to him whether he was prosecuted by one counsel or another. Whatever is forbidden on grounds of public policy, in connection with a trial, the party concerned may except to; and the correctness of motive, the high standing and upright character of the officer concerned, cannot be considered on such an exception, and, consequently, cannot be an answer to it: *Bashford v. People*, 24 Mich., 244.

Smith, a surrogate of Cortland county, acting as attorney and counsel for the plaintiff Darling in an action against the executors of one Pierce, recovered a judgment which was entered December 28, 1871. The executors were then compelled to account before the district attorney, acting as surrogate, and a distribution of the assets was ordered, the decree being made May 17, 1872. On that day the plaintiff paid the surrogate in full for his services as attorney and counsel, and he then ceased to act as such. October 12, 1876, both executors having died, an administrator with the will annexed was appointed. On the next day plaintiff filed a petition before Smith, the surrogate, praying for a sale of the real estate of Pierce to pay the amount due on his judgment. Such proceedings were had that an order was made requiring such sale to be made.

Held, that as the surrogate had acted as attorney and counsel in recovering the judgment on which the order of sale was based, he was disqualified under section 81 of chapter 280 of 1847 from acting on the application for such sale.

Semble, that it would be improper for him to act in such case, even though there were no statute in express terms disqualifying a judicial officer from adjudicating upon a matter as to

which he had acted as counsel: *Darling v. Pierce*, 15 Hun, 542.

Representing, as attorney, a third person not a party to the suit in proceedings against a receiver in said suit, does not disqualify such person from hearing as judge the case between the parties, when the equities of such case are independent of the rights and not connected with the case of such third person: *State v. Jacksonville, etc.*, 15 Florida, 201.

A counsel in a cause being afterwards raised to the bench is not thereby precluded, at common law, from taking part in the hearing and discussion of that cause; but he may properly (unless his doing so would entail great inconvenience and expense on the parties, or perhaps from his being, as in chancery, the sole judge of the court, amount to a denial of justice,) decline to take part in such hearing and decision: *Thellusson v. Rendleshaw*, 7 H. L. C., 429.

At common law the recusation of a judge, except in special cases, does not affect the jurisdiction, but is merely a ground to set aside the verdict on error or appeal.

Hence when any cause of recusation or exception to a judge exists, such as that he is interested in the result of a suit, or is related to the parties, or has been of counsel, his acts and proceedings as judge, though erroneous, are ordinarily voidable only, and not absolutely void.

In such a case the jurisdiction may be prorogued, or the exception waived by the party proceeding with the prosecution or the defence, after full knowledge of the existence of just ground of recusation, without making objection.

The acts of a judge of probate are absolutely void in cases in which he is forbidden by statute to sit or act as judge, and in cases where his jurisdiction over a case is, for special reasons conferred upon another judge.

Where a judge of probate acts as counsel in a cause in which he also acts as judge, his acts as judge are not, under our statute, absolutely void, but voidable on appeal: *Stearns v. Wright*, 51 N. H., 600.

The jurisdiction of a magistrate to try an action under the Gen. Sts., c. 187, for possession of land, which the plain-

1879

Langdon v. Howells.

tiff claims by virtue of a written lease from the owner, is not ousted by the fact that, some days before the action was begun, the magistrate drew the lease and a month before wrote a notice from the owner to the defendant to quit the premises, or by the fact that he was the only subscribing witness to the lease: *Cook v. Berth*, 102 Mass., 372.

Under the new constitution of this State, it is the right and the duty of a judge of the Court of Appeals to take part in the determination of causes brought up for review from a subordinate court, of which he was a member, and in the decision of which he took part in the court below: *Pierce v. Delamater*, 1 N. Y., 17.

[4 Queen's Bench Division, 387.]

May 17, 1879.

337] *LANGDON, Appellant; HOWELLS, Respondent.

Railway Company—Travelling without having previously paid Fare—Intent to avoid Payment of Fare—Railways Clauses Consolidation Act, 1845 (8 Vict. c. 20), s. 103.

The respondent who was travelling on the G. W. Railway in a train going to N. produced the "forward half" of a tourist return ticket from L. to N. and back. This ticket had been originally issued to another person and was stated on the back thereof to be not transferable. The original taker had used the ticket as far as H. on the way from L. to N., but then proceeded on a different route and, consequently not having given up the forward half of the ticket, sold it to the respondent who was travelling with it between H. and N.:

Held, that the respondent was liable to be convicted under 8 & 9 Vict. c. 20 s. 103, for travelling without having previously paid his fare with intent to avoid payment thereof.

CASE stated by justices under 20 & 21 Vict. c. 43.

A complaint had been preferred by the appellant against the respondent under section 103 of 8 Vict. c. 20, for that the respondent on the 10th day of November, 1878, at the parish of Neath, in the borough of Neath, in the county of Glamorgan, unlawfully did travel in a certain, that is to say, 338] a third class *carriage belonging to the Great Western Railway Company, without having previously paid his fare, and with intent to avoid payment thereof contrary to the statute in such case made and provided.

It appeared that the respondent was travelling in a down train which arrived at Neath, and on being asked for his ticket there he produced the forward half of a tourist return ticket which had originally been issued at Ludlow for New Milford, but not to the respondent. He stated to the ticket examiner that he took the ticket at New Milford, but that they had collected the wrong half at Ludlow. The respondent was allowed at the time to go on to New Milford, but afterwards the complaint was preferred. It was subsequently admitted by the respondent that he had given 3s. for the forward half of the ticket so produced by him to the man who had originally taken the ticket, but who it appear-

ed having used it from Ludlow to Hereford had then travelled via Hay and Brecon to Cardiff, and consequently had not given up the forward half of the ticket. It appeared that the tourist tickets had the words "not transferable" printed on the back.

One of the two magistrates who heard the complaint was in favor of convicting the respondent, but the other was of the opposite opinion, and considered that it was not necessary for a railway traveller personally to pay his fare, and that as it was proved: first, that the proper fare had been paid in the first instance for the ticket with which respondent was found travelling though not by respondent himself; secondly, that travellers holding tourist tickets were allowed to break their journeys; thirdly, that respondent was still travelling on a part of the line for which the half ticket was at all events available for the use of the person to whom it was issued (it having been issued on the 28th of September and in force for two months); he was not liable to be convicted of an offence under the section above mentioned, and that although the words "not transferable" were printed on the back of the railway ticket the holder of a transferred ticket ought not to be treated as guilty of a fraud under the act of Parliament, but should either have been proceeded against by a civil action or at most for a breach of some by-law of the company under which possibly the indorsement of the words "not transferable" was made.

In the result the magistrates dismissed the complaint. The *question for the court was whether the com- [339
plaint was rightly dismissed, and if not the case was to be remitted to the magistrates.

C. S. C. Bowen, for the appellant, contended that the magistrates ought to have convicted the respondent. He cited *Bentham v. Hoyle* ⁽¹⁾; *Dæarden v. Townsend* ⁽²⁾.

No counsel appeared for the respondent.

COCKBURN, C.J.: I think that the case comes within the provisions of the statute. It is not a case of a single ticket taken by A., but which A. being unable to use it hands over to B., a case which possibly might admit of different considerations. The ticket was a return ticket which the company issues at a cheaper rate because they find it advantageous to issue tickets to persons intending to return at a cheaper rate. If it is given by the original taker to a person who seeks to use it for a single journey, and so to travel at the cheaper rate for such journey, it seems to me clear that such

⁽¹⁾ 3 Q. B. D., 289.

⁽²⁾ Law Rep., 1 Q. B., 10.

1879

Atwood v. Sellar.

person does travel without having previously paid his fare with intent to avoid payment thereof within the meaning of the act. The case must be remitted to the magistrates.

MANISTY, J., concurred.

Judgment for appellant.

Solicitor for appellant: *R. R. Nelson.*

See *ante*, p. 268 note.

The right of a railroad company to make reasonable rules for its own protection and for the safety and convenience of passengers has been frequently recognized.

A passenger who voluntarily leaves his proper place in the passenger car of a railroad, in violation of the rules of the company, to ride in the baggage car, or other known place of danger, and is injured in consequence of such violation, cannot recover damages therefor.

It seems this would not apply to an accident, the result of a brief visit to the baggage car to give some needed directions about a passenger's baggage to have it re-checked, or for any other legitimate purpose; but to a person who rides in a baggage car in violation of a known rule of the company and who is injured in consequence of such violation.

Where the rule of a company is intended for the safety of passengers, the

company will be relieved from responsibility if it be shown that an injury was received in consequence of a violation of the rule, and this notwithstanding the fact the negligence of the company's servant was the cause of the accident.

A conductor of a railroad train cannot, in violation of a known rule of the company, license a man to occupy a place of danger so as to make the company responsible.

A conductor cannot waive a rule which, by its very terms, he is commanded to enforce. He may neglect to enforce it, and where the rule is a mere police arrangement of the company, such neglect may, perhaps, amount to a waiver as between the passenger and the company. But when the rule is for the protection of human life, the case is different: *Penn. R. R. v. Langdon*, 92 *Penn. St. R.*, 21, distinguishing *O'Donnell v. Allegheny*, 59 *id.*, 239; *Creed v. Penn. R. R. Co.*, 86 *id.*, 139.

[4 Queen's Bench Division, 342.]

March 4; May 17, 1879.

342] *ATWOOD and Others v. SELLAR & Co.

Ship and Shipping—General Average—Practice of Average Adjusters—Putting into Port of Refuge to repair—Expense of reshipping Cargo and leaving Port of Refuge.

A ship on her voyage with cargo to Liverpool encountering severe weather, the foretopmast had to be cut away and in its fall caused other damage to the ship, which was thereby compelled to put into port to repair. In order to effect the repairs, and to enable the ship to proceed on her voyage, it was necessary to discharge a portion of the cargo, and expense was incurred in landing and warehousing it. The repairs having been effected expense was incurred in reshipping such portion of the cargo. Further expense was incurred for pilotage and other charges in respect of the ship's leaving the port of refuge and proceeding upon her voyage. The ship ultimately reached her destination in safety. It has been for from seventy to eighty years the practice of English average adjusters in adjusting losses where ships have put into port to refit, whether such putting into port has been occasioned by a general average sacrifice, or a particular average loss, to treat the expense of discharging the cargo as general average, but the expense of warehousing

it as particular average on the cargo, and the expense of reshipment of the cargo and pilotage, port charges, and other expenses incurred to enable the ship to proceed on her voyage as particular average upon the freight. The owners of the ship claimed to have the above mentioned expenses of warehousing and reshipment of cargo, and the pilotage and other expenses of leaving the port, treated as matter of general average, and sued the owners of the cargo for contribution in respect thereof:

Held (by Cockburn, C.J., and Mellor, J., Manisty, J., dissenting), that the plaintiffs were entitled to recover on the ground that the expenses were all incurred in furtherance of the common purpose of prosecuting the adventure, and for the benefit of the cargo as well as the ship.

By Manisty, J., the above mentioned practice of average adjusters having existed for so long a period must be deemed to be the general mercantile usage of this country, and as such to have the force of law.

SPECIAL CASE stated in an action by the plaintiffs as owners of the Sullivan Sawin, to recover £13 14s. 9d., in respect of a general average contribution from the defendants as owners and consignees of certain goods on board the said vessel.

1. The plaintiffs are the owners of the ship Sullivan Sawin, and the defendants are owners and consignees of goods shipped on board the said vessel on the voyage hereinafter mentioned.

2. The said vessel sailed from Savannah for Liverpool on the 10th of February, 1877, and encountered severe weather in consequence of which a general average sacrifice became necessary, and *was made, the master being compelled [343] led to cut away the foretopmast, the fall of which occasioned further damage to the vessel, which was thereby compelled to put into Charleston on the 21st of February, 1877, to repair the said damage.

3. In order to effect the said repairs, and to enable the vessel to proceed on her voyage, it was necessary to discharge a portion of the cargo, and expenses were incurred in landing, warehousing, and reshipping the same, and further expenses were incurred at Charleston for pilotage and other charges paid in respect of the ship leaving port and proceeding upon her voyage. The said vessel afterwards completed her voyage, and discharged her cargo at Liverpool.

4. It is and for from seventy to eighty years past has been the practice of British average adjusters in adjusting losses in cases where ships have put into port to refit, whether such putting into port has been occasioned by a general average sacrifice, or a particular average loss, to treat the expense of discharging the cargo as general average, the expense of warehousing it as particular average on the cargo, and the expense of the reshipment of the cargo, pilotage, port charges, and other expenses incurred to enable the

1879

Atwood v. Sellar.

ship to proceed on her voyage as particular average upon the freight. Cases of putting into port in consequence of general average sacrifice only, and where there is no particular average loss at all are not of frequent occurrence, but such cases and cases where the substantial cause of the putting into port is a general average sacrifice are sufficiently common to establish a regular practice of treating the expenses in case of a general average sacrifice in the way above described.

5. Average adjusters regulate their rules of practice in accordance with what they consider are the legal principles applicable to the subject. There is an association of average adjusters which holds meetings from time to time at which the rules of practice are discussed and altered or modified with reference to legal decisions.

6. In March, 1876, one eminent average adjuster formed the opinion that the practice, as above described, was wrong, and that all such expense as heretofore described up to the time when the ship was again at sea, and had resumed her 344] voyage ought to be *charged to general average; and since March, 1876, the said average adjuster has made up adjustments in two or three cases of the kind in accordance with his said opinion, but, the practice of British average adjusters as above described has remained unaltered.

7. The case of the said ship, the Sullivan Sawin, was put into the hands of the said average adjuster to prepare the adjustment, which he did in accordance with his said opinion, charging the whole of the said expenses to general average, and the plaintiffs have brought this action against the defendants to recover the contribution appearing to be due from them in respect of their goods upon the footing of the said adjustment. The defendants have always been willing to pay a general average contribution upon the footing of an adjustment made up in accordance with the practice of British average adjusters as above described, but deny their liability to pay upon the footing of the said average adjustment which has been so prepared as aforesaid, and this action was brought for the purpose of determining whether or not they are so liable.

8. The plaintiffs contend that, notwithstanding the said practice of British average adjusters, they are entitled to have the whole of the said expenses brought into general average, and to receive a contribution from the defendants accordingly, and the defendants contend, firstly, that apart from the said practice general average expenditure ceases in such cases when the cargo has been discharged from the

ship; and, secondly, that the said practice of average adjusters is a valid and binding custom, regulating the treatment of the said expenses, and the contribution to be paid by the defendants.

The question for the opinion of the court is: Whether the plaintiffs are entitled to recover against the defendants a contribution in excess of what would be payable according to the said practice of average adjusters as stated in this case.

March 4. *Cohen*, Q.C. (*J. C. Mathew*, with him), for the plaintiffs: First, with regard to the law independently of any alleged custom. The English law has no doubt established distinctions, unknown to the laws of most other countries, between expenses of putting *into a port of [345] refuge and landing cargo, and those of reshipping the cargo and leaving the port for the prosecution of the voyage. But in the present case the basis of the argument for the plaintiffs is that the whole of the expenses here in question were the consequences of a general average sacrifice. The cutting away of the mast was a general average act, and the necessary consequence of that act was the further damage that happened to the ship. The ship having been thus obliged to put into port in consequence of imminent danger to the whole enterprise arising out of a general average sacrifice, all the expenses connected therewith are general average. No doubt when a ship merely puts into port to avoid stress of weather, this, though it may be an act of prudence, is not in the nature of a general average sacrifice, and there such expenses as these would not be general average. But it is contended that in the present case, inasmuch as all these expenses were the consequence of a general average sacrifice, not only the expense of discharging the cargo, but also the expenses of warehousing and reshipping it, and the pilotage and other expenses of leaving the port of refuge were general average. [He cited on this point, in addition to cases referred to in the judgments, *Lowndes on General Average*, 267, 287; *Abbott on Shipping*, 3d ed., 335; 2 *Phillips on Insurance*, 1326; *Hall v. Janson* (').]

Secondly, the finding of the case with regard to the practice of average adjusters is immaterial. For the purposes of this question it must be assumed that the law is as before contended. There is no express contract here in the bill of lading with regard to adjustment of average, as there was in *Stewart v. Pacific Steam Ship Company* (*). The con-

(') 4 E. & B., 500; 24 L. J. (Q.B.), 97.

(*) Law Rep., 8 Q. B., 88.

tract, therefore, would be that adjustment of average should be according to English law, but no evidence of a custom would be admissible to control what would otherwise be the effect of the contract unless such evidence also raised a presumption that the custom was known to the party to be affected by it.

Here the bill of lading was given in Savannah, and the ship was an American ship. There is, it is submitted, nothing to show that this practice of average adjusters was [346] known to the plaintiffs. *See *Mollett v. Robinson* ('). This is not put as a general custom of trade, but merely as the custom of average adjusters. This alleged custom is altogether different from any custom that has been held good for the purpose of modifying a contract. A well-known incident may be added to a contract on the ground that all parties must have contemplated it. Average adjusters do not profess to alter the law, or to add any incident to the contract. They regulate their practice in accordance with what they suppose to be the law and the effect of the decisions. Suppose a decision to have been unquestioned for a long time, but to be at length overruled, and in the meantime average adjusters have all regulated their practice by it, they would then alter their practice. This shows that this practice is not necessarily meant to be a permanent thing like a legal usage. [He also cited on this point *Kirchner v. Venus* ('); *Norden Steam Ship Company v. Dempsey* ('); *Couturier v. Hastie* (').]

Webster, Q.C. (Fullarton, with him), for the defendants: The plaintiffs wish to have the law of England on this subject assimilated to the law of most foreign countries, from which it at present differs. But the result would be to substitute for a plain and simple rule one involving the greatest difficulty and doubt. At present the law is clear. If a vessel springs a leak or is in any other imminent peril and bears up for a port of refuge, the expenses of entering the port of refuge and unloading for repairs are general average on the ground that the common peril was the cause of the going into port. The commencement of the general average act is the bearing up for the port, but it terminates when ship and cargo are in safety.

What difference can it make that the original peril is caused by a general average act? If the damage is caused by perils of the sea, and there is a common danger to all

(') Law Rep., 5 C. P., 646; 7 C. P., 84;
1 Eng. Rep., 835; 7 H. L., 802; 14 Eng.
Rep., 177.

(') 12 Moo. P. C., 361.

(') 1 C. P. D., 654.

(') 8 Ex., 40; 22 L. J. (Ex.), 299.

parties to the enterprise, the English law regards the bearing up for the port of refuge as a general average act, but why is the termination of the general average act to be affected by the fact that its commencement must be put a little earlier in the present case, viz., when the mast was cut away? In reality what the plaintiffs contend for is a principle *which the English courts have frequently re- [347] fused to apply. The laws of the foreign countries to which reference has been made do not stop short where the contention for the plaintiffs asks the court to stop short. They do not admit any distinction between the expenses of entering the port of refuge and unloading the cargo, and those of reshipping the cargo and leaving the port to prosecute the voyage. It is contended that the law of England is uniform in all cases, viz., that when the common peril has terminated no further expense incurred is general average. [He cited on this point, in addition to cases referred to in the judgments, Abbott on Shipping, 3d ed., 335; and 5th ed., 347.]

Secondly, the custom of average adjusters as found by this case is binding unless unreasonable. The law of all countries is that the port of destination is the place of adjustment, and that the adjustment must be regulated by the practice there. [He cited on this point: *Lohre v. Aitchison* (1); *Simonds v. White* (2).]

Cohen, Q.C., in reply.

Cur. adv. vult.

May 16. The following judgments were delivered:

MANISTY, J.: This was an action brought by the plaintiffs as owners of the American ship Sullivan Sawin to recover from the defendants as owners and shippers of goods on board that vessel at Savannah a small sum of money (£13 14s. 9d.), as a general average contribution under the following circumstances.

The ship sailed from Savannah for Liverpool, on the 10th of February, 1877, and encountered severe weather, in consequence of which a general average sacrifice became necessary and was made by cutting away the foretopmast, the fall of which occasioned further damage to the vessel, which was thereby compelled to put into Charleston to repair.

In order to effect the repairs and to enable the vessel to proceed on her voyage, it was necessary to discharge a portion of the cargo, and expenses were incurred in landing, warehousing, and reshipping it. Further expenses were

(1) 2 Q. B. D., 501; 21 Eng. R., 226; 3 Q. B. D., 558.

(2) 2 B. & C., 805.

1879

Atwood v. Sellar.

also incurred at Charleston for pilotage and other charges in respect of the ship leaving Charleston and proceeding on her voyage.

348] *The vessel completed her voyage and discharged her cargo at Liverpool.

The facts are more fully stated in a special case, and the question to be decided is whether the plaintiffs are entitled to have the expense of warehousing that portion of the cargo which was discharged at Charleston, and the expense of reshipment of it and the pilotage, port charges, and other expenses, incurred at Charleston, in respect of the ship leaving that port and proceeding on her voyage to Liverpool, or any, and if so which, of such expenses brought into general average.

The plaintiffs contend that they are entitled to have them all brought into general average. The defendants contend that by the law and usage in England none of the expenses in question are the subject of general average, but are particular average, the expense of warehousing being particular average on cargo, and the expense of reshipment of the cargo and pilotage, port charges, and other expenses incurred to enable the ship to proceed upon her voyage being particular average on freight.

It is found as a fact in the case that it is, and for from seventy to eighty years has been, the practice of British average adjusters in adjusting losses in cases where ships have put into port to refit, whether such putting into port has been occasioned by a general average sacrifice or a particular average loss, to treat the expense of discharging the cargo as general average, but the expense of warehousing it as particular average on the cargo and the expense of the reshipment of the cargo, and the pilotage, port charges, and other expenses incurred to enable the ship to proceed on her voyage as particular average upon the freight.

Recently, according to the statement in the special case, one eminent average adjuster formed the opinion that this practice is wrong, and this action is brought to have the matter judicially decided. It is necessary, therefore, to consider what is the law of England with respect to the adjustment of the loss in question, it being admitted that the loss must be adjusted according to that law.

The principle of general average, or general contribution, is, as is well known, derived from the ancient laws of the Rhodian Republic. It was imported into the Roman law 349] and forms a *head (') in the Digest of Justinian, with

(') De lege Rhodia de jactu.

an express recognition of its origin. It has since been adopted by all commercial nations, but with so many variations, in different nations, as to the application of the principle that, as has often been remarked both by judges and text writers, no principle of maritime law has been followed by more variations in practice. In one point it would seem that all nations agree, namely, that in the absence of any particular instrument or contract the place at which the average is (as between owner of ship and owner of goods) to be adjusted is the place of the ship's destination or delivery of her cargo. As regards the law of England, it was laid down in the year 1824 in the considered judgment of the Court of King's Bench, delivered by Abbott, C.J., in the case of *Simonds v. White* (¹), that "the shipper of goods tacitly, if not expressly, assents to general average as a known maritime usage which may, according to the events of the voyage, be either beneficial or disadvantageous to him—and by assenting to general average he must be understood also to assent to its adjustment, and to its adjustment at the usual and proper place, and to all this it seems to us to be only an obvious consequence to add that he must be understood to consent also to its adjustment according to the usage and law of the place at which the adjustment is to be made."

Assuming this to be, as I think it is, a correct exposition of the law of England, it seems to me to go far towards deciding this case in favor of the defendants.

But it is said on the part of the plaintiffs that the special case does not find what has been the usage and practice of shippers and shipowners in England, but only what has been the practice of British average adjusters.

I am of opinion that, in the absence of any evidence to the contrary, the usage and practice of average adjusters for so great a length of time must be deemed and taken to have existed from all time, and to have been acquiesced in, and so to have become the usage and practice of shippers and shipowners: see *Stewart v. West India Pacific Steam Ship Co.* (²).

I am at a loss to comprehend how the law of any particular nation as to general average can be arrived at [350 except by ascertaining what has been, as a matter of fact, the usage and practice in such particular nation with regard to it.

A great many cases were cited in the course of the argu-

(¹) 2 B. & C., 805-18.

(²) Law Rep., 8 Q. B., 88-94; 4 Eng. Rep., 229, affirmed 6 Eng. R., 102.

1879

Atwood v. Sellar.

ment, commencing with *Plummer v. Wildman* (1), which was decided in the year 1815, and ending with *Stewart v. West India and Pacific Steamship Co.* (2), decided in 1873. I do not propose to notice many of those cases. Some have been expressly or impliedly overruled; some were actions on policies of insurance or bills of lading containing special provisions; others contain dicta not altogether consistent with the usage found by the case. But it seems to me that *Simonds v. White* (3), *Job v. Langton* (4), and *Walthew v. Marrojani* (5), coupled with the finding in the present case as to what has hitherto been the usage and practice of British average adjusters, are very strong if not conclusive authorities in favor of the defendants. I have already adverted at some length to the judgment in *Simonds v. White* (3). In *Job v. Langton* (4) it was held that expenses incurred, after the cargo was in safety, in getting off the ship and towing her to Liverpool for repair were not chargeable to general average but to ship alone. I notice this case not only because it is an authority in favor of the present defendants, so far as general principles are concerned, but also because Lord Campbell, C.J., in delivering the considered judgment of the court (consisting of himself and Coleridge, Erle, and Crompton, JJ.), says: "*There is no mercantile usage stated to guide us. We must therefore resort to the general principles on which this head of insurance law rests;*" from which I infer that if a mercantile usage had been stated the court would have been guided by it.

In *Walthew v. Marrojani* (5) (which was decided in the Exchequer Chamber in the year 1870 by six eminent judges, affirming a judgment of the Court of Exchequer) the question was whether the expense of getting a ship off a bank on which she had been stranded by a storm was general average, seeing that before the expense was incurred the [351] cargo had been discharged and warehoused. *The court held that it was not general average, inasmuch as, although the expense was incurred with the view and for the purpose of prosecuting the voyage, it was incurred after the cargo was in a place of safety and when the ship only was in peril. Bovill, C.J., says, at p. 124: "The American courts have enlarged the limit of general average and have included within the description of extraordinary expenses incurred for the common benefit the expenses of repairs ren-

(1) 3 M. & S., 482.

(4) 6 E. & B., 779, p. 790; 26 L. J.

(2) Law Rep., 8 Q. B., 88; 4 Eng. R., (Q.B.), 97.

229.

(5) Law Rep., 5 Ex., 116.

(3) 2 B. & C., 805,

dered necessary by extraordinary perils and made at an intermediate port for the purpose of prosecuting the voyage, and have in some other respects deviated from what we consider the strict rule, but the English courts have held strictly that unless there be a common risk and a voluntary sacrifice or an extraordinary expenditure incurred for the joint benefit of ship and cargo, a claim to general average is not established." And a little further on the same learned judge says: "To ground a claim for general average there must be a danger, actual or impending, common to both ship and cargo; here the cargo was safe and the ship only in peril; it was indifferent to the owners of the cargo whether the ship floated or not, and there was therefore no sacrifice made or extraordinary expense incurred to save both ship and cargo or for the common benefit of both."

In the same case (1) the same learned judge says, "The claim has been put on the ground that the adventure was not complete, and that until it was terminated there was a common interest that it should be carried out; but that argument is in direct contradiction to the principle laid down with respect to repairs which are equally necessary to enable the ship to complete the adventure, but which are not matters for general average."

In these observations, which are very pertinent to the present case, I entirely agree.

Mr. Cohen, in his able argument, says these are cases in which the cause of the extraordinary expenditure was an ordinary peril of the sea unaccompanied by a general average cause, such as the cutting away of the mast, and he says that the existence of a general average cause distinguishes those cases from the present.

Let us consider that proposition practically. One ship meets with a storm so severe that it is deemed necessary for the safety of ship and cargo to run for an intermediate port, and it succeeds in reaching it without any voluntary sacrifice of any part of the ship or cargo. Another ship meets with a similar storm, and finds it necessary to run for an intermediate port, but, in order to reach it, is obliged to make a voluntary sacrifice of part of the ship, say, a mainmast or part of the cargo. Why should there be any distinction in the two cases with respect to what is to be deemed general and what is to be deemed particular average after the cargo is landed in a place of safety? The cases are identical, save and except as regards the loss caused by the voluntary sacrifice of part of the ship or cargo.

(1) Law Rep., 5 Ex., 125.

1879

Atwood v. Sellar.

I am unable to see any principle upon which to rest the distinction suggested by Mr. Cohen ; and it is, so far as I know, unsupported by authority. Certainly none has been cited in support of it.

Mr. Cohen further contended that it ought not to be presumed that foreigners contract with reference to the custom and practice of England in regard to general and particular average, and that inasmuch as the Sullivan Sawin was an American ship, and the cargo was shipped at Savannah, the plaintiffs were not bound by the usage in England. That contention is in direct contradiction to the law as laid down in *Simonds v. White*(¹), which, so far as I know, has never been questioned.

There is only one other argument put forward on behalf of the plaintiffs which I think it necessary to advert to. It is said that the court should adopt the principle contended for by the plaintiffs, in order that the law of England may be conformable to foreign law. The answer to this argument is that the adoption of the principle contended for would unsettle the usage and practice which has hitherto existed and been acted upon in England, while it would still leave the usage and practice of many other nations at variance with that of England and of each other.

I think it is much safer to adhere to a usage which has been acted upon, for aught that appears to the contrary, ever since England adopted the law of general average, than to introduce a new usage for no other reason, that I can perceive, than that such new usage would be more consonant with strictly logical principles. Such an alteration ought, 353] in my opinion, to be effected, if at all, by *legislation, and not by a decision of a court of law. Moreover, it is very immaterial what usage any particular nation may have adopted with respect to particular or general average, so long as that usage has been uniformly acted upon, and so become well known to all concerned.

For these reasons I am of opinion that the defendants are entitled to judgment.

The judgment of Cockburn, C.J., and Mellor, J., was delivered by

COCKBURN, C.J.: This was a case of general average, arising under the following circumstances.

The plaintiffs' ship, the Sullivan Sawin, sailed from Savannah for Liverpool with a general cargo. Encountering a storm, the master found it necessary to cut away the fore-topmast, and the mast in falling caused such further dam-

(¹) 2 B. & C., 805.

age as rendered it necessary to put into Charleston to repair the ship, in order to enable it to prosecute the voyage. To do the repairs, it became necessary to unship a portion of the cargo, and to land and warehouse it, and the repairs of the ship having been completed, the goods had to be reshipped. Expenses were also incurred on account of pilotage and other charges on the ship leaving the port in order to proceed on her voyage. The voyage was completed, and the cargo safely discharged and delivered at Liverpool, its proper destination.

The plaintiffs, the shipowners, claim contribution by way of general average from the defendants, the owners of the cargo, in respect not only of the expense of entering the port and of discharging the cargo, but also that of warehousing and reshipping the latter, as well as in respect of expenses incurred in the way of port charges and pilotage on the occasion of the vessel again putting to sea. The defendants, while they admit their liability to contribute to the expenses of entering the port and of discharging the cargo, deny any liability beyond that stage, taking their stand on the usage of average adjusters in this country, according to which the expense of entering the port of refuge and discharging the cargo has, under such circumstances, been treated as general average, but the expense of warehousing the cargo has been treated as particular average on the cargo, and *that of the reshipment, pilotage, port [354 charges, and other expenses incurred to enable the ship to proceed on her voyage, as particular average on the freight.

That such has been the practice of average adjusters in this country for from seventy to eighty years is admitted; but the plaintiffs deny the validity of this practice, as being inconsistent with the principles of law relating to average.

Two questions present themselves: first, what, independently of this practice of average adjusters, is the principle or rule of law applicable to the case? Secondly, assuming the practice to be inconsistent with what otherwise should be the law, having subsisted for so long a time, must it be taken to give the rule properly applicable to such a case?

No claim being made by the plaintiffs of general average in respect of anything expended on the ship itself—the claim as stated in the case being limited to the expense of discharging the cargo, and of warehousing and reshipping it, and to expenses incurred for pilotage and other charges on the ship's leaving port—the question which presented itself in *Power v. Whitmore* (1) and in *Hallet v. Wigram* (2), as to how

(1) 4 M. & S., 141.

(2) 9 C. B., 580.

1879

Atwood v. Sellar.

far repairs done to a ship—even to the extent of such temporary repairs only as would be necessary to enable it to proceed on the voyage—may be the subject of general average, does not arise. We have to deal only with the expenses incurred on entering and quitting the port, and in unshipping, warehousing, and reshipping the cargo.

That these expenses which, according to the practice of average adjusters in this country, are thus treated as particular average, should, according to legal principles, be made the subject of general average, appears to me to flow necessarily from the fundamental principle on which the whole doctrine of general average rests, namely, that all loss which arises from extraordinary sacrifices made, or expenses incurred, for the preservation of the ship and cargo must be borne proportionably by all who are interested.

The contract between the goods owner and the shipowner, on a charterparty or a bill of lading, being for the conveyance of the goods to a given port, there occurs in the course of the voyage a state of things which is not provided for by 355] the contract. A storm arises; the vessel is in danger; but a port is within reach, in which, in the common interest of all concerned, it would be prudent to take refuge. Or it becomes necessary to cut away a mast, and, as a consequence of so doing, to seek an intermediate port in order to replace it. Or the ship sustains damage from the violence of winds or waves, which renders it necessary, for the common safety of ship and cargo, and for the further prosecution of the adventure, to seek a port at which repairs which have become necessary for the safe prosecution of the voyage may be effected.

The result is that, in theory at least, a new arrangement not contemplated or provided for by the original contract takes place between the parties, who in theory, as formerly in fact, must be supposed to be present—each in the practice of modern times represented by the master, to whom the interests of both are committed. If we could suppose both parties to be actually present, and under a sense of imminent danger to concur in the necessity of seeking a port of refuge, but to be discussing the question as to how the expenses incidental to such a course should be borne, what arrangement could be more reasonable or just than that these expenses, being extraordinary expenses incurred for the common benefit, should be borne in common, on the same principle as that which has been established from the earliest times in case of the actual jettison?

Applying this principle with reference, in the first place,

to the expenses incurred by the ship, it is admitted on all hands that the expenses of entering the port of refuge should be carried to general average. Logically, it would seem to follow that, as the coming out of port is—at least where the common adventure is intended to be, and is afterwards further prosecuted—the necessary consequence of going in, the expenses incidental to the later stage of the proceeding should stand on the same footing as the former. The further prosecution of the voyage was in the contemplation of the parties, or of the master as representing them, in going in: the coming out, therefore, as essential to the further prosecution of the voyage, must equally have been in view when the resolution to go in was formed. But it is said—and it is upon this ground that the difference between the two *sets of expenses is alleged to be founded—first, [356 that it is the shipowner's duty under his contract to keep the ship in a navigable state, and consequently to repair any damage she may have sustained; secondly, that, when the ship has been repaired, it is the owner's duty under his contract to reship the goods, and to set forth again on the voyage, and to that end to incur the cost of quitting the port, and of employing a pilot or a tug if necessary. The whole of this reasoning appears to me to be based on an assumption altogether fallacious. The shipowner is not bound to repair for the purpose of carrying on the cargo; nor, having repaired, does he become bound to reship the cargo and complete the voyage under the original contract, but if bound to do so at all, is bound only under that contract as modified by the altered circumstances of the case.

The contract it should be remembered expressly exempts the shipowner from performance of his obligations under it when performance is prevented by perils of the seas. The ship having become incapacitated from prosecuting the voyage, and performance of the contract having been prevented by the excepted cause, the shipowner is under no obligation, so far as the goods owner is concerned, to repair. He cannot, it is true, expose the goods of the freighter to further peril by persisting in carrying them on, if, having the opportunity of putting into a port of refuge, he cannot, or will not, when there, repair the ship; but, if he chooses to forego his right to freight, he may repair or not as may best suit his interest.

“Under a charterparty containing such an exception,” says Parke, B., in delivering the judgment of the court in *Worms v. Storey* (1), “if the vessel sails in a seaworthy

(1) 11 Ex., 427, at p. 430.

state, and in the course of the voyage is damaged by perils of the sea, the owner is not bound to repair it; but if he does not choose to repair, he ought not to go to sea with the vessel in an unseaworthy state, and so cause a loss of the cargo: he ought either to repair or stop." It is true that in *Worms v. Storey* the liability to repair was not the question immediately before the court, the cause of action stated in the declaration, and on which there was a demurrer, be-357] ing that the shipowner, after having put into *a port where the ship might have been repaired, had put to sea again with the vessel in an unseaworthy state, and had thus occasioned the loss of the plaintiff's goods. The question was however one which the court had incidentally to consider, inasmuch as, if the shipowner had been under an obligation to repair, the proceeding to sea when the ship was unseaworthy would have been *a fortiori* actionable. But the view of the Court of Exchequer is supported by other considerations. By the express condition of the contract performance by the shipowner is dispensed with if prevented by perils of the seas. If it were true that under such circumstances he was nevertheless bound to repair, it would follow that he would be bound to do so without regard to the amount of the cost of repair, or to the degree to which the expense might involve him in loss. Yet it is well settled that where the cost of the repairs will exceed the value of the vessel when repaired, together with the freight, the owner is not bound to repair in order to carry on the cargo: and that the master, as his agent, will be justified, as against the goods owner, in abandoning the voyage: see *De Cuadra v. Swann* (*), where the law on this head was made the subject of learned and elaborate argument.

Some confusion may have arisen from the vague language in which the duty of the master to repair, after having gone into a port of refuge, is spoken of. Thus, in *Benson v. Chapman* (**) it is said in general terms that "the duty of the master, in case of damage to the ship, is to do all that can be done towards bringing the adventure to a successful termination; to repair the ship, if there be a reasonable prospect of doing so at an expense not ruinous, and to bring home the cargo and earn the freight, if possible." But however general the language here used, it is plain, on reference to the facts of the case, that the proposition thus stated related only to the duty of the master towards his owner. In the case of *Benson v. Duncan* (*) in the Exchequer Chamber, Patteson, J., in delivering the judgment of the court,

(*) 16 C. B. (N.S.), 772. (**) 2 H. L. C., 696. (*) 3 Ex., 644, at p. 655.

says: "In ordering the repairs of the ship the master acts exclusively as agent of the owner of the ship. No other person but the owner of the ship or his agent can have any authority to *order the repairs. The owner of the [358 cargo cannot insist on such repairs being made, for the shipowner is absolved from his contract to carry if prevented by the perils of the seas, and he is bound by it if prevented by inherent defects in the ship: in either case, if he does repair, he does so for the sake of earning the freight, which the master is bound to enable him to do if he can." The true rule is correctly stated in Maude and Pollock on Shipping, p. 498: "The owner of the cargo cannot insist on the repairs being done, for the shipowner is absolved from his contract to carry if prevented by the perils of the seas; but, on the other hand, it is the duty of the master, as the agent of the shipowner, to repair the ship if there be a reasonable prospect of doing so at an expense not ruinous, and to bring home the cargo and earn the freight, if possible."

But does the converse of the proposition equally hold? Though the shipowner or his master is not bound to repair, if he does so, is he released from the obligation to carry on the goods, or does the obligation to fulfil the original contract thereupon revive? At first sight it would seem to follow, from the position that the owner is absolved from his contract by the damage to the ship, and therefore is free from any obligation to repair, that he becomes released *in toto*, and, therefore, would be free, if he chose to sacrifice the freight, to decline to carry on the goods. But, though not arising directly out of the original contract to carry, the obligation presents itself under a different form. In the contract of affreightment there is an implied undertaking on the part of the shipowner, in consideration of his being intrusted with the custody of the goods, that if the further prosecution of the voyage should be interrupted by disaster to the ship, if he cannot, or does not choose to, transship the cargo and send it on in another vessel in order to earn the freight, he will do his best to protect the interest of the goods owner; and, therefore, if the circumstances will admit of it, must find another vessel and forward the goods to their destination. Upon which assumption it may be contended that as the ship, having been repaired and rendered fit to resume the voyage, is available for the purpose, the master will be bound, as the best course to promote the interest of the goods owner, to reship the goods on board his owner's ship.

*But the question is by no means free from diffi- [359

culty. In the first place, it is not settled that the master, though he has the right to transship, is bound to do so as the agent of his owner. The opinions of the foreign jurists, which will be found collected in Parsons on Shipping, in a note at p. 234, are altogether conflicting; and although we learn from the author just referred to that it is now well settled in the courts of the United States that the master is bound to transship, if there be a vessel or other means of transport to the place to which the cargo should go within reasonable reach, there has been no decision to that effect in a court of this country. The question presented itself in *Shipton v. Thornton* ⁽¹⁾, but it became unnecessary to decide it. But even if we assume that it would be the duty of the master, as becoming *ex necessitate* the agent of the shipper, to transship the cargo, it must not be forgotten that he continues the agent of his owner; and in the latter capacity, if he can find a more remunerative employment for the ship, or can earn a higher rate of freight, he may be justified in declining to carry on the goods.

But even if this point were, like the foregoing, assumed in favor of the goods owner, the case of the latter in the present instance would be no further advanced. For the whole argument in his favor rests on the fallacious assumption that the rights and obligations of the parties remain as they existed under the original contract. But this is to overlook the fact that by the interruption of the voyage, and the absolution of the shipowner from the further performance of it, and the new arrangement which must be taken to have been come to between the parties on deciding to enter the port of refuge, the original contract has been essentially modified: in fact a new one has been engrafted on it.

Let us see what is involved in the arrangement so made. In legal theory we must suppose the parties to be present. In contemplation of law, the master, as representing both of them, makes for both the agreement which it is reasonable to suppose that, if present, they would have made for themselves. Now, the common purpose is twofold. The first and immediate purpose is that of saving ship and cargo, by bringing both into harbor. The second is that of repair-
[360] ing the ship with a view to the further *prosecution of the voyage, if such repairs should prove reasonably practicable, with certain reservations on the part both of the shipowner and the goods owner, which possibly may lead to the abandonment of the further prosecution of the voy-

⁽¹⁾ 9 A. & E., 314.

age. The second of these purposes involves several subordinate operations and expenses incidental thereto.

The state of the ship and the degree of damage it has sustained, have first to be ascertained. To effect this, as well as to do the necessary repairs, it may be necessary to unship the cargo. To preserve the goods from harm they will have to be warehoused. The repairs to the vessel having been done, the cargo must be reshipped. Lastly, all things having been completed, the ship will have to leave the port to put to sea. In respect of each of these stages expenses have to be incurred, for which, as being altogether *dehors* the original contract, that contract wholly fails to provide. They are extraordinary expenses incurred for the preservation of ship and cargo, and in furtherance of the common adventure, under circumstances in which the ship and cargo would otherwise have perished, or the common adventure would have been abruptly brought to a termination.

Upon whom should the expenses of these different operations fall? The practice of the average adjusters makes the unloading of the cargo matter of general average; and as it seems to me, on principle rightly so. On what ground the distinction between the cost of unshipping the cargo, and of warehousing it, which is thrown on it as particular average, and that of reshipping, which is treated as particular average on the freight, is founded, I wholly fail to perceive. Looking to the common purpose for which all these operations are performed, it seems only reasonable and just that the expenses should be borne ratably by all parties concerned—in other words be treated as general average—so far, at all events, as the common purpose has been effected.

It is true that it not unfrequently happens that, the primary purpose of putting into port having been accomplished, the ulterior purpose, that of further prosecuting the voyage, fails. There may be no means in the port of refuge for repairing the vessel. The cost of repairing may be so great as not to make it worth the owner's while to repair in order to earn the freight. *As regards the alternative of [36] transshipment, there may be no opportunity to transship; or only at an increased rate of freight, on which account the shipowner may decline to transship, except on account of the goods owner. On the other hand the cargo may be of a perishable nature, or it may be so damaged that it cannot be carried on further without becoming worthless; or the repairs to be done to the ship will take so long a time that in the interest of the goods owner the master would not be jus-

tified in detaining the goods, but, acting as the agent of the latter, becomes bound to forego the right of carrying on the goods and so earning the freight, and must deal with them in the interest of their owner alone. In such cases it may well be that only the expense of putting into the port of distress could properly be made matter of general average, and that other expenses incurred, but from which no benefit results to the common adventure, should be treated as particular average to ship or goods, as the case may be. But we are here dealing with a case in which every expense has been incurred with a view to, and has resulted in, the further prosecution of the common adventure. The ship and cargo have been saved from destruction by being brought into port; the ship has been repaired; the cargo, having in the meantime been preserved by being warehoused, has been reshipped; the voyage has been resumed, and brought to a safe conclusion, and the goods have been delivered; in a word, the common purpose, the fulfilment of the contract of affreightment, has been effected. But how has this result been brought about? By the series of operations which have taken place from the ship's going into port to her putting to sea again inclusively. But the whole of these operations were necessary to the resumption of the voyage; the expenses of carrying them out were each of them incurred in furtherance of the common purpose. Not being expenses within the scope of the original contract, but extraordinary expenses incurred for the common benefit of ship and cargo, the conclusion appears to me irresistible that, with the exception of the cost of repairs to the ship, all these expenses should be charged to general average. As regards the cost of unloading and reloading, Lord Campbell, in *Hall v. Janson* ⁽¹⁾, says: "The expenses necessarily 362] incurred in *unloading and reloading the cargo for the purpose of repairing the ship, that she may be made capable of proceeding on the voyage, have been held to give a claim to general average contribution; for the acts which occasion these expenses become necessary from perils insured against; and they are deliberately done for the joint benefit of those who are interested in the ship, the cargo, and the freight."

This reasoning, in which I entirely concur, applies equally to expenses incurred in leaving the port, which, like the expenses of unloading, warehousing, and reloading, are expenses incurred in furtherance of the common enterprise, and must be taken, like them, to have been contemplated

(1) 4 E. & B., 500, at p. 507.

from the moment the resolution was taken to enter the port, as the necessary consequence of doing so. All such expenses, being extraordinary expenses, that is to say expenses arising out of a state of things not provided for by the original contract, must be matter of general average.

The exclusion of the cost of repairs to the ship from general average will not conflict with this conclusion, as it rests on exceptional grounds, namely, that the benefit of the repair enures to the owner beyond the scope of the voyage, and that it would therefore be unjust to the goods owner, whose interest is limited to the voyage, to make him contribute to such cost. A distinction has, indeed, been taken between general repairs and such temporary repairs as are necessary to enable the ship to complete the voyage. By the American law, as well as by that of many other maritime nations, such temporary repairs have been made the subject of general average, and this—assuming always that such repairs are of a temporary character only, and add nothing to the permanent value of the vessel—would certainly appear to be consistent with principle. It is, however, unnecessary to pronounce any opinion on this point, since, as has already been observed, no claim is made in this action for repairs. Nor is it necessary to consider whether, as the unseaworthiness of the vessel was caused by the jettison of the mast, and by damage occasioned by its fall—it being an admitted principle that consequential damage immediately caused by jettison is to be treated as jettison—the damage so caused might not have been made the foundation of a claim for general average, as no such claim is here made.

*We have next to consider whether the practice of [363 average adjusters in this country, which is said to have existed for seventy or eighty years, if thus found to be at variance with legal principles, shall nevertheless prevail, and must be considered as having settled the law. I am not aware of any principle on which the affirmative of this proposition can be maintained, or of any authority by which it can be upheld. The practice in question is not a usage of trade by which the terms of a contract may be interpreted or modified. It is not a custom which can be presumed to have had a legal origin. It is not the *inveterata praxis* of a court or courts having judicial authority, and which must therefore be taken to be the law though inconsistent with general principles. The authority of average adjusters may be said to be of an anomalous character. By the consent of shipowners and merchants they act as a sort of arbitrators

1879

Atwood v. Sellar.

in the settlement of matters of average; but they are bound, in the adjustment of such claims, to follow the law, and in the practice they have adopted they have not acted or intended to act on or give effect to any mercantile usage, but have intended to give effect to what they believed to be the law; but they have mistaken it. What was said by Pollock, C.B., in *Cox v. Mayor of London* (¹), is here in point. In that case a plea had been pleaded to a declaration in prohibition, alleging an immemorial custom, on a plaint being entered in the Lord Mayor's Court, to attach a debt due to the defendant from a third person, upon his being found within the jurisdiction, though none of the parties were citizens or resident in the city, and neither the original debt nor that due from the garnishee had accrued within it. The plea having been demurred to, the Lord Chief Baron in giving judgment says: "In holding this plea bad we neither overrule nor dissent from any former decision, for in no previous instance has the custom here stated been brought before any court, by plea or certificate, and held to be good. The superior courts have at all times investigated the customs under which justice has been administered by local jurisdictions, and unless they are found consonant to reason and in harmony with the principles of law, they have always been rejected as illegal."

364] *The terms in which the Chief Baron thus stated the law were expressly approved of by Lord Cranworth in giving judgment in the House of Lords on appeal. The law so stated appears to me to be *a fortiori* applicable to the present case. If a custom prevailing in a court, which, though an inferior court, is still a court of law, if inconsistent with law cannot prevail, surely the same rule must apply to a practice of average adjusters. When a practice of this kind is brought to the test of legal decision and is found to be erroneous and inconsistent with law, it cannot be permitted to override the law and acquire the force of law.

Three cases are relied on in opposition to the view expounded in the foregoing reasoning, and on which it may be desirable to make one or two observations, namely, *Simonds v. White* (²); *Stewart v. Pacific Steam Ship Company* (³), and *Walthew v. Maurojani* (⁴). Neither of these cases appear to me to be in point to the one before us. The point to be decided in the first of them, was whether the average which had to be adjusted should be determined according

(¹) 1 H. & C., 338, at p. 358.

(²) 2 B. & C., 805.

(³) Law Rep., 8 Q. B., 88.

(⁴) Law Rep., 5 Ex., 116.

to the law of Russia or that of this country. Lord Ellenborough, C.J., after stating that this was the question, says that the shipper must be taken to assent to the adjustment "according to the usage and law of the place at which the adjustment is to be made."

So far as relates to the place of adjustment, we are of course bound by this decision, and are therefore not at liberty to give effect to Mr. Cohen's argument, that the rights of the parties must be determined according to the law of the place where the average occurred, even if otherwise disposed to do so. But if any stress is sought to be laid on what Lord Ellenborough says as to "usage," it is to be observed that he is speaking (as is manifest from the language of the judgment throughout), of a usage consentaneous with the law. It would be to give a mistaken effect to his language to suppose he was referring to a usage at variance with the law.

The case of *Stewart v. Pacific Steam Ship Company* (¹), far from supporting the defendant's case, appears to me a strong authority the other way. There, by the terms of the bill of lading, average, *if any, was "to be adjusted [365 according to British usage." A fire having broken out in the ship, water was poured in to extinguish it, and bark shipped on board by the plaintiffs was seriously damaged thereby. The plaintiffs claimed as for general average, but it appeared that it was the practice of average adjusters in this country to treat such damage as particular average. The court expressly declared the practice to be at variance with the law applicable to such a case, and would assuredly have given judgment in favor of the plaintiffs, had not the latter by the terms of the bill of lading expressly agreed to make the usage a part of the contract. "If," says Mr. Justice Quain, in delivering the judgment of the court, "the present case depended wholly on the common law applicable to general average, we think the plaintiffs would be entitled to recover." But, "as the parties have agreed to make the custom a part of their contract, the case must be decided according to the custom, and the result is that our judgment must be for the defendant." To which the learned judge added: "It is to be hoped, however, that in future there will be no difference between law and custom on this point, and that average adjusters will act on the law as now declared, and that bills of lading will also be framed in accordance with it." There being no such term in the present contract, I see no reason for treating the practice

(¹) Law Rep., 8 Q. B., 88.

with which we have to deal with more consideration than the practice then before the court received at its hands in that case.

Walthev v. Marrojani (*) was a case altogether differing from the present. It was a case of stranding; and the question was whether expenses incurred for the purpose of getting the ship off, after the goods had been taken out of her and removed to a place of safety, could be made the subject of general average, and it was held that they could not. But of the six judges who so held in the Exchequer Chamber, Bovill, C.J., Mellor, Montague Smith, Lush, and Hannen, JJ., base their judgment on the ground that, while it was essential to the owner of the ship to get his ship off, so as to be able to resume the voyage and earn the freight, it was indifferent to the goods owner, the goods being in safety, whether they were carried on in the same ship or in another. 366] "It is not *shown," says the Chief Justice, "that any advantage resulted to the goods from their being carried on in that ship rather than any other." "It was indifferent to the owners of the cargo whether the ship floated or not, and there was therefore no sacrifice made, or extraordinary expense incurred, to save both ship and cargo, or for the common benefit of both." "I draw the inference," says Mr. Justice Montague Smith, "that it was indifferent to the owner whether the goods went forward to England in the *Southern Belle*—the ship in question—or any other." Mr. Justice Hannen says: "It is unjust that expenses incurred by the owner of the ship for the benefit of all should be borne by him alone. But the expenses in question were not such, for it is indifferent to the owner of goods whether his goods are taken on by the same ship, except where they would not otherwise be carried on at all, or only at a greater expense." Even Mr. Justice Brett, who appears to have been disposed to lay down the rule more generally, treats these expenses as incurred solely for the benefit of the shipowner.

In like manner, in the earlier case of *Hallett v. Wigram* (*), in which a claim for contribution had been made where part of the cargo had been sold to raise money for the repair of the ship, which had put back by reason of damage sustained by ordinary perils of the sea, Wilde, C.J., in giving judgment, says: "It is in respect only of the incapacity of the particular ship to carry the goods forward to their destination that the pleas show that the cargo was in danger of being wholly lost. It is difficult to see how the repair of the ship could be for the benefit and advantage of the plaintiffs.

(*) Law Rep., 5 Ex., 116.

(*) 9 C. B., 580.

The plaintiff's goods were of a description not to be deteriorated to any great extent."

These two decisions are no doubt sufficient authority for saying that, according to English law, expenses incurred for the benefit of the ship alone, without any concomitant benefit to the cargo—such as the expense of getting off a stranded vessel after the goods have been discharged, or of repairing a vessel in a port of refuge—in the absence of special circumstances such as were referred to in *Walthew v. Marrohani*, will not give a claim to general average. But they are inapplicable to a case like the present. There is nothing here to show that the goods could *have been [367 sent on in another vessel. And, what is of more importance, the expenses were all incurred in furtherance of the common purpose, and for the benefit of the cargo as well as the ship—of the ship, as an opportunity was thus afforded of repairing it and enabling it to take on the cargo; of the cargo, as it was thus enabled to be carried on to its destination.

I am therefore of opinion that our judgment must be for the plaintiffs; and as my Brother Mellor concurs in this view and in the reasons on which it is founded, there will be judgment for the plaintiffs.

Judgment for the plaintiffs.

Solicitors for plaintiffs: *Field, Roscoe & Co.*, for Bateson & Co.

Solicitors for defendants: *Parker & Clarke.*

[4 Queen's Bench Division, 375.]

Dec. 21, 1878.

[IN THE COURT OF APPEAL.]

*NUTTER V. THE ACCRINGTON LOCAL BOARD [375
OF HEALTH.

Highway—Turnpike Road—"Street," Definition of—Alteration of Level of Street—Damage—Compensation—11 & 12 Vict. c. 63, ss. 2, 68, 144; 15 & 16 Vict. c. 42, s. 18; 21 & 22 Vict. c. 98, s. 41.

By the Public Health Act, 1848 (11 & 12 Vict. c. 63), s. 68, streets being highways within the district of a local board shall vest in and be under the management of the board, and the board shall cause all such streets to be levelled, paved, flagged, channelled, altered, and repaired as occasion may require.

By the interpretation clause (s. 2): "The word 'street' shall apply to and include any highway (not being a turnpike road)." By s. 144 compensation shall be made to all persons sustaining any damage by reason of the exercise of the powers of the act;

1878

Nutter v. Accrington Local Board of Health.

and in case of dispute as to amount, the same shall be settled by arbitration in the manner provided by the act.

The footpath of a street which was a highway and also a turnpike road within the district of a local board, was altered by them under an agreement with the turnpike trustees, so as to raise the level of the footpath in front of the house of the plaintiff and cause him damage :

Held, by Brett and Cotton, L.JJ., reversing the judgment of the Queen's Bench Division, Bramwell, L.J., dissenting, that a street which is also a turnpike road is not excluded by s. 2 from the operation of ss. 68 and 144, and that the plaintiff was therefore entitled to recover compensation from the board in the manner prescribed by s. 144.

SPECIAL CASE stated under judge's order.

The plaintiff was in September, 1864, and is now, the owner of a house and land in the town of Accrington adjacent to the Whalley Road.

The defendants became in 1857 the local board of health, and are the urban sanitary authority for the town and district of Accrington, under the provisions of the Public Health Act, 1848, and the other acts therewith incorporated.

The house and land of the plaintiff and that part of the Whalley Road adjacent are within the district of the local board.

By 29 Geo. 3, c. 107, a turnpike trust was established, which included the Whalley Road, part of which was within and some part without the district of the Accrington Local Board, and such trust expired in 1874, up to which time toll-gates were maintained, and tolls taken at various parts of the road.

There had always, for fifty years at least, been a footway 376] *immediately adjacent to the plaintiff's premises, and previous to the establishment of the local board the turnpike trustees had maintained and from time to time repaired the footway and the carriageway both within and without the local board district, with the exception of the pavement within the local board district. The carriageway adjacent to the plaintiff's property had not been paved at the time the footway was raised as hereinafter set forth.

After the establishment of a local board, and previous to the year 1871, by agreement between the local board and the turnpike trustees, the local board sometimes provided curb stones for the footpath of such part of the Whalley Road as was within their district, and the trustees put them in, and the trustees did everything that was done for the maintenance and repair of the carriageway.

In the year 1864 the trustees communicated to the defendants their intention of erecting a toll-bar in another turnpike road in the township of Accrington, subject to the same trust; and afterwards, in February, 1865, the defendants,

in order to induce the trustees not to erect such toll-bar, passed the following resolution, which was in due course communicated to the trustees, and accepted by them: "Resolved, that the proposal made to a deputation from this board by the trustees of the turnpike road at their meeting of September 15th last to the following effect: 'That the local board should take upon themselves the future repair of such parts of the turnpike road within their district as are already and may be hereafter pitched with stone and all such parts of the footpaths as are already or may hereafter be flagged at least a yard in width, and that other parts of the road and footpaths shall be continued to be repaired by the trust,' be accepted by this board."

That part of the footpath immediately adjoining the plaintiff's land was flagged more than a yard in width previous to 1864.

Previous to 1871 a further agreement had been entered into between the local board and the trustees, whereby, amongst other things, the trustees undertook to raise the level of the carriageway at a part of the road immediately opposite the house and land of the plaintiff, and the defendants on their part undertook to raise the footpath to a corresponding height.

*In or about the month of May, 1871, in execution [377 of this agreement, the trustees raised the level of the carriageway opposite the plaintiff's house and land, and the defendants raised the footpath to a corresponding height.

The plaintiff sustained damage within the meaning of s. 144 of the Public Health Act, 1848, by raising of the footway by the defendants, and such damage was the necessary and direct result of the raising of the footpath, and not of any negligence of the defendants in the execution of the work.

In October, 1874, proceedings against the defendants were commenced by the plaintiff to obtain compensation under the provisions of the Public Health Act, 1848; and after all due preliminaries required by the act were performed, were carried on ex parte by the plaintiff, and on the 19th of January, 1875, an award was published, whereby the defendants were ordered to pay to the plaintiff £112 compensation for the damage she had sustained, and a further sum of £111 5s. 8d. taxed costs.

The award was in all respects a good and valid award, provided that the damage sustained by the plaintiff was a proper subject for arbitration and compensation within the

meaning of the Public Health Act, 1848, and the other acts therewith incorporated.

Neither of the sums of £112 and £111 5s. 8d. have been paid by the defendants to the plaintiff.

That part of the Whalley Road which is adjacent to the plaintiff's house and land was at the time the footpath was raised as stated and is a street, unless the court find, first, that it was a turnpike road; and, secondly, rule as a matter of law that a turnpike road is excepted from the definition of "street," within the true intent and meaning of the Public Health Act, 1848, and other acts incorporated therewith.

The questions for the opinion of the court were: First, whether the claim of the plaintiff was a claim within the true intent and meaning of the Public Health Act, 1848 (¹), 378] and other acts incorporated therewith. Secondly, whether the arbitrator had authority to make such award, and whether the award was good and binding upon the defendants.

Forbes, for the plaintiff.

C. Crompton, for the defendants.

(¹) 11 & 12 Vict. c. 63 (Public Health Act, 1848):

Sect. 2: "The word 'street' shall apply to and include any highway (not being a turnpike road) and any road, public bridge (not being a county bridge), lane, footway, square, court, alley, or passage within the limits of any district."

Sect. 68: "That all present and future streets being, or which at any time become, highways within any district, and the pavements, stones, and other materials thereof, and all buildings, implements, and other things provided for the purposes thereof by any surveyor of highways, or by any person serving the office of surveyor of highways, shall vest in and be under the management and control of the said local board of health; and the said local board shall from time to time cause all such streets to be levelled, paved, flagged, channelled, altered, or repaired, as and when occasion may require; and they may from time to time cause the soil of any such street to be raised, lowered, or altered as they may think fit, and place and keep in repair fences and posts for the safety of foot passengers."

Sect. 144: "That full compensation

shall be made out of the general or special district rates to be levied under this act to all persons sustaining any damage by reason of the exercise of any of the powers of this act; and in case of dispute as to amount the same shall be settled by arbitration in the manner provided by this act. . . ."

15 & 16 Vict. c. 42, s. 13: "The term 'highway' in the sections of the Public Health Act, 1848, numbered respectively 68 & 69 . . . shall mean any highway repairable by the inhabitants at large."

21 & 22 Vict. c. 98, s. 41: "It shall be lawful for any local board, by agreement with the trustees of any turnpike road, or with any corporation or person liable to repair any street or road, or any part thereof . . . to take upon themselves the maintenance, repair, cleansing, or watering of any such street or road, or any part thereof . . . on such terms as the local board and the trustees, or corporation, or person, or surveyor aforesaid may agree upon between themselves."

The above acts have been repealed by the Public Health Act, 1875 (38 & 39 Vict. c. 55), and re-enacted by ss. 4, 148, & 149 of the same act.

COCKBURN, C.J.: I regret that we must give our judgment for the defendants. I very much doubt whether the 41st section of this act of 1858 (21 & 22 Vict. c. 98) has any application to such a case at all, and without that it is clear that the trustees and the board of health had no authority to make the agreement by virtue of which and under which the defendants raised the level of the footpath. They have authority by agreement with the trustees of the turnpike road, or other persons liable to repair the highways, to take upon themselves the maintenance and repair of the road or any part of the road; but I doubt extremely whether that can be so interpreted as to be held to *mean that they [379 may divide the road longitudinally, and that one part of the road is to be repaired by one party and the other part of the road by the other, or that part of the highway which is set apart for the passage of vehicles and horses and so forth may be repaired by one of these authorities, and that the footpath or highway for foot passengers may be repaired by the other. My judgment proceeds more immediately upon the other ground, viz., that the case does not come within the 144th section of the first act, the act of 1848, which expressly excludes turnpike roads. With regard to other roads it placed them in the local authority, but it makes that authority liable to make compensation where, in the exercise of the power vested in them with reference to streets and highways, they do any damage or cause any injury to individuals. That has reference to ways which are not turnpike highways, and it expressly excludes turnpike highways. Then in the act of 1858 (21 & 22 Vict. c. 98) the local board is authorized to enter into agreements with trustees of turnpike roads, or other persons liable to repair highways, to take upon themselves the maintenance and repair of such highways. I think the powers and liabilities they may take upon themselves under such agreements can only be such as are coextensive with those of the person or authority whose powers and liabilities they accept and which are transferred to them. This brings me to the question whether, supposing the trustees of the turnpike road had done what in the present instance the defendants did, they would have been liable to give compensation. It is not necessary to decide the question, because one thing is clear—the act does not give any summary method of obtaining compensation if compensation is to be made.

If they are entitled to do what they did in the exercise of their powers, there is no provision for compensation. If they do it wrongfully redress would be had by action. So

1878

Nutter v. Accrington Local Board of Health.

here they act as delegates of the authority of the trustees. The local board did something which the trustees were not empowered to do, and which they, therefore, acting with that delegated authority were not empowered to do, and the remedy against them would be the same as against the trustees. Whether it would lie it is not necessary to decide.

380] *On the question whether the act of 1848 is applicable to this case, very much to my regret I say it is not.

MELLOR, J.: I am of the same opinion, and I rather think I have a stronger view than my Lord has upon the first point to which he referred.

My impression is that under the 41st section they cannot make an agreement to divide the road into longitudinal sections. Turnpike roads were excluded from the operations of the original Board of Health Act. This was a turnpike road; but there might be and probably would be a convenience to give power to turnpike trustees and local boards to agree to repair a certain length of road, taking the whole width between the two boundaries of the road as the subject-matter of the transfer; because then it might be more conveniently repaired and kept in condition by the board of health than by the trustees, but I do not think it was intended to introduce double jurisdiction on the same breadth of highway. Therefore I think strongly that it was not within the powers of the board to make the arrangement which was come to.

On the other part of the case it is unnecessary to say more than that I regret that the plaintiff is to lose the fruits of the litigation by reason of the defendant's setting up such a defence after this lapse of time.

The plaintiff appealed.

Gully, Q.C., and Forbes, for the plaintiff: First. The local board had power to raise this road, for it was a "street," being a highway, and therefore vested in them, and they might cause the soil to be raised under 11 & 12 Vict. c. 63 (Public Health Act 1848), s. 68. They, indeed, rely on the fact that the street was also a turnpike road, and on the interpretation clause (s. 2), enacting that "the word street shall apply to and include any highway (not being a turnpike road)." This way was however a street in common parlance, viz., a thoroughfare, with houses on either side. Whether it was a street or not is a question of fact, *Reg. v. Fullford* (1), and has been found in the affirmative. And as was said in that case by Blackburn, J.: "The interpretation

381] *clause referred to does not exclude the ordinary

(1) 33 L. J. (M.C.), 122.

meaning of 'street,' though it may include other meanings. Would this road necessarily cease to be a street because it became a turnpike road?"

Secondly. Even if not a "street" within s. 68 of the Public Health Act, 1848, the board had power under the Local Government Act, 1858 (21 & 22 Vict. c. 98), s. 41, by agreement with the turnpike trustees to take upon themselves the "maintenance, repair, cleansing, or watering" of it.

[BRAMWELL, L.J.: What power had the trustees to raise the road?

BRETT, L.J.: Maintenance must mean keeping it up as it is; could they level a hilly road?]

By 9 Geo. 4, c. 77, s. 9, the trustees of any turnpike road are empowered to "make, divert, shorten, vary, alter, and improve the course or path of any of the several and respective roads under their care and management," and under this clause the trustees are authorized to lower hills and raise hollows; but the trustees are not liable to consequential injury resulting from an act which they are authorized to do: *Boulton v. Crouther* (*). The trustees of the turnpike road could have effected the alteration, and without paying compensation; if so they could authorize the local board to alter the road under s. 41 of the Local Government Act, 1858, but by s. 4 the provisions of the Public Health Act, 1848, apply, which, by s. 144 entitles the plaintiff to compensation.

C. Crompton, for the defendants: If the street vested in the local board the turnpike trustees had no power over it. But 11 & 12 Vict. c. 63, s. 68, does not vest it in them. Being a turnpike road it is excluded from the definition of the word "street" in s. 2.

[BRETT, L.J.: By which, according to your argument, that which was a street ceases to be so.]

It does: for by 15 & 16 Vict. c. 42, s. 13, "the term 'highway' in the sections of the Public Health Act, 1848, numbered respectively 68 and 69, shall mean any highway repairable by the inhabitants at large." The intention of the Legislature was that *if the burden of repair was not [382 on the inhabitants the highway should not vest in the local board; *Reg. v. Fullford* (*) was a decision on a later act. If 11 & 12 Vict. c. 63, s. 68, vests the road in a local board, then s. 41 of the Local Government Act, 1858, empowering them to agree with the trustees and to take upon themselves the maintenance of the road is superfluous. That s. 68 of the Public Health Act, 1848, should oust the trustees could never have been intended.

(*) 2 B. & C., 703.

(*) 33 L. J. (M.C.), 122.

1878

Nutter v. Accrington Local Board of Health.

Secondly. As to the effect of s. 41, and the agreement under it, the section only authorizes an agreement as to the "maintenance and repair, cleansing or watering" of the road, and not the raising or alteration of it. Moreover, although an agreement be made to repair "any street or road, or any part thereof," such part must not be a longitudinal section. The court below so held. Much inconvenience would arise if a part on one side of the *medium flum viæ* were repairable by the board and the part on the other side by the trustees. For instance, the board might raise the footpath above the road, or the trustees raise the road above the footpath. The division to make the "part" contemplated by the act must be transverse. Then, unless the proceedings of the local board were under s. 68 or s. 41, the compensation clause s. 144 of the Public Health Act, 1848, does not apply. If the conduct of the board was *ultra vires*, the remedy was not compensation but an action: see *Brine v. Great Western Ry. Co.* (').

[BRETT, L.J.: Your argument is that the local board are not liable to make compensation, and if sued can justify under the trustees?]

The argument must go so far, and it is supported by *Ferrar v. Commissioners of Sewers of London* (') where serious injury was done to the premises of the plaintiff by works executed under an act which did not incorporate or contain any provisions for compensation, and it was therefore held that he was without remedy. This principle was established in *Vaughan v. Taff Vale Ry. Co.* ('). There is neither a right of action nor a right to compensation. If there had been a right of action it might have been brought in 1874. *383] *Want of notice of action could not have been relied on as answer.

Gully, Q.C., in reply: The turnpike trust expired in 1874, before these proceedings were taken, so there are no trustees who could be sued for the damage. The defendants are maintaining and keeping up the road. There was therefore a cause of damage on which the arbitrator could adjudicate. Then 15 & 16 Vict. c. 42, s. 13, was only intended to set at rest a question whether s. 68 of the Public Health Act, 1848, included roads merely dedicated to and used by the public but not adopted by the parish. Sect. 68 leaves to the trustees the means of collecting tolls, and s. 41 of the Local Government Act, 1858, was a mere corollary enabling the local board to take some parts of rural roads, and by

(') 2 B. & S., 402; 31 L. J. (Q.B.), 101.

(') Law Rep., 4 Ex., 227.

(') 5 H. & N., 679; 29 L. J. (Ex.), 247.

agreement with the trustees to relieve towns of toll gates. A footpath or a part of a road divided in any direction may be taken under s. 41. [He cited also *Reg. v. Trustees of the Oxford and Witney Turnpike Roads* (').]

Cur. adv. vult.

Dec. 21, 1878. The following judgments were delivered :

COTTON, L.J.: This is an action to enforce an award, ascertaining the amount of compensation payable to the plaintiff in consequence of certain alterations in a road near her house done by the Accrington Local Board of Health, and the question raised on this appeal is, whether or no the matters in respect of which the plaintiff complains were done under the powers of the local board, so as to entitle the plaintiff to compensation under s. 144 of the Public Health Act of 1848.

The facts are these. An arrangement was made between the local board and the trustees of the turnpike road, part of which was the place where the act complained of was done, that control of the road should be divided between them longitudinally; that is to say, that one body should retain the footpath and the other the carriageway; and the local board altered the level of that part of the road of which they took the charge. I may at once here dispose of a question which appears to have been raised in the court below, that although there was power, given by an act of Parliament *(21 & 22 Vict. c. 98, s. 41) to the local board [384 to make arrangements with turnpike trustees to take charge of a definite portion of the turnpike road, this could not be exercised by one body taking the centre of the road and the other keeping the side of it, but that it must be exercised by one party taking a portion of the road up to a particular point and the other taking the remainder. I cannot accede to this objection, for in my opinion it is not necessary that the local board and the turnpike trustees should divide the road by a line drawn at right angles to the centre line. In my opinion they may divide it in any reasonable way which they think fit to adopt. The real question is whether or no the place where the alterations were made by the Accrington Local Board was part of a street vested in them under s. 68 of the Public Health Act of 1848, by which "all present and future streets being, or which at any time become, highways within any district, and the pavements, stones, and other materials thereof, and all buildings, implements, and other things shall vest in and be under the

(') 12 Ad. & E., 427.

management and control of the said local board; and the said local board shall from time to time cause all such streets to be levelled, paved, flagged, channelled, altered and repaired, as occasion may require." The local board did, in fact, alter this street in front of the plaintiff's house by altering the level. It was argued that although in other respects the place where this was done was a street, yet it was not a "street" within the meaning of s. 68, on the ground that nothing is a street within that section if it is part of a turnpike road, and for that purpose reference was made to the interpretation clause which provides as follows: "The word 'street' shall apply to and include any highway (not being a turnpike road), and any road, public bridge (not being a county bridge), lane, footway, square, court, alley, passage, whether a thoroughfare or not; and the parts of any such highway road, bridge, lane, footway, square, court, alley, or passage within the limits of any district."

It was argued that, looking to the terms of this enactment, even if the place in question were a street, it is part of a turnpike road, and therefore is not a street within s. 68. My opinion is the contrary. The interpretation clause is not restrictive. It does not say that the word "street" shall be confined to any highway not being a turn-385] pike road, but that it shall "apply to and include any highway not being a turnpike road," &c. That is enlarging, not restricting the meaning of "street," and in my opinion, as I read these words, the place in question is a street; that is to say, that which, independently of the act of Parliament, in ordinary language is properly a street does not cease to be so because it is part of a turnpike road. It is very true that, independently of the interpretation clause, there may be sufficient in the act to show that its provisions relative to streets cannot apply to what is part of a turnpike road even though it is a street. But in my opinion there is nothing in the act sufficient thus to restrict the effect of its enactments as to streets. There may be some little difficulty in consequence of the street or a portion of the street, over which the turnpike trustees have certainly some powers, being vested in the local board under the powers given by the act of Parliament; but that is not, in my opinion, a sufficient inconvenience to prevent what would otherwise be their meaning being given to the words. It must be remembered that a subsequent act of Parliament was passed to which I have already referred (21 & 22 Vict. c. 98, s. 41), enabling the trustees of the turnpike road and the local board to make arrangements as to the management

and care of particular parts of the street, and in my opinion that act of Parliament was passed for the express purpose of preventing any difficulty which might arise under this act of Parliament in consequence of a street, being part of a turnpike road, being vested in the local board with certain powers; while the turnpike trustees still had under their act certain powers over the street. It gives, therefore, a right to the turnpike trustees and the local board to make arrangements by which the local board shall undertake the entire charge of the management of the street, including that which the turnpike trustees formerly had. In my opinion, therefore, this was a street within the meaning of s. 68 of the Public Health Act, 1848, and the plaintiff is entitled to compensation.

It was also argued that the amount awarded was excessive. With that we are not concerned. The local board thought right not to appear, trusting that there was no power to award compensation. In my opinion that was wrong, and having taken that *course they cannot [386 complain that the amount was excessive. We have nothing to do with the amount, whatever it is. We have only to give our opinion whether the act complained of was done under the powers given by the act to the local board, and in my opinion it was.

BRETT, L.J.: If this way had not been a turnpike road, the facts would have brought it within the definition of "street;" and I think the fact of this being a turnpike road does not prevent it being a street. There seems to me to be no inconsistency in saying that a turnpike road is a street, either independently of the statute or within the terms of the statute; and this way, therefore, being a street was vested in the local authorities to the extent we stated in another case the other day (¹). Whatever might be the obligation of the turnpike trustees to keep the roadway in repair, the local board might alter it. They did alter it, and in so doing they were assuming to exercise, and I think they were exercising, the powers of the act. I think, therefore, that any injury done to the plaintiff was the subject-matter of compensation, and that compensation was rightly awarded for it.

I therefore agree with Cotton, L.J., that the judgment of the court below ought to be reversed, and with costs.

BRAMWELL, L.J.: The question in this case turns upon s. 68 of the Public Health Act, 1848, which says "that all present and future streets" may be altered by the local

(¹) *Coverdale v. Charlton*, ante, p. 705.

board ; then it is said that the word "street" in the interpretation clause (s. 2), includes not only the things there enumerated but everything which is a street. It enacts, "the word 'street' shall apply to and include any highway (not being a turnpike road) and any road, public bridge (not being a county bridge), lane, footway, square, court, alley, passage, whether a thoroughfare or not, and the parts of any such highway, bridge, lane, footway, square, court, alley, or passage, within the limits of any district." It is said that this interpretation does not necessarily exclude a turnpike road ; that "the word "street" shall mean what is actually a street ; that the interpretation is not the whole of the meaning of the word "street." Then this consequence would follow, that we are not to hold that this interpretation clause is exclusive. There is one interpretation clause which says, "words importing the singular number shall include the plural number, and that words importing the plural number shall include the singular number." And if that clause is to be taken in an exclusive sense, the words in the singular would never mean the singular, and the words in the plural would never mean the plural. It is thus clearly an additional interpretation. I read the words here, "the word 'street' shall apply to and include any highway (not being a turnpike road), and any road, public bridge (not being a county bridge)," and so forth. Then it is said that this is a street. So it is. But it is also a turnpike road. The arguments upon the interpretation clause are equally good for either party. Therefore I must consider if there is anything in s. 68 which will enable me to decide what the Legislature intended. With great respect to those who are of a different opinion, I cannot but think the clause means, as the court below held, that a street which is a turnpike road should not be included. See what the words are : "All present and future streets being, or which at any time become, highways within any district, and the pavements, stones, and other materials, thereof, and all buildings, implements, and other things shall vest in and be under the management and control of the said local board, and the said local board shall from time to time cause all such streets to be levelled, paved, flagged, channelled, altered, and repaired as occasion may require." Has that section taken away the management of the turnpike road from the turnpike trustees ? I think that is not intended. But it seems to me, that it is speaking of those things where the management is transferred to the local board. It seems to me, therefore, that these words show

that a street, which is a turnpike road, is not included in section 68. As to expressing an opinion upon such a case as this with confidence, I would much rather not express a confident opinion; and I do not think it is a case upon which one can be confident, especially when one hears the contrary opinions that have been expressed. There is one other remark, and that *is with regard to s. 117, [388 which says the local board are to be surveyors of the highways. Manifestly, that does not include a turnpike road. That is quite certain.

I am, therefore, of opinion, that upon the questions mainly argued before us, the judgment was right and should be affirmed.

But some other points remain. I will just refer to one, because I think it is of some consequence. I am not quite sure that this is not a more substantial question than the court below thought it. If the acts were done, as indeed they were, and the alteration was made under the powers of the turnpike trustees, I cannot see that any action would be maintainable against the turnpike trustees or those who acted on their behalf. The trustees are empowered under their act of Parliament, to raise and alter the levels of the road, and it has been held in a case in the Reports of Barnwell and Cresswell⁽¹⁾, that no action lies against the trustees of a turnpike road for acts done *bona fide* and within their jurisdiction. But I am inclined to look upon it as a principle that no action ought to be maintainable. Usually, a person cannot raise or lower a road in front of another man's park gate, and so leave his park gate high up in the air or below the level of the road; because any person having the right is not likely to interfere with the road. But supposing that the owner of property adjoining a highway is not the owner of the soil in the highway, I do not think that he has any right by the law of the land, to have the road continued at a particular level. It may be a great inconvenience to him, no doubt, to have the road altered, if he has built with reference to the level of the road; but it may be an inconvenience to the public not to have the level altered, and I do not know that he has any vested right in the road remaining at that level to the inconvenience of all mankind. I am not clear, therefore, that there was not a more meritorious defence in this case than it was supposed by the court below. If this view is right, then there is no ground for saying that the defendants are continuing and maintaining a wrong which they have committed. If the

(1) *Boulton v. Crowther*, 2 B. & C., 708.

1878

Nutter v. Accrington Local Board of Health.

act was rightly done by the turnpike trustees, the defendants are justified in maintaining it, and I think the judgment of the court below must be affirmed; but as the other 389] members of the *court are of a different opinion, the judgment of the Queen's Bench Division must be reversed.

Judgment reversed.

Solicitors for plaintiff: *Ridsdale, Craddock & Ridsdale.*

Solicitors for defendants: *Johnson, Weatherall & Co.*

See 20 Eng. Rep., 308 note; 21 Eng. Rep., 47 note; 23 Eng. Rep., 345 note; Moak's Underhill on Torts, 6, 453, 469, 713, 26 Am. Rep., 457 note.

In the following States it is held, under statute, or otherwise, that the owner of a lot abutting on a street is entitled to damages against a city altering the grade, etc.:

Canada, Lower: *Re Colquhoun*, 44 U. C. Q. B., 631; *Matter of Yeomans*, 43 id., 522, 4 U. C. App. R., 301.

Illinois: See *People v. Walsh*, 96 Ills., 232.

Massachusetts: *Donovan v. Springfield*, 126 Mass., 371; *Lane v. Boston*, Id. 519; *Cambridge v. Commissioners*, etc., Id., 529.

Nebraska: *Goodrich v. City of Omaha*, 10 Neb., 98.

Tennessee: *Mayor, etc., v. Nichol*, 3 Baxter, 338.

United States, Supreme Court: *Transportation, etc., v. Chicago, etc.*, 99 U. S. R., 635.

Wisconsin: *Tyson v. Milwaukee*, 50 Wisc., 78.

In the following, that he is not:

Canada, Lower: *Mayor v. Drummond*, 22 L. C. Jur., 1.

Connecticut: *Fellowes v. City of New Haven*, 44 Conn., 240, 26 Am. R., 447, 457 note; *Healey v. New Haven*, 47 Conn., 305.

Minnesota: *Lee v. Minneapolis*, 22 Minn., 13; *Alden v. Minneapolis*, 24 id., 261-2.

Vermont: *Richardson v. Vermont*, etc., 25 Verm., 465.

In the following cases, a municipal corporation is held liable if it be guilty of negligence in the performance of the work, resulting in direct injury to the abutter:

Connecticut: *Healey v. New Haven*, 47 Conn., 305.

Minnesota: *Robs v. Minneapolis*, 22

Minn., 159; *Alden v. Minneapolis*, 24 id., 263.

Defendant was sued in trespass to land claimed to belong to the plaintiff, but which had been taken and used for the Intercolonial Railway. Defendant was superintendent of government railways, and an application was made for a stay of proceedings, on an affidavit alleging that the alleged trespass was committed by him in the employ of the government as such superintendent, and not otherwise. Plaintiff, in answer, swore that the action was brought against the defendant for personally trespassing on his land, and denied that the land had been legally taken by the government. Held, per Allen, C.J., and Fisher and Wetmore, JJ., *Wellson, J.*, dissenting, that the court ought not, on a summary application, to stay the proceedings, but should leave the defendant to resist the action by plea in the ordinary way: *Milner v. Brydges*, 2 Pugsley & Burbidge (N.B.), 113.

A mortgagor in possession is a proper party to the proceedings to assess the damages: *Matter of Yeomans*, 43 U. C. Q. B., 522, 4 U. C. App. R., 301.

In Nebraska, it is held that damages occasioned by the established grade of a street, which have been ascertained and paid to property owners as provided in sec. 40 of the act to incorporate cities of the first class, cannot be reimbursed to the city by means of a special assessment laid upon the lots abutting said street: *Goodrich v. Omaha*, 10 Neb., 98.

Damages are not recoverable for a change of grade of a street which is merely laid out and not made: *Tyson v. Milwaukee*, 50 Wisc., 78.

In case of a change in the established grade of a street in the city of Milwaukee by order of the common council, it

is only where a change in the grade of adjacent premises, by cutting or filling, is thereby rendered necessary for their proper and convenient use, that the cost of such cutting or filling becomes a legitimate item of damages: *Tyson v. Milwaukee*, 50 Wisc., 78, explaining *Church v. Milwaukee*, 81 id., 512, and *Stowell v. Milwaukee*, Id., 523.

Where no private rights are involved or invaded, the legislature may close a highway or street, or relinquish altogether its use by the public, or it may regulate its use or restrict it. In the absence of constitutional restriction, the legislature may vacate or discontinue a street or highway, or invest municipal corporations with this authority: *People v. Walsh*, 96 Ills., 232.

A city may allow park commissioners

to make a boulevard, in conjunction with a park, of a public street, though it was held that for any change in the use of a street *dedicated* to the use of the public for ordinary purposes, to the extent that it damages private individuals, they will be entitled to recover: *People v. Walsh*, 96 Ills., 232, explaining *Kreigh v. Chicago*, 86 id., 407.

Where a city is authorized by statute to grant the control of certain streets to park commissioners or not, at its pleasure, it may grant such control with reservations as to the laying of gas and water pipes and the construction of sewers, and such reservations will not invalidate the grant, but it must be taken subject to the reservations and conditions imposed, if accepted: *People v. Walsh*, 96 Ills., 232.

[4 Queen's Bench Division, 394.]

June 10, 1879.

***BABCOCK and Others v. LAWSON and Another. [394]**

Sale or Pledge of Goods—Purchaser or Pledgee, Right of Innocent, where Property procured by Vendor or Pledgor by Fraud—Fraud, which of Two Innocent Parties to suffer by—Pledge—Property revested by Pledgee in Pledgor through Fraud of the latter.

The plaintiffs made advances to D. & Sons on the security of certain flour, the following memorandum being signed by D. & Sons: "As security for the due fulfilment on our part of this undertaking, we have warehoused in your name sundry lots of flour, and in consideration of your delivering to us or our order said flour as sold, we further undertake to specifically pay you proceeds of all sales thereof immediately on their receipt." The flour was warehoused in the plaintiffs' name. The defendants subsequently made advances to D. & Sons on the security of a pledge of the flour, in ignorance of the prior transaction with the plaintiffs; and D. & Sons, by a fraudulent representation that they had sold the flour to the defendants, procured from the plaintiffs a delivery order for the flour, which they gave to the defendants. The defendants, in pursuance of the delivery order, obtained possession of the flour, and, the advances made by them not being repaid, sold it. The plaintiffs sued the defendants for the conversion of the flour:

Held, that (assuming that the plaintiffs had originally a special property in the flour), the intention of the plaintiffs must be taken to have been to revest the whole property in the flour in D. & Sons, in order that they might transfer it to the defendants as purchasers; and that, though the plaintiffs might have revoked the delivery order as being procured by fraud, as long as the flour remained [395] in the hands of D. & Sons, yet when the property in the flour had been transferred by D. & Sons to bona fide transferees for good consideration, the title of the latter was indefeasible:

Held, also, that of two innocent parties, one of which must suffer, the plaintiffs having enabled D. & Sons to commit the fraud on the defendants, must suffer the consequences, and that, consequently, the action was not maintainable.

SPECIAL CASE stated in an action for conversion of certain sacks of flour. The facts sufficiently appear from the judgment.

1879

Babcock v. Lawson.

May 13. *T. H. James*, for the plaintiffs: The plaintiffs were pledgees of the flour and therefore had a special property in it. The pledgors had no right to the possession of the flour until the debt was paid and could not sue in trover: *Halliday v. Holgate* (*); *Cundy v. Lindsay* (*). The plaintiffs parted with the possession of the flour, but they did so for the purposes of a sale not of a pledge, on a fraudulent representation by the pledgors, that they had effected a sale of the flour in conformity with the agreement. They never intended to give up their special property in the flour except for that purpose. There is no evidence of a contract between the plaintiffs and defendants to pass the property, because they were never *ad idem*. The plaintiffs supposed the defendants to be purchasers, whereas they never intended to purchase. The special property, therefore, remains in the plaintiffs, and they can maintain trover. An action of trover would certainly lie against Denis Daly & Sons by the plaintiffs; and it is therefore submitted, that as the defendants must derive their title from Denis Daly & Sons, it will lie against the defendants. [He also cited *Kingsford v. Merry* (*), and *Roberts v. Wyatt* (*).]

Cohen, Q. C. (Warr, with him), for the defendants: The test suggested is not a true one. The defendants do not stand in the shoes of Denis Daly & Sons. It is a case for the application of the well known doctrine that where one of two innocent persons must suffer by the fraud of a third, the person who has given credit to the third person and thus enabled the fraud to be committed must be the sufferer. The case admits of two aspects. If the plaintiffs remained the owners of the goods, the Factors Acts apply. If they 396] parted with the property in the goods when *they gave them up to Denis Daly & Sons, clearly the defendants are entitled to the property. It is, moreover, contended that the contract is not one of pledge at all, and that it gave no special property in the goods to the plaintiffs. At any rate, by the very nature of the arrangement, when the goods were given up by the plaintiffs, the whole property was intended to be revested in the pledgors, the plaintiffs looking only to the proceeds of the sale. [He cited *Knights v. Wiffen* (*); *Vicars v. Hertz* (*); *White v. Garden* (*); *Attenborough v. St. Katharine's Dock Co.* (*); *Pease v. Gloahec* (*).

James, in reply.

Cur. adv. vult.

(*) Law Rep., 3 Ex., 299.

(*) 3 App. Cas., 459; 24 Eng. R., 345.

(*) 1 H. & N., 503.

(*) 2 Taunt., 268.

(*) Law Rep., 5 Q. B., 660.

(*) Law Rep., 2 H. L. (Sc.), 115.

(*) 10 C. B., 919.

(*) 3 C. P. D., 450, 464.

(*) Law Rep., 1 P. C., 219.

June 10. The judgment of the Court (Cockburn, C.J., and Mellor, J.,) was delivered by

COCKBURN, C.J.: This was an action for the wrongful conversion of a quantity of flour alleged to be the property of the plaintiffs.

The facts were shortly these: The plaintiffs, who are merchants at Liverpool, had lent to the firm of Denis Daly & Sons, also merchants at Liverpool, their acceptances for the sum of £11,500 (for which Denis Daly & Sons undertook to provide at or before maturity), on the security of certain flour, a memorandum as to such security being given by Denis Daly & Sons in these terms: "As security for the due fulfilment on our part of this undertaking, we have warehoused in your name sundry lots of flour, and in consideration of your delivering to us, or our order, said flour as sold, we further undertake to specifically pay you proceeds of all sales thereof immediately on their receipt."

The flour was accordingly warehoused in the name of the plaintiffs in a room let to them for the purpose, and of which they kept the key and paid the rent.

Three of the acceptances thus given by the plaintiffs, amounting in the whole to £6,500 having been in due time provided for by Denis Daly & Sons, it was agreed between them and the plaintiffs that the two remaining bills [397 for £2,500 each, should be renewed, which was accordingly done, a memorandum similar to the former one being again given by Denis Daly & Sons, whereby they undertook to provide for the acceptances at or before maturity, with this addition: "As security for the due fulfilment on our part of this undertaking, you hold two lots of Baltic whites flour, warehoused in December and January last." The Baltic whites flour thus mentioned consisted of 1,500 sacks, being the flour originally pledged to the plaintiffs.

In the interval between the giving of these last-mentioned acceptances and the time of their becoming due, one of the firm of Denis Daly & Sons, on the 13th of May, 1878, applied to the defendants to advance them a sum of £2,500 on the security of the 1,500 sacks of flour deposited, as has been stated, with the plaintiffs, but without in any way communicating to them the fact of the flour having been so deposited. The defendants, in entire ignorance of this fact, and believing the flour to be the property of Denis Daly & Sons, agreed to advance the £2,500 on the security of the flour, but on the terms that they were to have absolute possession of the flour, and to warehouse it in their own name, and to have power to sell it.

1879

Babcock v. Lawson.

For the fraudulent purpose of obtaining possession of the flour, so as to be able to give possession of it to the defendants, Arthur Daly, one of the firm of Denis Daly & Sons, brought to the plaintiffs, but unknown to the defendants, a memorandum in these terms: "14th May, 1878. We have sold Messrs. R. & J. Lawson 1,500 sacks of Baltic whites, payment as follows: £1,000 upon delivery, £1,000 in fourteen days, £1,000 in a month, which amounts we will hand you as received. D. Daly & Sons."

The plaintiffs by the fraudulent misrepresentation that Denis Daly & Sons had found a purchaser for the flour, and would hand over to them the amount to be received as the price, were induced to part with the possession of the flour, and for that purpose gave, as requested, on the 14th of May, a delivery order to Denis Daly & Sons; and subsequently addressed a written direction to the landlord of the warehouse, which they delivered to Arthur Daly, to transfer the room in which the flour was deposited to Lawson & Co., which was accordingly done.

398] *The defendants on the same day that the delivery order was given by the plaintiffs to Denis Daly & Sons, namely, the 14th of May, advanced to Denis Daly & Sons the sum of £1,725, and on the next day the further sum of £775 in cash.

It is stated in the case that the fraudulent memorandum of the sale to the defendants, by which the plaintiffs were induced to give the delivery order for the flour, was brought to them by Arthur Daly after banking hours on the 14th, from which it may be inferred that the £1,725 advanced by the defendants to Denis Daly & Sons on that day, was advanced before the possession of the flour had been given up to the latter by the plaintiffs. Possession of the flour having been transferred to defendants, they, between the 18th of May and the 1st of June, by virtue of the right to sell vested in them by the agreement with Denis Daly & Sons, sold the flour in the Liverpool market for sums amounting in the whole to £2,647 10s. 3d., and the flour was delivered to the respective purchasers.

Of the £2,500 thus advanced by the defendants to Denis Daly & Sons, £500 was paid by the latter to the plaintiffs, as part of the price received on the sale of the flour. But the plaintiffs have received no further payment, and Denis Daly & Sons have become bankrupts.

We have in this case to discharge the unpleasant duty of deciding on which of two innocent parties the loss, occasioned to one or other of them by the fraud of a third, shall

fall. In discharging such a duty a court, to use the words of Lord Cairns in *Cundy v. Lindsay* (¹), "can do no more than apply rigorously the settled and well-known rules of the law." Unfortunately, however, some difficulty presents itself in the present case in applying the law. For the case is, so far as we are aware, *sui generis*, the contract out of which the claim of the plaintiffs arises being of an altogether exceptional character. The contract is not one in which goods are deposited upon the ordinary terms incidental to a bailment of pledge, namely, that the thing pledged shall remain in the possession of the pledgee until the engagement of the pledgor, which it was given to insure, has been fulfilled.

Here the pledgors, when they find a purchaser, are to have *possession of the thing pledged, in order to [399 sell it, not in the name, or even on behalf of the pledgees, but as their own, subject only to the condition of handing over the proceeds in liquidation of the debt.

It may be doubted whether under such a contract any special property, however limited, vested in the pledgees, or whether their right was not limited to the possession and custody of the goods, so as to secure to them the knowledge of any sale which the owners might be able to make, and so to afford them the opportunity of insisting on the price being handed over to them as soon as paid.

Assuming, however, that under the contract with Denis Daly & Sons the plaintiffs acquired, as pledgees, a special property in the flour deposited in their name, it was subject to the right of the pledgors to have the flour given up to them on their finding a purchaser for the purpose of the sale by them as owners, without any intervention on the part of the pledgees. If, having obtained the goods for the purpose of selling them, and having sold them, the pledgors had kept the price instead of handing it over to the pledgees, the latter could not have disputed the title of the buyer, and would have had no remedy except by action against the pledgors for breach of contract.

In compliance with the agreement, the flour was delivered by the plaintiffs to Denis Daly & Sons, the pledgors, with the full intention that they should sell it as their own and make a good title to it to their vendees.

It is true that the possession of the goods was obtained by the fraud of the pledgors, but this appears to us to make no difference in the result. The flour having been given up by the plaintiffs to Denis Daly & Sons, conformably to the

(¹) 3 App. Cas., 463; 24 Eng. Rep., 349.

1879

Babcock v. Lawson.

contract, to sell as their own, the special property vested in the plaintiffs as pledgees, whatever it may have been, was intentionally surrendered; and the possession having been parted with, the contract of pledge was, at all events for the time being, at an end. The abandonment of the property in, and the surrender of, the thing pledged might, as between the pledgees and pledgors, have been revoked as having been obtained by fraud, so long as the goods remained in the hands of the pledgors. But when, prior to any such 400] *revocation, the property in the goods had been transferred by the owners for good consideration to a *bona fide* transferee, the latter acquired, as it appears to us, an indefeasible title. The analogy to a case of sale where the vendor is induced to part with his property by fraud appears to us complete; and the principle laid down by the Court of Common Pleas in *White v. Garden* (¹), and by the House of Lords in *Cundy v. Lindsay* (²), and acted upon by this court in *Moyce v. Newington* (³), is, we think, applicable to the case before us; and we are therefore of opinion that the defendants acquired a good title to the flour by their contract with Denis Daly & Sons.

Our view of the case being founded on the assumption that the property in the goods became by the act of the pledgees revested in the pledgors, it makes no difference that the goods, having been parted with by the plaintiffs with a view to their being sold, were, instead of being sold, pledged. The property having by the act of the pledgees become revested in the pledgors, the latter were as competent to dispose of the goods by way of pledge as by that of sale.

Nor in this view of the case is it in any way material that the larger portion of the money advanced by the defendants to Denis Daly & Sons was paid (if we are to take the fact to have been so) before the possession of the flour was given up by the plaintiffs. The property in the flour was made over to the defendants, and the possession of it given up to them, by Denis Daly & Sons for good consideration when the full property in it was, as we think, in the latter, and the transfer took place by virtue of a contract whereby the money was to be advanced on the pledge of the goods. That the money was paid down before the goods were delivered, provided the property in the goods was in Denis Daly & Sons when, in fulfilment of the contract, they transferred the property in, and gave possession of, the flour, can make no difference.

(¹) 10 C. B., 919.

(²) 3 App. Cas., 459; 24 Eng. Rep., 345.

(³) 4 Q. B. D., 32; *ante*, p. 674.

But there is a further ground on which we are of opinion that the defendants are entitled to our judgment. We are prepared to hold, as we intimated in *Moyce v. Newington*⁽¹⁾, that where one *of two innocent parties must suffer [401 from the fraud of a third, the loss should fall on the one who enabled the third party to commit the fraud. It has been so held by the Supreme Court of Judicature of the State of New York in a case of *Root v. French*⁽²⁾. In *Vickers v. Hertz*⁽³⁾ Lord Chancellor Hatherley says: "If one person arms another with a symbol of property he should be the sufferer, and not the person who gives credit to the operation and is misled by it." It is on this principle that the legislation with reference to fraudulent sales made by factors or agents intrusted with the possession of goods or of the documents of title to goods has been based. It was on this ground that the Court of Session in *Pochin v. Robinows*⁽⁴⁾ and in *Vickers v. Hertz*⁽⁵⁾, independently of the Factors Acts, and proceeding on general principles, decided in favor of an innocent purchaser. And though in *Vickers v. Hertz*⁽⁶⁾ in the House of Lords the case was decided in favor of the defendant, as coming under the Factors Acts, Lord Colonsay expressly says that the judgment appealed from was well founded independently of those acts.

Now in the case before us Denis Daly & Sons were allowed by the plaintiffs to appear as the ostensible owners of the flour, and to exercise uncontrolled dominion over it, without the plaintiffs, by intervening themselves in the transaction, as they might have done, securing themselves against any fraudulent conduct on the part of Denis Daly & Sons. It would, therefore, be in the highest degree unjust and inequitable that the defendants, Lawson & Co., who have innocently advanced money on the goods in the ordinary course of commercial dealing, should be sufferers through the improvident contract of the plaintiffs with Denis Daly & Sons, or want of proper caution on their part.

We, therefore, on both grounds, give judgment for the defendants.

Judgment for the defendants.

Solicitors for plaintiffs: *Gregory, Rowcliffe & Co.*, for Stone & Fletcher.

Solicitors for defendants: *Field & Roscoe*, for Bateson.

(1) 4 Q. B. D., 35; *ante*, p. 674.

(2) Law Rep., 2 H. L. (Sc.), 115.

(3) 13 Wendell, 570.

(4) 3d Series, vol. vii, p. 622.

See 20 Eng. Rep., 280 note.

A purchaser of a bond and mortgage takes it subject to the equities between

the original parties, and the assignor can give no better title than he has himself.

It is only where the owner has, by his own affirmative act, conferred the apparent title and absolute ownership of a non-negotiable chose in action upon another, on the faith of which it has been purchased for value, that he is precluded from asserting his real title.

Plaintiff and her husband executed to R. a bond and mortgage simply as an accommodation, to be used as collateral security for a loan he proposed effecting. R. failed to procure the loan, but sold the bond and mortgage to defendant B. In an action brought by plaintiff to have the bond and mortgage cancelled, held, that R. having no authority to sell the bond and mortgage, conveyed no title to B., and that plaintiff was entitled to judgment, declaring the bond and mortgage void as against her: *Davis v. Bechsteine*, 69 N. Y., 440, 25 Am. Rep., 218, 220 note.

The owner of property which has been tortiously taken from him is not estopped from reclaiming it by the fraudulent act of the tortious taker, to which he was not a party, and which he in no way aided, to create an estoppel; he must have enabled the wrongdoer to perpetrate the fraud.

Plaintiff discounted the note of N. upon transfer to it as security of the bill of lading of a cargo of wheat shipped at Chicago, owned by and consigned to N. at Buffalo; while the wheat was in transit to Buffalo, defendants accepted and paid drafts of N. upon transfer of false bills of lading of wheat, purporting to have been shipped by N. at Buffalo on board of certain canal boats named, consigned to defendants at New York, no wheat in fact having been shipped. Upon arrival of the wheat at Buffalo N., without consent or knowledge of plaintiff, caused it to be shipped on board the canal boats named in the false bills of lading, and to be transported and delivered to defendants at New York, who refused to deliver the same to plaintiff on demand, and afterwards sold it. In an action for conversion, held that defendants were liable; that plaintiff was special owner and in possession of the wheat by virtue of the transfer of the bill of lading; that the general owner had no right to the possession, disposal or control of the wheat; any possession obtained or do-

minion exercised by him without plaintiff's assent was tortious, and he could transfer no title; that as plaintiff had not clothed N. or the pretended canal carriers with the apparent title to, or authority to dispose of, the wheat, or in any way aided or facilitated in the fraud perpetrated upon defendants, it was not estopped from reclaiming its property.

Also held, that the fact that there was a small quantity of wheat upon the canal boats to which the plaintiff was not entitled, and that the demand was for the whole, did not defeat its right to recover, as the refusal was upon the ground that no part of the wheat belonged to plaintiff, and as there was an actual conversion by a sale: *Marine Bank v. Fiske*, 71 N. Y., 353, distinguishing *Rowley v. Bigelow*, 12 Pick., 307.

One who purchases goods at half their value, he having information from which he may know that the factor with whom he deals is acting without authority, and in fraud of his principal takes no title thereto, such a purchase being inconsistent with good faith and void, and the principal may recover the goods from such pretended vendee.

A factor cannot generally pledge the goods of his principal for his own liabilities, and is bound to obey the orders of his consignor as to the terms of sale: *Singer, etc., v. Hudson*, 4 Mo. App., 145.

The payee of a note delivered it as collateral security with his written assignment to the pledgee indorsed thereon, and the pledgee afterwards gave temporary possession of the note for a specific purpose to the payee, who thereupon converted it to his own use, by selling it to one W., to whom the makers paid the note and took it up. In an action by the pledgee against the makers—held,

1. That defendants refusing to produce the note, on notice, it must be presumed that when they took it up the assignment indorsed remained un erased and uncanceled.

2. That from the note itself, in that condition, both W. and defendants were chargeable with notice of plaintiff's right as assignee. Mere possession of the note in that state by the payee did not raise any legal presump-

tion of a re-assignment to him; the inability of W. to read, or his having in fact overlooked the assignments, would not prevent his being chargeable with notice thereof; the delivery of the note to the payee under such circumstances would not estop the assignee from asserting his ownership; and in the absence of further evidence, it was error to direct a verdict for the defendants: *Pier v. Bullis*, 48 Wisc., 429.

Where one of two parties who are equally innocent of actual fraud must lose, the one whose misplaced confidence in an agent or attorney has been the cause of the loss, shall not throw it on the other: *Pennsylvania R. R. Co.'s Appeal*, 86 Penn. St. R., 80; *Stewart v. Reed*, 91 id., 290; *Wood v. Smith*, 92 id., 379; *Peake v. Thomas*, 39 Mich., 584; *Morris v. Preston*, 93 Ills., 216.

Whatever may be the actual intent of a party to a transaction, if he so acts as to lead a reasonable person to believe that he understands and assents to its terms, and the other party so believing acts accordingly, the former is estopped from asserting that he did not so understand and assent; and he is bound by the action taken: *Peake v. Thomas*, 39 Mich., 584.

An assignee from an agent of the owner takes, as against the owner, when the agent is vested with the apparent control, and the assignee is a *bona fide* purchaser for value without notice. Where the agent is intrusted, by the real owner, with an assignment of a chose in action executed in blank, he is invested by the owner with the apparent control of it as owner: *Hazewell v. Coursen*, 45 N. Y. Superior Ct. R., 22.

Where the owner of property confers upon another an apparent title to, or power of disposition over it, he is estopped from asserting his title as against an innocent third party who has dealt with the apparent owner in reference thereto, without knowledge of the claims of the true owner.

The rights of such third party do not depend upon the actual title or authority of the one with whom he dealt, but upon the act of the owner which precludes him from disputing the title or authority he has apparently conferred.

Plaintiff was the owner of 134 shares of the stock of the First National Bank

of St. Johnsville, the certificate of which he delivered to and left with G. B. & D., his stockbrokers, to secure any balance of account. Upon the certificate was indorsed a blank assignment and power of attorney to transfer, signed by the plaintiff, purporting on its face to have been executed "for value received." Plaintiff's indebtedness on the account was \$3,000 and interest. G. B. & D. without authority, and without plaintiff's knowledge, pledged the scrip with other securities to secure an advance of \$45,135. Defendant at the request of G. B. & D. paid the advance, and received the securities. The other securities were sold, leaving \$15,219.81 of the advance unpaid: Held that the defendant was entitled to hold the stock for the full amount remaining unpaid: *McNeil v. The Tenth*, etc., 46 N. Y., 825.

A *bona fide* purchaser for value of a non-negotiable chose in action from one upon whom the owner has, by assignment, conferred the apparent absolute ownership, when the purchase is made upon the faith of such apparent ownership, obtains a valid title as against the real owner, who is estopped from asserting title thereto.

B. makes and delivers his non-negotiable promissory notes to C., from whom they are obtained by fraud, misrepresentation and without adequate consideration. The assignee, having thus obtained them, transfers them to W., who is a *bona fide* purchaser for value, before due, without notice: Held, C. cannot reclaim the notes from W.: *Combes v. Chandler*, 33 Ohio St. Rep., 178.

If W., being the owner of certain shares of the stock of a corporation, causes them to be transferred on the books of the company to M., to whom a certificate is issued in due form, and if M. thereupon indorses the certificate in blank and delivers it to W., from whom, while so indorsed in blank, and while M. still stands on the books of the company as the registered owner, the certificate is stolen, M., who puts it on the market and it is purchased in the usual course of business, in good faith and without notice by a third person, the purchaser will acquire a valid title to the stock as against W.: *Winter v. Belmont*, etc., 53 Cal., 428.

Where a party purchases negotiable

1879

Babcock v. Lawson.

paper, and, without any indorsement to him, permits it to remain in the hands of the vendor, invested with all the evidence of ownership, and the latter afterwards indorses such paper to another for value without notice, the loss must fall upon him whose act or neglect has enabled the agent to commit the wrong: *First National Bank of Auley v. Beaird*, 7 Bradwell, 80.

A wife joined in her husband's mortgage of certain lands, including the homestead. On foreclosure she claimed that the lot was her separate property, and that she had not known that the mortgage covered it; that she had not read the mortgage nor heard it read, and that if she had, she would not have recognized the home lot by its description. It appeared that the mortgagee had acted in good faith, and had done nothing to mislead her: Held, that the home lot was subject to the foreclosure decree: *Peake v. Thomas*, 39 Mich., 584.

Where B., an attorney, had been requested by the mortgagor to procure him a loan on the property, and the papers were executed and acknowledged by M., the mortgagor, and, after execution and acknowledgment were sent by K. and by him delivered to B. for the purpose of obtaining a loan thereon, and B. applied to H., the plaintiff, who consented, and gave B. a check for \$5,000, the amount asked for, and received the bond and mortgage from B. and delivered the latter to B. to record, the mortgagor and mortgagee never having seen each other:

Held, that B. was M.'s agent for the purpose of raising money on the bond and mortgage, and the delivery of the same by B. to H. was a good delivery and binding upon M., the defendant, and that the payment of the \$5,000 by H., the plaintiff, to B., was a payment to M., the defendant, through his agent.

Although the name of the mortgagee was not filled in at the time of the execution of the mortgage, under the peculiar circumstances of the case, the papers must be held to have been delivered to B. by the mortgagor with authority to fill in the name of the mortgagee.

A bond and mortgage executed in blank as to a material point, with parol authority to fill up the blank and deliver it, is good.

B., the agent of the defendant, drew the money on plaintiff's check for \$5,000, but did not pay it to defendant, claiming some unsettled account between them, and after some months sent \$3,500 back to plaintiff. Plaintiff commenced foreclosure, which was settled by the mortgagor signing a paper dated December 9, 1876, acknowledged the payment to B. of the \$1,500 on account of the mortgage, and on this plaintiff paid the mortgagor the \$3,500 balance:

Held, that if one of two innocent persons must suffer pecuniary loss from the dishonesty of B., that the defendant is the person who must sustain the loss.

Held, further, that the defendant, by the execution of the instrument dated December 9, 1876, is estopped from denying the validity of the bond and mortgage, on the ground that the mortgagee's name was not inserted at the time the instrument was executed: *Hemmenway v. Mulock*, 56 Howard's Pr., 38.

Plaintiffs made advances to U. on pledge of the bill of lading of a cargo of corn, of which U. was general owner, and which was consigned to him at B. Upon arrival of the corn, plaintiff consented that U. might designate the elevator in which it should be stored; this he did; and upon receiving from the master of the vessel the elevator receipt, instead of procuring a warehouse receipt in the names of plaintiffs and delivering it to them as according to usage it was his duty to do, he obtained such receipt in his own name. The plaintiffs knew that, according to the usual course of dealing, the master would deliver the elevator receipt to the consignee on payment of freight, and that on such receipt a warehouse receipt would be issued to the consignee, or in the name of whom he should direct. They expected U. to pay the freight, and intended him to receive the elevator receipt. The corn arrived November 8th; plaintiff paid no attention to its possession until November 18th, when they demanded repayment of their loan. Meanwhile U. had shipped the corn to New York by canal, and, on the faith of the canal boat bills of lading, obtained advances from defendants. Held, that conceding plaintiffs' claim could not be enforced

as against defendants, as to which, *quære*, yet it remained good as against U. or his creditors, and defendants would be entitled to protection against such claim only to the extent of their advances, and so far only as a lien on the corn or its proceeds; had in their hands other funds belonging to U. upon which they had a lien for, and had the right to apply them to the payment of these advances, and which, after due notice of plaintiffs' claim, they paid over to another on the order of U. Held, that plaintiffs were entitled to demand, and, upon refusal to pay, to maintain an action to recover the corn or its proceeds.

Also held, that plaintiffs' rights to have such other funds applied to cancel defendants' lien was superior to the title thereto of an assignee in bankruptcy of U., or to that of any person to whom U. might have assigned the same: *Hazard v. Fiske*, 83 N. Y., 287.

When the owner of stocks leaves his certificates with a blank power of attorney in the possession of his broker, who pledges them for his own debt, the true owner is estopped from setting up his ownership as against such pledgee, who has advanced money upon the certificates without knowledge of the fraud of the broker: *Burton's Appeal*, 8 Week. Notes (Pa.), 505.

A certificate of stock, accompanied by an irrevocable power of attorney, either filled up or in blank, is, in the hands of a third party, presumptive evidence of ownership in the holder.

One of four executors placed in the hands of his brokers certain certificates of stock which belonged to the estate of his testator. These certificates were pledged as collateral security for the personal indebtedness of this individual executor, and were accompanied by a blank bill of sale and a power of attorney, signed by him as acting executor. The brokers in turn pledged the stock to one who advanced money to them in the belief that the brokers were the real owners of the stock. The remaining executors filed a bill in equity to recover the stock. Held, that the same principle which prevails in the case of an absolute owner applies in the case of an executor who invests the holder of certificates of stocks with apparent ownership, and that there could be no recovery of the stock

until the advances made thereon were paid.

The fact that the legal title to the stock was known to have previously been in the executor, and that the title of the holder appeared on its face to have been derived from him in his representative capacity, does not raise a suspicion, or put a purchaser on inquiry, for the reason that it is the executor's primary duty to dispose of the assets and settle the estate.

The law casts no duty upon a purchaser to ascertain if the trusted executor of a decedent's will is managing the estate in fraud of creditors or legatees: *Wood's Appeal*, 92 Penn. St., 379.

J. and his wife executed and delivered to G. a bond and mortgage for \$10,000, on the property of the wife, accompanied with a certificate of no defence, and G. assigned them to M. J. and his wife then conveyed a part of the mortgaged premises to M. J. and his wife then conveyed a part of the mortgaged premises to Mc., and the remainder to the wife of Mc., both of whom had knowledge of the assignment to M. Mc. and wife reduced the mortgaged debt to \$3,000, which was noted on the mortgage, and Mc., at the suggestion of G., gave the latter a negotiable note for that amount, with the agreement that G. should hold the mortgage of J. and wife to secure the payment of the note or its renewal. M. re-assigned the mortgage to G., who, without the knowledge of Mc., assigned it to L. The note of Mc. was several times renewed. Upon the last renewal G. transferred it to a bank for value before maturity, which obtained judgment and recovered the amount from Mc. L. brought suit on the mortgage and showed that she had paid full value for it, and that she purchased said mortgage without actual notice or knowledge of any agreement between G. and Mc., or that the latter had given a note for the same debt. Held (affirming the court below), that Mc. having put it in G.'s power to commit the fraud, and having exercised that power by the assignment of the mortgage to L., and at the same time keeping secret the collateral arrangement involving the note, Mc. must suffer the loss. Held further, that no duty of inquiry rested on L. to ascertain if Mc. had a

defence to the mortgage, the want of reasonable prudence on the part of the latter having been the cause of the imposition upon her: *Jeffers v. Gill*, 91 Penn. St., 290.

Where the owner of stock intrusts the certificates with blank powers of attorney to an agent for safe keeping, who fraudulently transfers them to a third party, who in turn, without knowledge of the fraud, has them transferred to himself, the owner cannot recover from the corporation for the loss. A corporation is the trustee of its stockholders, and is bound to proper vigilance and care that they may not be injured by unauthorized transfers of stock.

Where, therefore, signatures to powers of transfer were genuine, yet it appearing that at the time the transfer was made they were thirteen years old, this fact should have put the corporation upon inquiry, and it was not justified in making the transfer unless it had first ascertained if the powers had been revoked: *Penns. R. R. Co.'s Appeal*, 86 Penn. St. R., 80.

Quiggle and wife placed in the hands of Hepburn, as their attorney, 253 shares of a canal company's stock, with blank power to transfer 100 shares, being owned by the wife and standing in her name. Her power was witnessed by Quiggle. Hepburn delivered the certificates to Persch, who pledged them to a bank as collateral for his own debt. The stock was transferred under this power on the books of the company to the bank, and certificates issued to them. Neither Persch nor the bank knew that Mrs. Quiggle was a married woman. After this transfer, Quiggle and wife notified the company not to allow the bank to transfer, as the stock had been "illegally and fraudulently" transferred. The bank sold the stock, but the company refused to permit a transfer. The transfer to the bank being in due form, and certificates issued to a *bona fide* purchaser without notice, the absolute legal title was in the bank, although the party transferring had been guilty of fraud.

Anything sufficient to put a party on inquiry is notice of whatever such inquiry would reveal.

A note had been given by Persch to the bank. When due it was renewed,

the stock being then delivered to the bank as collateral; the time given was sufficient consideration, and the bank thereupon held stock *bona fide*.

The company were bound to pay the bank for the loss resulting from their refusal to permit the transfer.

In this case the measure of damages was ascertained from what was the value of the stock at the time they refused to transfer.

Principles of estimating damages and for refusal to transfer, stated in the master's report and the opinion of the court in this case: *West Branch and Susquehanna Canal Co.'s Appeal*, 81 Penn. St. R., Supp., 19.

Certain certificates of mining stock, issued in the usual form, in the name of, and indorsed by, C. & Co., as trustees, were delivered by plaintiff to M. as collateral security for an indebtedness then due to M. M. delivered the certificates to G., who had full knowledge of the former transaction. Plaintiff thereafter tendered to M. and G. the full amount of the indebtedness. G., thereafter claiming to be the owner, employed defendants, as stockbrokers, to sell said certificates in the stock board of San Francisco. Defendants sold the same, and the proceeds were placed to G.'s credit. Defendants had no knowledge of the previous transaction, and were not aware the plaintiff claimed any interest in the certificates: Held, that plaintiff was estopped from asserting her title to the certificates as against the defendants: *Stone v. Marye*, 14 Nev., 362.

A. was induced by his law agent B. to sign a bond for £1,000 on heritable property belonging to him, allowing B. to retain the money when it should be obtained from the lender and place it to A.'s credit in current account between them.

B. had for some time acted as agent for A., and had been in the custom of making disbursements on his behalf. B. was at the time insolvent and had embezzled a large sum to another client C. To conceal his defalcation by rendering valid a security he had delivered to C., over a house already burdened to the full extent, B. induced D., another client, to discharge a first bond for £1,000 which he held over this house, undertaking to deliver to him a new security for his £1,000. He then

put on record, and delivered to D., the bond signed by A. Three months thereafter B. became bankrupt and absconded. A., who had never received any value for the bond granted by him, thereupon raised a reduction of it. Held, on a proof by a majority of seven judges, that A., having put B. in a position to commit the fraud, must bear the loss, and bond accordingly sustained—*diss.* Lord President and Lord Chief Clerk, who were of opinion that what B. had done amounted to an attempt to benefit D. at the expense of A., and that the bond should therefore be reduced: *Rose v. Spaven*, 17 Scot. Law Rep., 583.

A blank transfer of a certificate of stock with irrevocable power of attorney to transfer, signed by the person who appears by the certificate to be the owner, does not confer upon the holder apparent authority as agent for such owner to pledge the stock as collateral. Defendant L. delivered to defendant B. a certificate of stock as collateral for a loan of \$3,000. B. applied to W., plaintiff's agent, for a loan thereon of \$3,000, stating that he wanted it for a client. W. agreed to make the loan if B. would procure a proper power of attorney, to be attached to the certificate. B., by representing that he ought to have the instrument to secure his loan, procured from L. a transfer and irrevocable power of attorney to make a transfer executory in blank. B. filled up the blanks save the name of transferee and attorney, and delivered it with the certificate to W., who thereupon made the loan. B. had no authority from L. to borrow or to pledge the stock. In an action to foreclose plaintiff's alleged lien upon the stock, held that as B. did not claim to be the owner of the stock, but only to be acting as agent for the owner, and as he had in fact no authority or apparent authority so to act, L. was not estopped from asserting his title to the stock, and plaintiff could not assert a lien save at most for the amount for which the stock was pledged to B.; that while the transfer and power of attorney gave to B. an apparent ownership in case he had claimed title or an apparent authority to sell as agent, it did not hold him out as authorized to make a loan or to pledge the stock, or at most, it only indicated that he

could pledge the stock for an authorized loan: *Merchants' Bank v. Livingston*, 74 N. Y., 223, distinguishing *McNiel v. Tenth, etc.*, 46 N. Y., 325.

The T. & N. R. Co. executed a mortgage on its road to secure its bonds to defendant, the U. T. Co., as trustee for the bondholders, and bonds were prepared for issuing, each of which contained a clause that it should not become obligatory until authenticated by a certificate indorsed thereon duly signed by said trustee. Said bonds were signed by the proper officers of the company, but before the company's seal was affixed or the required certificate attached, a portion of them were stolen, a seal and certificate forged thereon and the bonds sold; plaintiffs purchased them for a valuable consideration and in good faith. The T. & N. Co. was consolidated with defendant, the M. K. & T. R. Co.; by the agreement of consolidation the latter was to take up outstanding bonds of the former company, issuing its own in exchange. In an action to compel such an exchange for plaintiff's bonds, held that plaintiffs were bound by the condition in the bonds making the certificate of the trustee essential to their validity; that neither the payment of value nor good faith on their part created a cause of action, and that the defect in the bonds was not waived by the agreement of consolidation: also, that the failure of the obligor, after discovering that the bonds had been lost or stolen, to notify the public of that fact did not constitute negligence, making it liable.

Also, held, that the plaintiffs were not entitled to have returned to them said forged bonds, which had been delivered for the purpose of exchange; that plaintiffs had no title to them, as they had never been issued or put in circulation by defendants, and so were the property of the T. & N. Co.: *Maas v. Missouri, etc.*, 83 N. Y., 223.

Where the payee of two promissory notes of \$5,000 each indorsed the same in blank and placed them in the hands of a banker as his agent, to collect the interest due thereon and to sell the same for his benefit, and such agent pledged the same to secure a debt owing by him to another bank and for future advances, there being nothing to put the latter bank on inquiry or excite suspicion, it was held that the pledgee

1879

Phillips v. South Western Railway Co.

having acquired the same in good faith, in the usual course of business, from one apparently the owner, and clothed with *indicia* of ownership, could not be divested of his right to the notes by the real owner thereof: *Morris v. Preston*, 93 Ills., 215.

[4 Queen's Bench Division, 406.]

June 20, 1879.

406] *PHILLIPS V. THE SOUTH WESTERN RAILWAY COMPANY.

Damages—Insufficiency of—Negligence—New Trial.

The court will grant a new trial, in an action for personal injuries sustained through the defendants' negligence, on the ground of the inadequacy of the damages found by the jury, when it appears upon the facts proved that the jury must have omitted to take into consideration some of the elements of damage properly involved in the plaintiff's claim.

MOTION for a new trial, in an action for personal injuries, on the ground of insufficiency of damages and misdirection. The facts sufficiently appear from the judgment.

April 25. *Ballantine, Serj.*, and *Dugdale*, showed cause.

They contended that when the action was for unliquidated damages the court would not grant a new trial on account of the damages being too small, unless there had been some mistake in point of law on the part of the judge or in the calculation of the figures by the jury, or some misconduct on the part of the jury. They cited *Rendall v. Hayward* (¹); *Forsdike v. Stone* (²); *Falvey v. Stanford* (³); *Rowley v. London and North Western Ry. Co.* (⁴); *Barker v. Dixie* (⁵); *Mauricet v. Brecknock* (⁶); *Armstrong v. Haley* (⁷); *Kelly v. Sherlock* (⁸).

Sir J. Holker, A.G., *Pope, Q.C.*, and *A. L. Smith*, supported the rule. They cited *Pym v. Great Northern Railway* (⁹) (¹⁰).

Cur. adv. vult.

June 20. The judgment of the Court (Cockburn, C.J., and Lopes, J.,) was delivered by

COCKBURN, C.J.: This was an action brought by the plaintiff to recover damages for injuries suffered,

(¹) 5 Bing. N. C., 424.

(²) Law Rep., 3 C. P., 607.

(³) Law Rep., 10 Q. B., 54; 11 Eng. R., 146.

(⁴) Law Rep., 8 Ex., 221.

(⁵) 2 Str., 1061.

(⁶) 2 Doug., 509.

(⁷) 4 Q. B., 917.

(⁸) Law Rep., 1 Q. B., 686.

(⁹) 2 B. & S., 759; 31 L. J. (Q.B.), 249.

(¹⁰) The arguments and the authorities cited on the question whether there had been a misdirection are not given, inasmuch as it turned principally on the construction of the expressions used by the learned judge at the trial (Field, J.), and the court, as will be seen, did not think that there had been any misdirection on a fair construction of the summing up.

when travelling on the defendants' railway, through the negligence of their servants. A verdict having passed for the plaintiff with £7,000 damages, an application is made to this court for a new trial, on behalf of the plaintiff, on the ground of the insufficiency of the damages as well as on that of misdirection as having led to an insufficient assessment of damages; and we are of opinion that the rule for a new trial must be made absolute; not indeed on the ground of misdirection, for we are unable to find any misdirection, the learned judge having in effect left the question of damages to the jury, with a due caution as to the limit of compensation, though we think it might have been more explicit as to the elements of damage.

It is extremely difficult to lay down any precise rule as to the measure of damages in cases of personal injury like the present. No doubt, as a general rule, where injury is caused to one person by the wrongful or negligent act of another, the compensation should be commensurate to the injury sustained. But there are personal injuries for which no amount of pecuniary damages would afford adequate compensation, while, on the other hand, the attempt to award full compensation in damages might be attended with ruinous consequences to defendants who cannot always, even by the utmost care, protect themselves against carelessness of persons in their employ. Generally speaking, we agree with the rule as laid down by Brett, J., in *Rowley v. London and North Western Ry. Co.* (¹), an action brought on the 9 & 10 Vict. c. 93, that a jury in these cases "must not attempt to give damages to the full amount of a perfect compensation for the pecuniary injury, but must take a reasonable view of the case, and give what they consider under all the circumstances a fair compensation." And this is in effect what was said by Mr. Justice Field to the jury in the present case. But we think that a jury cannot be said to take a reasonable view of the case unless they consider and take into account all the heads of damage in respect of which a plaintiff complaining of a personal injury is entitled to compensation. These are the bodily injury sustained; the pain undergone; the effect on the health of the sufferer, according to its degree and its *probable [408 duration as likely to be temporary or permanent; the expenses incidental to attempts to effect a cure, or to lessen the amount of injury; the pecuniary loss sustained through inability to attend to a profession or business as to which, again, the injury may be of a temporary character, or may

(¹) Law Rep., 8 Ex., 231.

be such as to incapacitate the party for the remainder of his life. If a jury have taken all these elements of damage into consideration, and have awarded what they deemed to be fair and reasonable compensation under all the circumstances of the case, a court ought not, unless under very exceptional circumstances, to disturb their verdict. But looking to the figures in the present case, it seems to us that the jury must have omitted to take into account some of the heads of damage which were properly involved in the plaintiff's claim.

The plaintiff was a man of middle age and of robust health. His health has been irreparably injured to such a degree as to render life a burden and source of the utmost misery. He has undergone a great amount of pain and suffering. The probability is that he will never recover. His condition is at once helpless and hopeless. The expenses incurred by reason of the accident have already amounted to £1,000. Medical attendance still is and is likely to be for a long time necessary. He was making an income of £5,000 a year, the amount of which has been positively lost for sixteen months between the accident and the trial, through his total incapacity to attend to his professional business. The positive pecuniary loss thus sustained all but swallows up the greater portion of the damages awarded by the jury. It leaves little or nothing for health permanently destroyed and income permanently lost. We are therefore led to the conclusion, not only that the damages are inadequate, but that the jury must have omitted to take into consideration some of the elements of damage which ought to have been taken into account.

It was contended, on behalf of the defendants, that even assuming the damages to be inadequate, the court ought not on that account to set aside the verdict and direct a new trial, inadequacy of damages not being a sufficient ground for granting a new trial in an action of tort, unless there has been misdirection, or misconduct in the jury, or miscalculation, in support of which *position the cases of *Rendall v. Hayward* ⁽¹⁾, and *Forsdike v. Stone* ⁽²⁾ were relied on. But in both those cases the action was for slander, in which, as was observed by the judges in the latter case, the jury may consider, not only what the plaintiff ought to receive, but what the defendant ought to pay. We think the rule contended for has no application in a case of personal injury, and that it is perfectly competent to us if we think the damages unreasonably small to order a new trial

⁽¹⁾ 5 Bing. N. C., 424.

⁽²⁾ Law Rep., 3 C. P., 607.

at the instance of the plaintiff. There can be no doubt of the power of the court to grant a new trial where in such an action the damages are excessive. There can be no reason why the same principle should not apply where they are insufficient to meet the justice of the case.

The rule must therefore be made absolute for a new trial.

Rule absolute.

Solicitors for plaintiff: *Hargrove & Co.*

Solicitor for defendants: *Hall.*

The principal case is reported 20 Alb. L. J., 209. It was affirmed in the Exchequer Chamber, 5 Q. B. Div., 78 (to appear hereafter), and 20 Alb. L. J., 332.

In actions sounding in damages, where the law furnishes no rule of measurement save the discretion of the jury upon the evidence before them, courts will not disturb a verdict upon the ground of excessive damages, unless it be so flagrantly improper as to evince passion, prejudice, partiality, or corruption. Upon a mere matter of damages, where different minds might, and probably would, arrive at different results, and nothing inconsistent with an honest exercise of judgment appears, the verdict should be left as the jury found it: *Miss. Cent. R. R. Co. v. Caruth*, 51 Miss., 77.

The mere fact that damages are excessive, is not a ground for a new trial. They must appear to have been given under the influence of passion or prejudice: *M. K. & T. R. R. Co. v. Weaver*, 15 Kans., 456.

Where the action is for personal injuries, the court will rarely interfere on the ground that the damages are excessive.

Thus \$9,000, under the circumstances of the case, were held not to be excessive: *Hegeman v. Western Rail Road*, 19 Barb., 353.

So \$12,000: *Hume v. Mayor*, 57 How. Pr., 359; *S. C.*, 74 N. Y., 264, reversing 9 Hun, 674.

So \$14,000: *Gale v. N. Y. Central*, 53 How., 385, affirmed 13 Hun, 1, 76 N. Y., 594.

So \$15,000, from injuries to a lady from falling on the street: *Collins v. Council Bluffs*, 32 Iowa, 324, 7 Am. R., 200, 206 note.

So \$4,500 for loss of an arm: *Mentz v. Second Av., etc.*, 3 Abb. Dec., 274, affirming 2 Robertson, 356.

So \$11,000, where a man 34 years of age was very seriously injured, rendering amputation of one leg necessary: *Berg v. Chicago, etc.*, 50 Wisc., 419.

So \$30,000, in a case where chronic inflammation of the spine was produced by the injury, largely impairing his physical and mental condition: *Harrold v. New York, etc.*, 24 Hun, 186.

So \$15,000, where one was very seriously injured from being thrown from a car: *Schultz v. Third Av., etc.*, 46 N. Y. Superior Ct. R., 211.

The court will interfere with the verdict, if it appear that the jury assessed the damages under a mistake or ill-feeling, or if they give the plaintiff more than he is entitled to, according to his own showing, or where the smallness of the amount shows that the jury have made a compromise, and, instead of deciding the issues, have agreed to find for the plaintiff for nominal damages only: *Hambleton v. Veere*, 2 Wms. Saund., 170; *Britton v. S. W. R. Co.*, 27 L. J., Ex., 355; *Falvey v. Stanford*, L. R., 10 Q. B., 54, 11 Eng. R., 146, 148 note.

1878

Bidder v. North Staffordshire Railway Co.

[4 Queen's Bench Division, 412.]

Dec. 10, 1878.

[IN THE COURT OF APPEAL.]

412] *In the Matter of an Arbitration between BIDDER and Others and THE NORTH STAFFORDSHIRE RAILWAY COMPANY.

Practice—Appeal—Jurisdiction of Court of Appeal—Special Case stated by Umpire under the Lands Clauses Consolidation Act, 1845—Order of High Court—Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125), ss. 5, 22—Supreme Court of Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 19—Mine—Grant of Right of Way unconnected with Working of Mines—Grant of "Wagon or Cart Road," whether it confers Right to lay down Railroad or Tramway—Mining Lease—Power to lay Railway to carry away Coals, the Produce of the Mines demised or any other Mines.

The Court of Appeal has jurisdiction to entertain an appeal from the decision of the High Court of Justice upon a special case stated by an umpire appointed under the Lands Clauses Consolidation Act, 1845, to assess the compensation for lands taken for the purposes of an undertaking, or injured by the execution of the works thereof.

Rhodes v. Airedale Drainage Commissioners (1 C. P. D., 402,) commented upon and followed.

H., being the owner of certain land, and the mines thereunder, by indenture conveyed the surface to C.; but he excepted and reserved a "wagon or cart road" of the width of eighteen feet, to be at all times thereafter kept in repair at his own costs and charges:

Held, that these words would not enable H. to lay down a railroad or tramway for the carriage of coals raised from neighboring collieries belonging to him.

Senhouse v. Christian (1 T. R., 560), *Durham and Sunderland Ry. Co. v. Walker* (2 Q. B., 940), *Dand v. Kingscote* (6 M. & W., 174), distinguished.

By a lease of mines the lessees were authorized to take and use "full and sufficient rail and other ways, paths and passages to and for the said lessees and their agents, servants, and workmen, or others," to carry away "all or any of the coal, cannel, slack, iron, and ironstone, the produce of the mines thereby demised, or any other mines":

Held, that the lessees, by virtue of this clause, might lay down a railway for the carriage of coals raised by them from the pits of adjoining collieries worked by them, and that they were not restricted to using the railway for the carriage of coals raised by or through the pits of the mines demised to them by the above mentioned lease.

APPEAL from an order made by the Queen's Bench Division upon the award of an umpire under the Lands Clauses Consolidation Act, 1845, which had been stated in the form of a special case.

The award recited that by virtue of the North Staffordshire Railway (Potteries Loop Line) Act, 1865, and of other
413] acts of *Parliament incorporated therewith, the North Staffordshire Railway Company had taken for the purposes of a certain railway about to be constructed by them, certain lands situate at or near to Kids Grove, in the county of Stafford; that G. P. Bidder, Sir G. Elliot, S. P.

Bidder, and G. P. Bidder, junior (thereinafter called the claimants) had given notice to the company that they held the mines and minerals thereunder, with certain powers and privileges relating to the surface thereof, under a lease for the term of thirty-two years from the 1st of January, 1870, from J. H. E. Heathcote; and, further, that they claimed the sum of £20,000 for the purchase of their interest in the lands taken possession of for the purposes of the railway, and for compensation for injury sustained and to be sustained by the execution of the works; and also that they desired that the amount to be paid to them should be settled by arbitration in the manner prescribed by the Lands Clauses Consolidation Act, 1845; that the claimants and the company, not having concurred in the appointment of a single arbitrator, severally appointed arbitrators, who nominated an umpire; that the arbitrators having disagreed respecting the matters referred to them, the umpire took upon himself the burden of the reference, and made his "award in writing of and concerning the premises in the form of a special case for the opinion of the Queen's Bench Division of the High Court of Justice." The following were the material portions of the award.

Prior to the 24th of June, 1851, J. E. Heathcote was the owner of certain land and certain mines situate at Kids-grove, and by indenture of that date he conveyed to W. Cooper the surface of a part of his land; by the same indenture J. E. Heathcote excepted and reserved unto himself, his appointees, heirs, and assigns, the mines, and also a right of way or road along the southwest side of a specified piece of land as and for a wagon or cart road, which way or road was to be of the clear width of eighteen feet, and to be at all times thereafter maintained and kept in repair by and at the costs and charges of J. E. Heathcote, his appointees, heirs, and assigns. This right of way is hereinafter called "right of road." Power to work the mines was reserved, "but not by entry upon, or any working from the surface."

By indenture of lease of the 31st of March, 1859, made between *C. B. Lawton, of the one part, and E. An- [414 drew, S. P. Bidder, and G. Elliot, of the other part, C. B. Lawton demised to the parties of the other part certain mines and minerals situate near Kids-grove, together with full liberty, license, power, and authority for the lessees and their servants, agents, and workmen, from time to time during the continuance of the term thereby granted, to enter into and upon, and use and occupy, such parts of the surface of the said lands and premises, any mines under which

were thereby appointed and demised, as should be reasonably requisite for the working and getting the said mines and minerals thereby appointed and demised, and any part thereof, or for carrying into effect any of the purposes thereby authorized in the most efficient and proper manner; with the like liberty, license, power, and authority (but subject to the conditions, restrictions, and provisions therein-after expressed in that behalf), to search for, use, take, and dispose of the said coals, cannel, slack, iron, and ironstone thereby appointed and demised, or any part or parts thereof, and to use the then existing, and dig, sink, drive, work, and make new and other pits, shafts, groves, drifts, trenches, sluices, ways, gates, water-gates, and watercourses, and to use and repair the then existing, and make or erect upon the same lands any furnace or furnaces, mills, engines, coke-ovens, or other erections, or works whatsoever, as well for the finding, discovering, winning, working, cleansing, manufacturing, and procuring the coal, cannel, slack, iron, and ironstone, as well out of the said mines thereby demised, as any other mines or minerals, as for the avoiding and carrying away water, foul air, and stench from and out of the same. Provided always, and it was thereby expressly agreed, that it should be lawful to the said lessees to work the said mines thereby demised through pits or shafts made and sunk in, upon, and within other premises in the occupation for the time being of the said lessees, and with the like liberty, license, and authority, and power to take and use sufficient ground-room, heap-room, and pit-room not exceeding twenty acres in extent, for laying and plotting the coal, cannel, slack, or ironstone, and iron, and other materials and substances, which should from time to time proceed from and be wrought and dug as well out of the said mines and premises thereby appointed and demised as of any other mines, the part or 415] *parts of the surface of the said lands to be taken and used for the purposes aforesaid, to be determined by the said C. B. Lawton, or the person or persons for the time being entitled as thereafter mentioned, or if the lessees should object to the part or parts so determined upon, then to be ascertained and determined by arbitration pursuant to the proviso for that purpose thereafter contained, and full and sufficient rail and other ways, paths, and passages to and for the said lessees and their agents, servants, and workmen, or others, from time to time during the continuance of the term thereby granted to take and carry away with horses, carts, wains, wagons, locomotive and other engines and carriages, all or any of the coal, cannel, slack, iron, and

ironstone, the produce of the said mines thereby demised, or any other mines, and any coke into which any such coal or slack should be converted, and which ways, paths, and passages might be used and made in, upon, through, and over not only the lands under which the said mines lay, but also any lands comprised in and then subject to the limitations of an indenture of the 17th of March, 1829; and also with the like license, power, and authority to use the then existing, and erect, build, and set up in any convenient place or places near to any of the said mines thereby appointed and demised all such new or other houses, hovels, lodges, sheds, and other buildings as should be needful and convenient for the standing, laying, preserving, or placing of any workmen's houses, gear, tackle, implements, and utensils to be employed or used in or about the working of the said mines thereby demised, and any other mine or mines; and to do whatever else might be requisite, necessary, or convenient in, about, or for the winning, working, obtaining, getting, washing, scouring, cleansing, and melting, and manufacturing of the said thereby appointed and demised mines, and other coal, cannel, slack, iron, and ironstone, and for the manufacturing, taking, and carrying away the same; to hold the same from the 25th of March, 1859, for thirty-nine years thence next ensuing.

By an indenture of lease, dated the 10th day of June, 1870, and made between J. H. E. Heathcote, in whom the estate and title of the said J. E. Heathcote of and in the mines before mentioned were then vested, of the one part, and G. P. Bidder, *S. P. Bidder, and G. Elliott, of the other [416 part, the said J. H. E. Heathcote, thereafter called the lessor, demised to the parties of the second part, thereafter called the lessees, the Woodshutts Colliery, and the said mines, together with certain powers over the surface, together with full liberty, power, and authority for the lessees to use any of the existing railway or railways, tramway or tramways, roads or ways, and to lay out, make, and use any new railway or tramway, railways or tramways, in any course or direction over a portion of the said surface, for the purpose of conveying and removing the coal, cannel, slack, stone, sand, and also to divert or alter any roadway, railway, or tramway for the time being existing over the said lands (other than and except any public road), and to remove the materials thereof; to hold the same for thirty-two years from the 1st of January, 1870.

The mines demised by the indenture of the 31st of March, 1859, and those demised by the indenture of the 10th of

June, 1870, were immediately adjacent. The rights of the lessees under the above mentioned leases became vested in the claimants. Under the powers of their act, the company had taken a portion of the surface over the mines demised by the indenture of the 10th of June, 1870, and had thereby cut off all access from these mines to the Trent and Mersey Canal, except by going over the surface of the mines demised by the indenture of the 31st of March, 1859, as hereinafter mentioned. The company had taken also the whole of the land over which the "right of road" passed, which was reserved by the indenture of the 24th of June, 1851. Since the conveyance to Cooper of the 24th of June, 1851, some houses had been erected, whose back yards abutted on the piece of land over which the "right of road" passed, and the tenants of these houses had used this piece of land as a means of access to their back yards. This piece of land and the houses belonged to the same owner in fee. There formerly existed two pit-shafts, which were used some years previously for working the coal out of part of the mines demised by the indenture of the 10th of June, 1870. One of these pits had been taken by the railway company, and the other was severed by the railway from the rest of the surface of the land demised by the last-named indenture, and was thereby rendered valueless to the claimants. In February, 417] 1871, the *railway company gave Mr. Heathcote notice to treat for the land, which they had since taken as aforesaid. The claimants had not at that time begun to work the Woodshutts Colliery, and in consequence of the giving of such notice they had abstained from working it. Before the railway was made, the claimants had access from their pits to the Trent and Mersey Canal by passing along the "right of road" and afterwards crossing a public highway called Heathcote street. Access to the canal was of considerable value to colliery owners in that neighborhood, as by means of the canal they were enabled to sell and deliver their slack to the proprietors of saltworks in Cheshire. Carriage by canal was cheaper than carriage by railway, and in addition there was access by canal to many saltworks, to which there was no or a less convenient access by railway. In the case of the claimants, the value of their access to the canal depended to a great extent on whether they could have laid a locomotive railway or a tramway with an endless chain from the old engine pits to the bank of the canal. The claimants could have laid a locomotive railway along the "right of road" without substantially interfering with the level of the surface, but to do so they

must have laid a double line of rails along the whole length of the "right of road," and they must have erected fixed buffer-stops at the end of one of those lines next to Heathcote street, so as to form a blind siding to receive full wagons and prevent their running away over Heathcote street. They would have crossed Heathcote street by a single line, and necessarily on the level. The double line of rails would, with wagons standing on each line, have taken up the whole width of eighteen feet of the "right of road," and it would have been very dangerous for the inhabitants of the houses, the back yards of which abutted on it, to use that road, as in fact they had been accustomed to do. In the colliery districts it was not at all unusual to lay locomotive railways across public roads on the level. The inhabitants of towns in those districts, such as Kids Grove, were mainly dependent on the development of the coalfield in their vicinity, and the local board surveyors or trustees having the care of the road were usually asked to give, and gave, permission to colliery proprietors to lay lines across the public road on the level, and to cross it *with wagons and [418 locomotive engines. These level crossings almost invariably made, and the one across Heathcote street would have made, the road substantially less convenient to the public; but if the railway company had not taken the land in question, and if the Woodshutts Colliery had been in the market, an intending purchaser, if he would have had a right to use the "right of road" in the way suggested above, would have assumed that he would be allowed to cross Heathcote street on the level according to the usual practice, and would have given a higher price for the colliery than if he had had no such access by locomotive railway to the canal. The claimants could have made an endless chain tramway along the "right of road" and down to the bank of the canal, but to do so they must have substantially interfered with the level of the surface, as it would have been impossible to take an endless chain tramway across Heathcote street on the level, and consequently the endless chain tramway must either have gone over or under Heathcote street. An endless chain tramway would have required no fixed buffer-stops, would have taken up only ten feet in width of the "right of road," and if constructed as it might have been on the side furthest from the houses, would not substantially have interfered with the use, which the tenants of those houses had hitherto made of that road. The company contended that, under the indenture of the 24th of June, 1851, the claimants were not entitled to use the "right of

road" thereby reserved in either of the ways suggested above, and consequently that the compensation, to which they were entitled, must be assessed on the basis of their having no such right. The company further contended that, assuming the claimants were entitled to use the "right of road" in the manner suggested above with reference to a locomotive railway, inasmuch as such use necessarily involved the crossing of Heathcote street on the level, and as such level crossing was precarious and not as of right, the umpire ought not to take the possibility of its being done into consideration in assessing the compensation.

As the railway company had taken all that part of the surface of the Woodshutts Colliery which abutted on the canal, all direct communication between the old pits and the canal was necessarily cut off; but the company contended that the claimants had an *indirect mode of communication by going over the lands, the mines under which were demised by Lawton in the indenture of the 31st of March, 1859. The company suggested that the claimants should sink fresh pits at a certain point, raise the coal and slack to the surface there out of the Woodshutts Colliery, and convey it by means of an endless chain tramway to a point where it could be loaded into railway wagons and taken by a locomotive to an existing line belonging to the claimants, and so either to the canal or on to the North Staffordshire Railway. This scheme was perfectly practicable, if under their lease the claimants had the power of carrying the coal and slack so raised from the Woodshutts Colliery over the surface of the Lawton estate; and if this scheme were adopted, the loss which the claimants would sustain by the taking away of direct access to the canal, and consequently the compensation to which they were entitled would be much diminished. The claimants contended that under the terms of the Lawton lease they were not entitled to carry coal and slack over the Lawton estate in the manner suggested.

The questions for the court were, first, whether in assessing the compensation to which the claimants were entitled, the umpire was at liberty to take into consideration the increased value of the colliery, which would have arisen from the construction and use of a locomotive railway or tramway over the "right of road;" secondly, whether in assessing such compensation, the umpire was at liberty to take into consideration the diminution of loss, which would arise from the construction and use of a tramway and railway over the Lawton estate.

If the court should answer the first question in the affirmative and the second in the negative, the umpire awarded and adjudged that the claimants had sustained damage in respect of their interest in the lands, which had been taken for or injuriously affected by the execution of the company's works, to the amount of £7,060 and were entitled to be paid compensation for the same to that amount.

If the court should answer both questions in the affirmative, the umpire awarded and adjudged that the claimants had sustained damage as aforesaid to the amount of £5,200, and were entitled to be paid compensation for the same to that amount.

*If the court should answer both questions in the [420 negative, the umpire awarded and adjudged that the claimants had sustained damage as aforesaid to the amount of £2,480, and were entitled to be paid compensation for the same to that amount.

If the court should answer the first question in the negative and the second in the affirmative, the umpire awarded and adjudged that the claimants had sustained damage as aforesaid to the amount of £1,560, and were entitled to be paid compensation for the same to that amount.

The appointments of arbitrators by the claimants and the company respectively, and the appointment of the umpire, had been made an order of the Queen's Bench Division.

By an order of the Queen's Bench Division, "in answer to the questions submitted to the court by" the umpire "herein by the special case, the court finds the first question in the affirmative and the second question in the negative: it is ordered that judgment be entered for G. P. Bidder, Sir G. Elliott, S. P. Bidder, and G. P. Bidder, junior, on the special case herein for the sum of £7,060 with costs."

The North Staffordshire Railway Company appealed.

Nov. 26. *H. Sutton*, for the claimants: As a preliminary objection, it is contended on behalf of the claimants, that this court has no jurisdiction to hear this case; for no appeal lies on a special case stated by arbitrators or an umpire appointed to assess compensation under the Lands Clauses Consolidation Act, 1845⁽¹⁾. *The umpire [421

(1) By the Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), "With respect to the purchase and taking of lands otherwise than by agreement, be it enacted as follows:—"

By s. 18: The promoters of the undertaking are to give notice of their intention to take lands.

By s. 22: If no agreement be come to between the promoters and the own-

1878

Bidder v. North Staffordshire Railway Co.

had no power to state a case for the opinion of the Queen's Bench Division, and that court might have declined to exercise jurisdiction, for the awarding of compensation is not

ers, and, if the compensation do not exceed £50, the same shall be settled by justices.

By s. 23: If the compensation claimed shall exceed £50, and if the party claiming compensation desire to have the same settled by arbitration, the same shall be so settled accordingly.

By s. 25: "When any question of disputed compensation by this or the special act, or any act incorporated therewith, authorized or required to be settled by arbitration shall have arisen, then, unless both parties shall concur in the appointment of a single arbitrator, each party, on the request of the other party, shall nominate and appoint an arbitrator, to whom such dispute shall be referred; and every appointment of an arbitrator shall be . . . delivered to the arbitrator, and shall be deemed a submission to arbitration on the part of the party by whom the same shall be made; and after any such appointment shall have been made, neither party shall have power to revoke the same without the consent of the other, nor shall the death of either party operate as a revocation."

By s. 27: "Where more than one arbitrator shall have been appointed, such arbitrators shall, before they enter upon the matters referred to them, nominate and appoint by writing under their hands an umpire to decide on any such matters on which they shall differ, or which shall be referred to him under the provisions of this or the special act."

Sects. 28 to 34 contains provisions as to the appointment of arbitrators and umpire and the conduct and costs of proceedings before them.

By s. 35: "The arbitrators shall deliver their award in writing to the promoters of the undertaking, and the said promoters shall retain the same, and shall forthwith on demand, at their own expense, furnish a copy thereof to the other party to the arbitration, and shall at all times, on demand, produce the said award, and allow the same to be inspected or examined by such party or any person appointed by him for that purpose."

By s. 36: "The submission to any such arbitration may be made a rule of any of the superior courts on the application of either of the parties."

By s. 68: "If any party shall be entitled to any compensation in respect of any lands, or of any interest therein, which shall have been taken for or injuriously affected by the execution of the works, and for which the promoters of the undertaking shall not have made satisfaction under the provisions of this or the special act, or any act incorporated therewith, and if the compensation claimed in such case shall exceed the sum of £50, such party may have the same settled either by arbitration or by the verdict of a jury, as he shall think fit; and if such party desire to have the same settled by arbitration, it shall be lawful for him to give notice in writing to the promoters of the undertaking of such his desire, stating in such notice the nature of the interest in such lands in respect of which he claims compensation, and the amount of the compensation so claimed therein; and unless the promoters of the undertaking be willing to pay the amount of compensation so claimed, and shall enter into a written agreement for that purpose within twenty-one days after the receipt of any such notice from any party so entitled, the same shall be settled by arbitration in the manner herein provided."

By the Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125), s. 5: "It shall be lawful for the arbitrator upon any compulsory reference under this act, or upon any reference by consent of parties where the submission is or may be made a rule or order of any of the superior courts of law or equity at Westminster, if he shall think fit, and if it is not provided to the contrary, to state his award as to the whole or any part thereof, in the form of a special case for the opinion of the court, and when an action is referred, judgment, if so ordered, may be entered according to the opinion of the court."

By s. 32: "Error may be brought upon a judgment upon a special case, in the same manner as upon a judg-

*reference within the Common Law Procedure Act, [422 1854, s. 5, even although the submission to arbitration may be made a rule of court under the Lands Clauses Consolidation Act, 1845, s. 36. However, neither party objected to the hearing in the Queen's Bench Division, and accordingly a decision upon two questions submitted to it, was pronounced in that court; but that decision, was an order made by consent, and therefore if more than a mere expression of opinion, is not subject to appeal: Supreme Court of Judicature Act, 1873, s. 49. The claimants do not consent to an appeal to this court from that decision of the Queen's Bench Division. The proper mode of enforcing payment of the amount awarded, is by action in which the company may insist on all legal objections. But, further, it is contended for the claimants, that the decision of the Queen's Bench Division was a mere expression of opinion, and that the direction as to the entry of the judgment for £7,060 with costs, was only surplusage; and therefore no appeal will lie to this court: *Jones v. Victoria Graving Dock Co.* (¹); *Reg. v. Overseers of Walsall* (²); *Courtauld v. Legh* (³).

**J. Brown*, Q.C., for the company: It is submit- [423 ted that *Rhodes v. Airedale Drainage Commissioners* (⁴) shows conclusively that an umpire appointed to assess compensation under the Lands Clauses Consolidation Act, 1845, has power to state a case for the opinion of the court.

[BRAMWELL, L.J.: This preliminary objection is not decided by *Rhodes v. Airedale Drainage Commissioners* (⁴).

ment upon a special case, in the same manner as upon a judgment upon a special verdict, unless the parties agree to the contrary; and the proceedings for bringing a special case before the court of error shall, as nearly as may be, be the same as in the case of a special verdict; and the court of error shall either affirm the judgment, or give the same judgment as ought to have been given in the court in which it was originally decided, the said court of error being required to draw any inferences of fact from the facts stated in such special case which the court where it was originally decided ought to have drawn."

By the Supreme Court of Judicature Acts, 1873 (36 & 37 Vict. c. 66), s. 19: "The said Court of Appeal shall have jurisdiction and power to hear and determine appeals from any judgment or order, save as hereinafter mentioned,

of Her Majesty's High Court of Justice, or of any judges or judge thereof, subject to the provisions of this act, and to such rules and orders of court for regulating the terms and conditions on which such appeals shall be allowed, as may be made pursuant to this act."

By s. 49: "No order made by the High Court of Justice or any judge thereof by the consent of parties, or as to costs only which by law are left to the discretion of the court, shall be subject to any appeal, except by leave of the court or judge making such order."

(¹) Per Lord Coleridge, C.J., 2 Q. B. D., 314, at pp. 326, 327, 328; 21 Eng. Rep., 124, 135, 136, 137.

(²) 3 Q. B. D., 457; *ante*, p. 887, reversed on appeal, 4 App. Cas., 30.

(³) Law Rep., 4 Ex., 187.

(⁴) 1 C. P. D., 402.

1878

Bidder v. North Staffordshire Railway Co.

In that case the Court of Appeal held that an arbitrator appointed under the Lands Clauses Consolidation Act, 1845, had power under the Common Law Procedure Act, 1854, to state a case for the opinion of a superior court of law; it is therefore conclusive that the umpire had power to state a special case for the opinion of the Queen's Bench Division; but the point now to be determined is whether we have jurisdiction to hear an appeal from the decision of the Queen's Bench Division upon that special case.]

In any point of view the decision was an "order" within the meaning of the Supreme Court of Judicature Act, 1873, s. 19, and therefore is subject to appeal.

[COTTON, L.J.: It seems to me that the claimants are in a dilemma; the Queen's Bench Division either had or had not power to make the order complained of; if they had power, an appeal clearly lies; if they had not, the company are entitled to have the order set aside.]

Even before the Supreme Court of Judicature Acts, 1873, 1875, error lay upon a special case by the Common Law Procedure Act, 1854, s. 32, and the decision in *Courtauld v. Legh* (*) may be explained by the circumstance that the parties had agreed not to bring error. In *Jones v. Victoria Graving Dock Co.* (*) two of the judges in the Court of Appeal (Bramwell and Brett, L.JJ.) appeared to think that an appeal would lie upon a special case stated by an arbitrator, to whom an action had been referred, although Lord Coleridge, C.J., seemed to be of a different opinion; the court, however, was unanimous that the parties had by agreement debarred themselves from appealing. In *Reg. v. Overseers of Walsall* (*) a case had been stated by a court of quarter [424] sessions for its own *information, and there is a wide difference between a proceeding of that kind and a reference to determine the conflicting rights of private persons.

[BRAMWELL, L.J.: Whatever may be the ultimate decision of that case, I am satisfied that it has not the slightest bearing upon the question before us.]

It was intended by the Legislature to allow the widest liberty of appealing from orders made by the High Court of Justice.

BRAMWELL, L.J.: We all think that we ought to hear this case upon the merits. I have considerable doubt whether if the Supreme Court of Judicature Acts, 1873, 1875, had not passed, we could have heard this appeal; and my doubt arises from the technical reason to which I alluded in

(*) Law Rep., 4 Ex., 187.

(*) 2 Q. B. D., 314; 21 Eng. R., 124.

(*) 3 Q. B. D., 457; *ante*, p. 387, reversed on appeal, 4 App. Cas., 30.

Courtauld v. Legh ⁽¹⁾, namely, that error lay only on the judgment of a court of record; and with all submission to those learned judges who may have thought otherwise, I very much doubt whether under the Lands Clauses Consolidation Act, 1845, the court has power to order the payment of money, even although the submission has been made a rule of court; for the arbitrator himself does not order, or at least ought not to order, the payment of money; he only finds what is the proper amount of compensation, which does not become due until the claimant has done his part, that is to say, has executed a conveyance ⁽²⁾. In the present case the umpire has awarded contingently upon the answers of the court four different sums of money, and it is only when the court has answered the questions submitted to them in a certain manner, that one of the specified amounts becomes payable by his direction; he does not order the amount to be paid, but simply finds that the claimants "are entitled to be paid compensation for the" damage sustained "to that amount." Therefore I incline to think that the Queen's Bench Division had not power to order the payment of any sum, and it seems to me doubtful whether, if I am right as to that, error would be maintainable under the Common Law Procedure Act, 1854, s. 32, upon a special case like this. However that may be, I am clearly of opinion that the decision of the Queen's Bench *Division [425 was an "order" within the Supreme Court of Judicature Act, 1873, s. 19. I am sure that the Legislature intended that enactment to include such a decision as that now before us. I therefore think that an appeal will lie. Before concluding my remarks I wish to say that I agree with the observation made by Cotton, L.J., in the course of the argument, that the claimants are in a dilemma; either there was no jurisdiction in the Queen's Bench Division to give a decision, and then the company are entitled to have the proceedings set aside; or there was jurisdiction, and then the company are at liberty to show that a different amount ought to have been awarded.

BRETT, L.J.: It seems to me that in *Rhodes v. Airedale Drainage Commissioners* ⁽³⁾, this court held that where the promoters and the claimant under the Lands Clauses Consolidation Act, 1845, have agreed to appoint arbitrators, they have agreed to that which is a submission to arbitration within the Common Law Procedure Act, 1854, s. 5, and

⁽¹⁾ Law Rep., 4 Ex., 187, at p. 189.

⁽²⁾ See *East London Union v. Metropolitan Ry. Co.*, Law Rep., 4 Ex., 309.

⁽³⁾ 1 C. P. D., 402.

that consequently the arbitrators or umpire have power to state a special case for the opinion of the High Court of Justice. Therefore the Queen's Bench Division had jurisdiction to hear and decide upon the special case now before us; and it seems to me to follow that their decision was an "order" within the Supreme Court of Judicature Act, 1873, s. 19, and that this court is bound to hear an appeal from it.

COTTON, L.J.: I am of opinion that we are bound to entertain this appeal by virtue of the Supreme Court of Judicature Act, 1873, s. 19. It might have been different if, as has been contended, this special case had been stated for the opinion of the Queen's Bench Division merely by the consent of parties, without any power in the umpire so to do independently of that consent; for it might have been argued that the parties had by their consent given that court a jurisdiction which it would not otherwise have had, that is to say, had constituted it a *quasi* arbitrator from whose jurisdiction the parties could not appeal. But it is shown by *Rhodes v. Airedale Drainage Commissioners* ⁽¹⁾ that a 426] *reference under the Lands Clauses Consolidation Act, 1845, does fall within the Common Law Procedure Act, 1845, s. 5, and that the arbitrators have power to state a case for the opinion of the High Court. Therefore the case before us was stated not pursuant to an authority given by the consent of parties, but under an authority which the Common Law Procedure Act, 1854, s. 5, conferred upon the umpire. The Queen's Bench Division having exercised the jurisdiction which they had without the consent of the parties, their decision on the matter is, on a fair construction of the Supreme Court of Judicature Act, 1873, s. 19, open to an appeal before us. It can hardly be maintained that the decision of the Queen's Bench Division is not an "order" within that enactment, for we have before us what is, at least in form, an order directing judgment to be entered for the claimants for £7,060. I repeat the remark which I made in the course of the argument, and which has been approved of by Bramwell, L.J.: the Queen's Bench Division either had or had not power to make the order appealed from: if they had not, they exceeded their jurisdiction, and the party against whom it was made may be heard in this court to complain of it; if there was not an excess of jurisdiction, the party dissatisfied with the order may examine before us the grounds upon which it was made.

The court proceeded to hear the argument upon the merits.

⁽¹⁾ 1 C. P. D., 402.

Nov. 26, 27. *J. Brown*, Q.C., and *J. Edwards*, Q.C. (*W. Graham*, with them), for the company: As to the first question put by the umpire, the reservation or grant of a "wagon or cart road," contained in the indenture of the 24th of June, 1851, does not enable the claimants, who claim through *J. E. Heathcote*, to lay down a railroad or tramway. The words are not wide enough, and the stipulation by *Heathcote* to keep the way in repair shows that it was intended for the use of other persons besides himself, namely, *Cooper* and those claiming through him; therefore the claimants could not have constructed a railway along it which would have rendered it dangerous to the inhabitants of the neighboring houses. The language of the indenture above mentioned and the indenture of the 31st of March, 1859, is very striking; *by the latter the right to lay [427 railroads and tramways is conferred in clear terms. The claimants' counsel may rely upon *Dand v. Kingscote* (¹), where it seems to have been assumed by the court (p. 197) that an exception and reservation from a conveyance of mines, "with sufficient way-leave and stay-leave to and from" the same, might confer the right to lay a railroad; but that was obviously a very different case, for the "way-leave and stay-leave" were annexed to the mines themselves. Moreover, it follows from the statements in the case that to lay down such a tramway as is suggested must have interfered with the level of the surface of the land subject to the grant of the right of way, and no authority was given by the indenture of 24th of June, 1851, to interfere with the level.

[They also argued that inasmuch as the laying of a railway or tramway from the claimants' pits over the "right of road" to the canal would have involved the crossing of *Heathcote* street and an interference with its surface, a public and indictable nuisance would have been created, *Heathcote* street being a highway; and that local authorities had no power to legalize a public nuisance; as to this they cited *Reg. v. Charlesworth* (²); *Reg. v. Train* (³); and that no compensation could be given under the Lands Clauses Compensation Act, 1845, to a claimant on the ground that by the execution of the works he was prevented from deriving profit by the commission of an illegal act; as to this they cited the definition of the right to compensation stated by Lord Cairns, C., in *Metropolitan Board of*

(¹) 6 M. & W., 174.

(²) 16 Q. B., 1012.

(³) 2 B. & S., 640; 31 L. J. (M.C.), 169.

Works v. McCarthy ('): and that no compensation could be given to a claimant on the ground that he had suffered an injury which was not actionable; as to this they cited *In re Stockport, Timperley and Altringham Ry. Co.* (').]

As to the second question put by the umpire, the claimants were empowered by the lease of the 31st of March, 1859, to take and use full and sufficient railways to carry away "the produce of the said mines thereby demised or any other mines." These words are wide enough to authorize the construction of a railway to work the mines de- 428] mised by Heathcote to the claimants, and *there is no reason why any limit should be put to their natural meaning.

Nov. 28. *R. E. Webster, Q.C.*, and *H. Sutton*, for the claimants: As to the first question put by the umpire, the term "wagon road," used in the indenture of the 24th of June, 1851, is sufficiently wide to include a railway or tramway: *Durham and Sunderland Ry. Co. v. Walker* ('); *Senhouse v. Christian* ('); *Dand v. Kingscote* ('). The stipulation by Heathcote to repair the right of road was probably inserted to protect Cooper, who, under the Local Government Acts, would be the adjoining owner, and would be held liable by the local authorities to repair it; and as the right of road was granted for Heathcote's benefit, it was only just that the duty to maintain it should by clear words be cast upon him.

[They also argued that even if the railway or tramway proposed to be laid down by the claimants were an indictable nuisance, yet this circumstance did not take away the claim to compensation which does not depend upon rights enforceable by law; as to this they cited *Ex parte Farlow* ('): and further that the umpire had not found that the proposed railway or tramway would be a nuisance; as to this they cited *Matson v. Baird* ('): that although the enjoyment of the proposed railroad or tramway might be precarious, the claimants were not by that circumstance deprived of compensation; as to this they cited *Holt v. Gas Light and Coke Co.* (').]

As to the second question put by the umpire, the counsel for the company really argue that they can set off the license to make a railway under the powers contained in the indenture of the 31st of March, 1859, against the deprivation of

(') Law Rep., 7 H. L., 243, at p. 253;

(*) 6 M. & W., 174.

10 Eng. R., 1.

(*) 2 B. & Ad., 341.

(*) 33 L. J. (Q.B.), 251.

(*) 3 App. Cas., 1082; 24 Eng. R., 676.

(*) 2 Q. B., 940.

(*) Law Rep., 7 Q. B., 728.

(*) 1 T. R., 560.

the right to make a railroad or tramway along the "right of road;" but benefit to one property cannot be set off against injury to another, *Senior v. Metropolitan Board of Works*, per Bramwell, B. (1); and it is plain that the claimants cannot make a railway over the *land belonging [429 to Lawton, in order to carry away the coal obtained from shafts sunk upon Heathcote's land.

J. Brown, Q.C., in reply: The cases relied upon by the claimants' counsel turned upon special circumstances. The general words contained in the indenture of the 31st of March, 1859, must be read in their ordinary meaning; their operation is not to be limited by any arbitrary restrictions.

Cur. adv. vult.

Dec. 10. The judgment of the Court (Bramwell, Brett, and Cotton, L.JJ.) was delivered by

BRAMWELL, L.J.: The first question in this case arises thus: The arbitrator finds that the claimants are entitled to compensation, which would be diminished if they were not at the time when their land was taken entitled to make a locomotive railway or tramway such as he mentions; or, if being so entitled, he ought not take into account the benefit they might get from such railway or tramway. Materially or physically, such railway or tramway could be made; that is to say, there is nothing in the nature of the ground, over which they would go, to prevent their being made, if the ground belonged to the claimants, or they had a sufficient right over it; but he refers to the court the question of whether they had such right. We are of opinion that they had not. It depends on the reservation or grant in the deed of the 24th of June, 1851. By that the grantor reserves "a right of way along the southwest side of the land conveyed as and for a wagon or cart road." Now it is certain that if such reservation were made, or, if such a grant were made in an ordinary conveyance of land, it would not in ordinary cases grant the right to lay down a line of railway or tramway. But it is said that it is otherwise in this particular case, because the grantor not only reserves this right of way, but also reserves the mines, and that therefore the effect is as though there was a grant or lease of mines, and a grant of a wagon way to work them, and that in such case the authorities show a railway or tramway might be laid down. Now, we fully and unreservedly admit the authorities, and agree with the reasoning, on which they proceeded; but they do not govern this case. In all of them the way is granted generally, not in a *particular [430

(1) 2 H. & C., 258, at p. 267; 32 L. J. (Ex.), 225, at p. 229.

place; in all the way or ways is a way or are ways to work the mines, and for the use of the grantees only, and their being presently used is contemplated, and in all of them sufficient words are used to include the making of a railway or tramway. None of these matters exist in this case: none of these peculiarities exist here. The words describing the road are a "right of way as and for a wagon or cart way," wagon way and cart way being used as equivalent terms. The road is not for the working of the mines: on the contrary the mines are not to be worked from the land conveyed. It is not a road in any place convenient for the mines, but it is a road in a defined place. Heathcote covenants to maintain and keep it in repair, showing, therefore, it was to be a road for the use of others as well as himself, the ingenious suggestion that that was to guard against Cooper being liable to do so being wholly unfounded. It is also a grant of a way, one end of which runs into a public highway, over which parties do not presumably contemplate making railways or tramways. It is the grant of a way useful for ordinary surface purposes to connect the southern parts of Heathcote's land, out of which a triangular piece was taken, and which Cooper intended to use also himself. This is manifest from Heathcote's covenant to repair. The claimants then are not entitled to make either a railway or tramway over the land in question. A tramway involving raising or lowering the level of the road sufficiently to pass over Heathcote street cannot be within the grant or reservation; nor can a railway, which, as the arbitrator finds, would take up the whole width of eighteen feet, and be very dangerous to the inhabitants of the houses adjoining in the use of the road, as they have used it, and rightfully used it, hitherto. This renders it unnecessary to consider the question of whether if a railway were made, its being a nuisance (as we hold the arbitrator finds it to be) would preclude his taking its benefits into account. On this, therefore, we say nothing; but are of opinion that the first question must be answered in the negative, and the judgment thereon reversed.

The other question is wholly different and depends on, first, whether the claimants have power to make a rail or tramway over the Lawton estate for the carriage of coals got on the Heathcote estate; secondly, on whether if they 431] have such power, any deduction *is to be made from the sum otherwise payable to them. We are of opinion that they have this power. Nothing can be larger than the words used: "Full and sufficient rail and other ways to

take and carry away the produce of the said mines or any *other mines*." It is admitted that in words this includes the right to take away the produce of the Heathcote mines; but it is said that a limitation must be put on them, or otherwise the produce of mines not adjoining and worked by the claimants could be taken over the Lawton land. But in the first place what is to be done is to be done by the lessees, their agents, servants, and workmen; which limits the power to mines worked by them. But suppose that is not the case; where is the necessity or reason for putting a limitation, where the parties have put none? People do not grant way-leaves over their land gratis for the carriage of coal, whether the produce of mines under those lands or not, and no doubt commonly the leave when granted is limited to the produce of the mines under the land, over which the way goes. But, where is the difficulty or improbability of supposing that a man taking a lease of mines, and knowing he will or may have to make a rail or tramway for removal of the produce, should bargain that he should have power to connect that rail or tramway with other mines, whether worked by him or not, and so diminish the expense he otherwise would be at? What is the limitation here proposed? It is to read after "*other mines*," the words "*and brought to the surface on the Lawton land*." Why? The result would be that Lawton coal brought to the surface on Heathcote land could not be taken away over Lawton's land. Are the other powers so limited? May the coke ovens on Lawton's land be used only for the coking of coal brought to the surface on Lawton's land, excluding Lawton's coal brought to the surface on Heathcote's land? It is clear that workmen's houses and standing for gear, tackle, &c., may be on Lawton's land, though the workmen and gear are employed on other mines. Also, "*whatever else is necessary or convenient*," applies to Lawton and other mines. We see no reason to limit the generality of the words, but the contrary, and on this question are against the claimants.

Mr. Webster, however, for them made a point, apparently not made in the court below, which at the first view seemed very *clear in their favor, namely, that assuming they [432 had a right to make such a rail or tramway as alleged over the Lawton land, no deduction ought to be made on that account from the loss they sustain if they had no such right. He called it a set-off. He also urged that it was precarious, that the Lawton lease would end before the other; that either lease might be determined or sold, and that if the lessees of the Heathcote lease gained by the use of such a rail

or tramway, the lessees of the Lawton lease lost. In order to determine this point, we must see what question the arbitrator asks. It is not whether if the railway or tramway can be constructed over Lawton's grounds there is no loss, but whether he can take the power to do so into consideration, which of course means making allowance for its being more circuitous, for its precariousness, the damage to the Lawton land, and all other matters. We think he can take that into account; not, in a sense, because the claimants are lessees of Lawton; but because the lessees of Lawton's land are able, and ought to be willing to let it be done, and would be, if so doing would be to their gain or lessened loss, unless the railway makes them compensation. In short, it is as though a house in a street were taken, where a man carried on business, and there were other houses in the same street to be had, to which the business could be transferred with no loss of good-will. In such a case no compensation for good-will ought to be given. If the rent was greater, that ought to be compensated for: if the lease was shorter, that ought; and if other circumstances of loss or precariousness, they ought. These we assume the arbitrator has allowed for. If the claimants were seised in fee of both properties, there could not be a doubt on the matter. As Mr. Webster admitted, if one door of a house is stopped, and another can be opened conveniently, it must be done; and the loss is the cost of the removal of the door and not of its extinction. So of a field, so of two fields, where access can be got from one through the other. Otherwise the claim would be different, where a man had his land divided in two by a fence, from the case, where it was not so divided. So of mines. But the only difference between a seisin in fee of the whole, and shorter estates under separate leases of the parts, is to introduce the element of precariousness, which ought to be 433] taken into account indeed in considering the value of the powers, but which ought not to exclude the value altogether. On this ground also we are adverse to the claimants. We do not give any judgment except this, that the first question be answered in the negative, the second in the affirmative (').

Appeal allowed.

Solicitors for claimants: *Lewis & Sons*, for Sherratt & Son, Kids Grove.

Solicitors for North Staffordshire Railway Co.: *Burchells*.

(1) At the conclusion of the judgment a discussion arose as to whether the company were entitled to costs. Sutton, for the claimants contended that as the company had not before the arbitration offered any sum by way of compensation, they were not entitled to any costs; and he relied upon the Lands Clauses Consolida-

tion Act, 1845, § 34. Ultimately the court intimated that they would leave the question to be raised upon taxation, and they declined to give any direction as to costs.

The order of the Court of Appeal (the formal parts being omitted), was drawn

up in the following terms: "It is ordered that the judgment of the court below be reversed on both points, and that the first question be answered in the negative, and the second question in the affirmative, and that this court doth make no order as to costs."

See 8 Eng. Rep., 774 note; 18 Eng. R., 858 note; 21 Eng. R., 862 note; 23 Eng. R., 707 note; 25 Eng. R., 392 note; Moak's Underhill on Torts, 487-502.

In every deed of a part of the grantor's land, without express provision on the subject, there is an implied grant, or reservation, of easements of necessity for the enjoyment of the part conveyed, or of the part retained: *Jarstadt v. Smith*, 51 Wisc., 96.

A right of way does not originate in mere convenience. It must spring from an express grant, or from an implied reservation, or from a user for a sufficient length of time to create a prescription, or a bar under the statute of limitations, either of which is presumptive evidence of a grant: *Carey v. Rae*, 14 Chicago Leg. News, 10, 2 Leg. Adv., 308, Sup. Ct., Cal.

The "right of way," in its legal and generally accepted meaning in reference to a railway, is a mere easement in the lands of others obtained by lawful condemnation to public use, or by purchase: *Williams v. Western, etc.*, 50 Wisc., 71.

Where a railroad procured to be condemned a strip of land $4\frac{1}{2}$ rods wide, of which 2 rods were west of the centre of its track. It then purchased from one F. a strip of land six rods wide along the line of their road for the uses and purposes of said railroad, and also all the land in the south half of the block situated west of the route of said road. It then conveyed to E. "all that portion

of block fifty-eight which lies west of and beyond the western boundary of the right of way of said company's railroad, as the same is located and established." Held, 1. That the eastern line of the land granted to E. is a line two rods west of the centre of its track, i.e., the west boundary of the land condemned for use. 2. That there was an incurable uncertainty in the description of the strip six rods wide conveyed by F.: *Williams v. Western, etc.*, 50 Wisc., 71.

As to the extent of use the owner of a servient tenement may make of the lands over which another has an easement, i.e., a raceway or a right of way—and that where the grant of water is of a quantity measured by what would carry a certain wheel that the owner of the easement may use it for any purpose; and as to his right to an open raceway, see *Johnston v. Hyde*, 38 N. J. Eq., 632.

If the owner of land which is subject to a right of way obstructs the way, a person entitled to use the same may enter upon and go over land of the same owner, doing no unnecessary damage: *Jarstadt v. Smith*, 51 Wisc., 96.

The impassibility of a road gives to a party no right to an easement over adjoining land. It may confer a personal temporary right, which he has in common with the travelling public, to pass over the land of another where an established road is impassible: *Carey v. Rae*, 14 Chicago Leg. News, 10, 2 Leg. Adv., 308, Sup. Ct., Cal.

INDEX.

A.

ABORTION.

See CRIMINAL LAW, 616, 645.

ACCOMPLICE.

See CRIMINAL LAW, 616, 620.

ADMIRALTY.

1. The Merchant Shipping Act, 1876 (39 & 40 Vict. c. 80), does not extend the jurisdiction to suspend or cancel the certificate of the master to cases not within the Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104), ss. 242, 432. There is, therefore, no power to suspend the master's certificate where a ship has merely been stranded without material damage to the ship or loss of life. *Matter of Story.* 157
2. A ship during her voyage from India to London was stranded on the coast of France. The shipowner dispatched his manager and other persons to take part in the necessary salvage operations, and the whole of the cargo was saved, transhipped, and brought forward to London and the freight earned. Part of the cargo which could not be identified was sold by the shipowner by arrangement with the consignees through

a broker, who received his brokerage. The shipowner incurred considerable trouble in chartering ships to carry on the cargo from France to London, and in sending out lighters and necessary appliances to France, and in the identification of the cargo, preparing for the sale, answering the inquiries of and arranging with the consignees. In the average statement a remuneration to the shipowner for "arranging for salvage operations, receiving cargo, meeting and arranging with consignees, and receiving and paying proceeds, and generally conducting the business," was charged partly to general average, and partly as particular average on the several interests ratably, the average stater thinking that the amount was a reasonable remuneration to the shipowner for his services and for commission on the sale of unidentified cargo, and on disbursements:

Held, that under the circumstances the amount was improperly charged and could not be recovered, there being no contract on the part of the owners of the cargo to remunerate the shipowner for his services, a great part of which had been rendered with the object of earning his freight. *Schuster v. Fletcher.* 349

3. A ship on her voyage with cargo to Liverpool encountering severe weather, the foretopmast had to be cut away and in its fall caused other damage to the ship, which was thereby compelled to put into port to repair. In order to effect the repairs, and to enable the ship to proceed on her voyage, it was necessary to discharge a

portion of the cargo, and expense was incurred in landing and warehousing it. The repairs having been effected expense was incurred in reshipping such portion of the cargo. Further expense was incurred for pilotage and other charges in respect of the ship's leaving the port of refuge and proceeding upon her voyage. The ship ultimately reached her destination in safety. It has been for from seventy to eighty years the practice of English average adjusters in adjusting losses where ships have put into port to refit, whether such putting into port has been occasioned by a general average sacrifice, or a particular average loss, to treat the expense of discharging the cargo as general average, but the expense of warehousing it as particular average on the cargo, and the expense of reshipment of the cargo and pilotage, port charges, and other expenses incurred to enable the ship to proceed on her voyage as particular average upon the freight. The owners of the ship claimed to have the above mentioned expenses of warehousing and reshipment of cargo, and the pilotage and other expenses of leaving the port, treated as matter of general average, and sued the owners of the cargo for contribution in respect thereof:

Held (by Cockburn, C.J., and Mellor, J., Manisty, J., dissenting), that the plaintiffs were entitled to recover on the ground that the expenses were all incurred in furtherance of the common purpose of prosecuting the adventure, and for the benefit of the cargo as well as the ship.

4. By Manisty, J., the above mentioned practice of average adjusters having existed for so long a period must be deemed to be the general mercantile usage of this country, and as such to have the force of law. *Atwood v. Selar*. 794

See DEMURRAGE, 206, 332, 443.
INSURANCE, MARINE, 700.

ADULTERATION.

1. Under 32 & 33 Vict. c. 112, which by s. 2 defines the term "to dye seeds," as giving to seeds by any process of

coloring, dyeing, sulphur smoking, or other artificial means, the appearance of seeds of another kind, and by s. 3 imposes a penalty upon any person, who with intent to defraud, "dyes any seeds, or sells any dyed seed," no offence is committed by subjecting seeds to a process by sulphur smoking, so as to improve them in appearance, and to make old and inferior seed appear to be new seed, so long as such seed is not made to appear of a different species or description from that to which it actually belongs. *Francis v. Maas*. 308

2. Where the seller of an article brings to the purchaser's knowledge the fact that the article sold to him is not of the nature, substance, or quality of the article he demands, the sale is not "to the prejudice of the purchaser," within the meaning of the 6th section of 38 & 39 Vict. c. 63, and consequently no offence is committed within that section.
3. The 8th section of the act points out a mode of giving notice to the purchaser that is made by the statute sufficient, but it is not intended by that section that, whenever the mode therein specified is not adopted, there shall necessarily be an offence against the 6th section. *Sandys v. Small*. 380, 384 note.
4. Where an article of food, which was not of the nature, substance, and quality of the article demanded, was sold to an inspector of nuisances, who purchased for the purpose of analysis under s. 13 of the Sale of Food and Drugs Act, 1875, with money belonging to the authority by whom he was employed:

Held, that such sale was "to the prejudice of the purchaser" within the meaning of the Sale of Food and Drugs Act, 1875, s. 6. *Hoyle v. Hitchman*. 755

ADULTERER.

See CRIMINAL LAW, 622, 624 note.

ADVERSE POSSESSION.

See LIGHT, 164.

SUPPORT, 706, 745 note.

AGREEMENTS.

1. An intimation in the written acceptance of a tender that a contract will be afterwards prepared, does not prevent the parties from becoming bound to perform the terms in the tender and acceptance respectively mentioned, if the intention of the parties was thereby to enter into an agreement, and if the preparation of the contract was contemplated merely for the purpose of expressing the agreement already arrived at in formal language. *Lewis v. Brass.* 528, 533 note.

See ILLEGAL AGREEMENTS.
DEMURRAGE, 332, 766.

AIR.

See LIGHT, 164.

AMENDMENT.

1. When indictment amended and when not. *Regina v. O'Callaghan.* 641
Regina v. Tiley. 645

See LIMITATIONS, STATUTE OF, 307.

AMOTION.

See OFFICER, 322, 325 note.

ANIMALS.

1. The defendant sent for sale to a public market pigs which he knew to be infected with a contagious disease; they were exposed for sale subject to a condition that no warranty would be given and no compensation would be made in respect of any fault. No verbal representation was made by or on behalf of the defendant as to the condition of the pigs. The plaintiff having bought the pigs, put them with other pigs, which became infected; some of the pigs bought from the defendant and also

some of those with which they were put died of the contagious disease. The plaintiff having sued to recover damages for the loss which he had sustained:

Held, reversing the judgment of the Queen's Bench Division, that, although the defendant might have been guilty of an offence against the Contagious Diseases (Animals) Act, 1869, he was not liable to the plaintiff, for that his conduct in exposing the pigs for sale in the market did not amount to a representation that they were free from disease. *Ward v. Hobbs.* 142, 156 note.

2. A person is not justified in entering the land of another against his will for the purposes of the sport of foxhunting. *Paul v. Summerhayes.* 664, 667 note.

See CRIMINAL LAW, 123, 126 note, 551.
HIGHWAYS, 748, 749 note.

APPEAL.

1. The Court of Appeal has jurisdiction to entertain an appeal from the decision of the High Court of Justice upon a special case stated by an umpire appointed under the Lands Clauses Consolidation Act, 1845, to assess the compensation for lands taken for the purposes of an undertaking, or injured by the execution of the works thereof. *Bidder v. North, etc.* 848

See COSTS, 1.
TERMS OF COURT, 6.

APPURTENANCES.

See EASEMENT, 848, 867 note.

ARBITRATION.

1. The complainant became conductor of a tramway company under an agreement by which he was to pay them £5, to be retained, together with his wages for the current week, as security for the discharge of his duties and the

observance of the rules of the company, &c.; the company to have power, in case of any breach by the conductor of the rules, to retain the £5 and his wages for the current week as liquidated damages for such breach; and it was provided that "the manager of the company should be the sole judge between the company and the conductor whether the company was entitled to retain the whole or any part of the £5 and wages for the current week as liquidated damages; and that the certificate should be binding and conclusive evidence in all courts of justice, civil and criminal, and before all stipendiary and police magistrates, &c., that the amount thereby certified as the amount to be retained was the true amount to be retained, and should bar the conductor of all right to recover it." The complainant having summoned the company before a police magistrate, under 6 & 7 Vict. c. 86, to recover his deposit and wages:

Held, that the agreement was not illegal, and the complaint being substantially a civil proceeding, the manager's certificate that the deposit and wages had been forfeited was conclusive evidence of the fact, precluding the magistrate from making any further inquiry. *London Tramways, etc., v. Bailey.*

199, 203 note.

ARCHITECT.

See ARBITRATION, 199, 203 note.

ARREST.

See CRIMINAL LAW, 564.

ASSAULT.

See CRIMINAL LAW, 627.

ASSESSMENTS.

1. Under the Public Health Act, 1875 (38 & 39 Vict. c. 53), s. 150, which enables

the urban authority to give notice to the owners of premises abutting upon a street (not being a highway repairable by the inhabitants at large), to sewer, level and pave it, and upon default to execute the works and recover the expenses from the owners in default, according to the frontage of their respective premises, such expenses cannot be recovered from any one who, though the owner of premises when notice was first given by the urban authority, has ceased to be owner before the completion of the works. *Queen v. Swindon, etc.*

773

See TAXATION, 331.

ASSIGNMENT.

1. A garnishee order was made under Order XLV, Rule 2, attaching a debt. At the time the order was made the garnishees had given the judgment debtor a check for the amount of the debt. Upon service of the order on the garnishees they stopped payment of the check at the bank, the check not having been presented:

Held, that upon the check being stopped it was as if it had never been given, and that there was therefore an existing debt capable of being attached, and the garnishee order was effectual. *Cohen v. Hale.*

325, 328 note.

2. G. agreed to build a vessel for the defendant, the price of which was to be paid by instalments. Before the vessel was finished, G., being in debt to the plaintiff, by an instrument in writing directed the defendant to pay to the plaintiff £100 out of moneys due or to become due from the defendant to G. At the time of giving this direction all the instalments which were due had been paid by the defendant to G. Notice in writing of the above mentioned instrument was given to the defendant, but he refused to be bound by it, and afterwards paid to G. the balance of the price of the vessel, amounting to more than £100:

Held (by Bramwell and Cotton, L.JJ., Brett, L.J., dissenting), that the instrument in writing constituted a valid assignment of £100, part of the moneys

due or to become due from the defendant to G., and that the plaintiff was entitled to recover that amount from the defendant, notwithstanding the subsequent payments by him to G. *Brice v. Bannister.* 459, 470 *note*.

ATTACHMENT.

1. The salary of a medical or other officer cannot, before it is actually payable, be attached by a garnishee order under the County Court Rules, 1878, for it is not "a debt due, owing, or accruing" to the judgment debtor. *Hall v. Pritchett.* 194, 196 *note*.

ATTORNEYS.

See CRIMINAL LAW, 605.
EVIDENCE, 629, 633 note.

B.

BANKRUPTCY.

See CRIMINAL LAW, 624.

BENEVOLENT SOCIETY.

See OFFICER, 322, 325 note.

BILLS OF EXCHANGE.

1. A bill of exchange drawn in England and payable in Spain, was indorsed in England by the defendant to the plaintiff, who indorsed it to M., residing in Spain. Acceptance having been refused, a delay of twelve days occurred before M. wrote to inform the plaintiff of the dishonor. On receipt from M. of the notice of dishonor, the plaintiff gave immediate notice to the defendant.

28 ENG. REP. 110

No notice of dishonor by non-acceptance is required by the law of Spain:

Held, that the plaintiff was entitled to recover the amount of the bill. *Horne v. Rouquette.* 424

2. The defendant gave H. his blank acceptance on a stamped paper, and authorized H. to fill in his name as drawer. H. returned the blank acceptance to the defendant in the same state in which he received it. The defendant put it into a drawer of his writing table at his chambers, which was unlocked, and it was lost or stolen. C. afterwards filled in his own name without the defendant's authority, and an action was brought on it by the plaintiff as indorsee for value:

Held, that the defendant was not liable on the bill.

3. Per Bramwell, L.J., on the ground that there was no estoppel between the parties, which prevented the defendant from setting up the true facts, and if the defendant had been guilty of negligence it was not the proximate or effective cause of the fraud.

4. Per Brett, L.J., on the ground that after the return of the blank acceptance by H. the defendant had never authorized any one to fill in a drawer's name, and that he had never issued the acceptance intending it to be used. *Bazendale v. Bennett.* 434, 442 *note*.

See ASSIGNMENT, 459, 470 note.

BILL OF LADING.

See DAMAGES, 766.

BLANKS.

See BILLS OF EXCHANGE, 434, 442 note.
PARTNERSHIP, 517.

BOARDING HOUSE KEEPERS.

See LIEN, 390, 400 note.

BODILY HARM.

See CRIMINAL LAW, 603.

BONA FIDE.

1. The plaintiffs made advances to D. & Sons on the security of certain flour, the following memorandum being signed by D. & Sons: "As security for the due fulfilment on our part of this undertaking, we have warehoused in your name sundry lots of flour, and in consideration of your delivering to us or our order said flour as sold, we further undertake to specifically pay you proceeds of all sales thereof immediately on their receipt." The flour was warehoused in the plaintiffs' name. The defendants subsequently made advances to D. & Sons on the security of a pledge of the flour, in ignorance of the prior transaction with the plaintiffs; and D. & Sons, by a fraudulent representation that they had sold the flour to the defendants, procured from the plaintiffs a delivery order for the flour, which they gave to the defendants. The defendants, in pursuance of the delivery order, obtained possession of the flour, and, the advances made by them not being repaid, sold it. The plaintiffs sued the defendants for the conversion of the flour:

Held, that (assuming that the plaintiffs had originally a special property in the flour), the intention of the plaintiffs must be taken to have been to revert the whole property in the flour in D. & Sons, in order that they might transfer it to the defendants as purchasers; and that, though the plaintiffs might have revoked the delivery order as being procured by fraud, as long as the flour remained in the hands of D. & Sons, yet when the property in the flour had been transferred by D. & Sons to *bona fide* transferees for good consideration, the title of the latter was indefeasible:

2. *Held*, also, that of two innocent parties, one of which must suffer, the plaintiffs having enabled D. & Sons to commit the fraud on the defendants, must suffer the consequences, and that,

consequently, the action was not maintainable. *Babcock v. Lawson*. 831, 837 *note*.

See BILLS OF EXCHANGE, 434, 443 *note*.
FRAUD, 674, 678 *note*.

BOXING MATCH.

See CRIMINAL LAW, 576.

BRIDGES.

See CORPORATIONS, 2, 4 *note*.

BURIAL.

See CRIMINAL LAW, 648, 656 *note*.

BY-LAWS.

See ORDINANCES, 331.
RAILWAY COMPANIES, 792, 794 *note*.

C.

CARRIERS.

1. The plaintiff was a brewer carrying on business at B., where the defendants, a railway company, and the M. Company, another railway company, had stations. Three firms of brewers also carried on business at B., and their premises respectively were connected with the M. Railway. The plaintiff's were not connected with either the M. Railway or the defendants' railway. In order to prevent the traffic of the three firms from passing wholly over the M. Railway and to divert some portion of it to their own line, the defendants agreed to cart goods gratuitously between their station at B. and the premises of the three firms respectively, and they also allowed certain deductions from the rates charged to the

three firms for the carriage of their goods, the effect of which was that their goods were loaded and unloaded by the defendants gratuitously. The defendants did not cart gratuitously for the plaintiff between his premises and their station, and they did not allow to him deductions similar to those allowed to the three firms. After carting the goods for the three firms gratuitously and allowing them the deductions before mentioned, the defendants derived a profit from the traffic, and they had not any intention to prejudice the plaintiff:

Held, affirming the judgment of the Queen's Bench Division, that the gratuitous carting, loading and unloading of the goods for the three firms was an inequality in favor of them and an undue preference granted to them by the defendants, and was in contravention of 8 & 9 Vict. c. 20, s. 90, and 17 & 18 Vict. c. 31, s. 2, and that the plaintiff was entitled to maintain an action to recover the amounts paid by him to the defendants, which represented the cost of carting his goods between his premises and their station at B., and of loading and unloading the same. *Evershed v. London*, etc. 128, 141 *note*.

2. The plaintiff, under a contract in writing signed by his agent, delivered to the defendants certain cheeses to be carried from L. to S. at "owner's risk." As the plaintiff knew, the defendants had two rates of carriage; a higher rate, when they took the ordinary liability of carriers, and a lower, when they were relieved of all liability, except that arising from the wilful misconduct of their servants. In using the words "owner's risk" the plaintiff intended that the cheeses should be carried at the lower rate, and subject to the conditions restricting the defendants' liability. The defendants' servants packed the cheeses in such a manner that during their transit upon the defendants' railway they were damaged, but the defendants' servants did not know that damage would result from the mode in which the cheeses were packed:

Held, that, as the defendants carried at alternative rates, the condition excepting them from liability when carrying at the lower rate was just and reasonable; and that the injury to the cheeses had not arisen from the wilful

misconduct of their servants. *Lewis v. Great Western*, etc. 178, 191 *note*.

See RAILWAY COMPANIES, 263, 268 *note*, 792, 794 *note*.

CASES AFFIRMED, REVERSED, OVERRULED, AND CONSIDERED.

Angus, etc., v. Dalton, 28 Eng. R., 80, *reversed*. 706
 Backhouse v. Bonomi, 9 H. L. Cas., 508, *considered*. 332
 Bower v. Peate, 16 Eng. R., 374, *approved*. 706
 Bradlaugh v. Regina, 21 Eng. R., 269, *reversed*. 482
 Cod v. Cabe, 45 L. J. Mag. Cas., 101, *considered*. 564
 Coverdale v. Charlton, 28 Eng. R., 831, *affirmed*. 705
 Dand v. Kingscote, 6 M. & W., 174, *distinguished*. 848
 Doyle v. Kaufman, 3 Q. B. Div., 7, *discussed*. 307
 Durham, etc., v. Walker, 2 Q. B., 940, *distinguished*. 848
 Evershed v. London, etc., 20 Eng. R., 323, *affirmed*. 128
 Galliard v. Saxton, 2 B. & S., 303, *considered*. 564
 Gatly v. Fry, 2 Exch. Div., 265, *distinguished*. 157
 Gundry v. Feltham, 1. T. R., 334 *discussed*. 664
 Hooper v. Burne, 21 Eng. R., 145, *affirmed*. 236
 Jones v. Thompson, Ell., Bl. & Ell., 63, *followed*. 194
 Mangan v. Atterton, L. R., 1 Exch., 289, *discussed*. 295
 Martin v. Goble, 1 Camp., 320, *disapproved*. 164
 Nicklin v. Williams, 10 Exch., 259, *considered*. 332
 Owen v. London, etc., L. R., 3 Q. B., 54, *approved*. 1
 Regina v. Bradlaugh, 21 Eng. R., 269, *reversed*. 482
 Regina v. Chapman, 12 Cox's Cr. Cas., 4, *considered*. 564
 Regina v. Cleary, 2 F. & F., 850, *considered*. 583
 Regina v. Postmaster-General, 1 Q. B. Div., 658, *affirmed*. 359
 Regina v. Sykes, 1 Q. B. Div., 53, *followed*. 329
 Regina v. York, 1 Ell. & Bl., 858, *considered*. 173

Rex v. Camberworth, 3 Barn. & Adol.,
108, *disapproved*. 173
Rex v. Trustees, etc., 5 Ad. & Ell.,
581, *disapproved*. 823
Rhodes v. Airedale, etc., 1 C. P. Div.,
403, *followed*. 848
Senhouse v. Christian, 1 T. R., 560,
distinguished. 848
Tayleur v. Wildin, L. R., 8 Exch., 308,
distinguished. 401
Ward v. Hobbs, 21 Eng. Rep., 140, *re-
versed*. 143
Watson v. Clark, 1 Dow., 836, *consid-
ered*. 471
Watt v. Barnett, 28 Eng. Rep., 169,
affirmed. 318
Welply v. Buhl, 28 Eng. Rep., 76,
affirmed. 281

CHANCEERY.

See ISSUES, 7, 11 note.

CHARTERPARTY.

See DEMURRAGE, 206, 332, 443.

CHECK.

*See ASSIGNMENT, 325, 328 note, 459,
470 note.*

CHILD.

See CRIMINAL LAW, 624, 627.

CONDITION.

See LEASES, 314, 317 note.

CONSENT.

1. Of child to indecent assault. *Regina
v. Roadley.* 627

See CRIMINAL LAW, 548, 550, 554 note.

CONSIGNOR AND CONSIGNEE.

See DEMURRAGE, 766.

CONSPIRACY.

See CRIMINAL LAW, 610.

CONTAGIOUS DISEASES.

See ANIMALS, 142, 156 note.

CONTINUING DAMAGES.

See DAMAGES, 332, 348 note.

CONTRACTS.

*See AGREEMENTS.
TORT, 11.*

COPYRIGHT.

1. The act 5 & 6 Vict. c. 45, ss. 4, 20, does not confer any exclusive right to the performance of musical compositions published before the passing of the act.
2. Upon an application under s. 14, to expunge entries in the register at Stationers' Hall, representing A. to be the proprietor of the liberty of performing certain songs published before the act, it appeared that the applicants, who were music-publishers, claimed under a general grant of the copyright in the songs made by the composer after the act, and that A. claimed under a subsequent grant by the composer which purported to convey separately the right of performing them. A., under color of this grant, had threatened to take proceedings against persons performing the songs without his consent:
Held, that the application to expunge the entries must be granted; for although the applicants had equally with

A. no exclusive right to the performance of the music, they were "aggrieved" by the existence of the entries, which were calculated to prejudicially affect their literary copyright in the songs by diminishing the number of copies sold. *Matter of Hutchins.* 705

CORPORATIONS.

1. The court will not issue a writ of mandamus against a public body when it is clearly shown that the performance of the duty sought to be enforced is impossible, by reason of want of funds not involving any default on the part of such body.

An order was issued by the Board of Trade, under the 7th section of the Railway Clauses Act, 1863 (26 & 27 Vict. c. 92), directing a railway company to make a bridge for the purpose of carrying a turnpike road over their line instead of crossing the same on the level.

Previously to the making of this order, the company had exhausted all their powers of raising money in making the line, and, the undertaking proving a failure, they had leased their line in perpetuity to another company, and such lease was confirmed by a special act of Parliament. The lessees took all the profits of the line, paying a portion of the interest due to the company's debenture stockholders. The company consequently had no funds for the construction of the bridge.

On an application for a mandamus to compel the company to comply with the order of the Board of Trade, the above facts being shown, the court discharged the rule for the mandamus. *Matter of Bristol, etc.* 2, 4 note.

2. An act of Parliament authorized trustees to establish a ferry and make certain highways in connection therewith. The trustees were likewise empowered to take tolls, out of the proceeds of which the ferry and roads were to be maintained. No limit of time was specified by the act for the expiration of the trust. The act also provided that, in case the works thereby authorized should not be executed within the space of ten years, all the powers and authorities thereby given should cease and determine, save only as to so much

of the work as should have been completed within that time.

The trustees established the ferry, and made all the roads specified by the act but one. The funds arising from the tolls becoming insufficient for the repair and maintenance of the roads so made, an application was made by the trustees to justices for an order for contribution to the repair of one of their roads so made out of the highway rate under 4 & 5 Vict. c. 59, s. 1:

Held, that the trust created by the act was a turnpike trust, within the meaning of 4 & 5 Vict. c. 59; and secondly (on the authority of *Reg. v. York and North Midland Ry. Co.* (1 E. & B., 858)), that inasmuch as the act merely authorized and did not compel the making of the roads thereby specified, and contemplated that all the works might not be executed, the construction of the whole system of roads authorized to be made was not a condition precedent to the roads that were made becoming highways, and consequently that an order for contribution to the repair of the road in question might be made under 4 & 5 Vict. c. 59, s. 1. *Regina v. French.* 172

3. When included in word "person." *Pharmaceutical, etc., v. London, etc.* 775, 783 note.

See COSTS, 217.

ELECTION, CORPORATE, 877.

CORPSE.

See CRIMINAL LAW, 548, 656 note.

COSTS.

1. Where costs of an inquiry before arbitrators under the Lands Clauses Consolidation Act, 1845, "are taxed and settled as between the parties by one of the taxing masters of the superior courts of law" under s. 1 of 32 & 33 Vict. c. 18, the court has no jurisdiction over the master's taxation on a motion to review. *Sandback Charity v. North Staffordshire, etc.* 1
2. Upon an application to stay an action brought against a company which was

being voluntarily wound up, it appeared that the plaintiff had gone on with the action after notice of the winding up and an offer from the company to allow him to prove against the estate for his debt and costs, if he would undertake not to proceed further:

Held, that on making the order to stay proceedings the plaintiff could not be allowed to add to his debt his costs of appearing upon the application.
Rose v. Gardden. 217

See SECURITY FOR COSTS, 293.

COUNSELLORS.

See CRIMINAL LAW, 605.
EVIDENCE, 629, 633 note.

COUNTERFEITING.

See CRIMINAL LAW, title Forgery.

COURTS.

See CRIMINAL LAW, 620.
DAY, 751, 754 note.

COVENANTS.

See DAMAGES, 332, 348 note.
LEASES, 314, 317 note.

CRIMINAL LAW.

1. *Abortion.* On an indictment under 24 & 25 Vict. c. 100, s. 58, for causing to be administered to a woman "a noxious thing," described in one count as an excessive dose of oil of juniper, which was the drug administered (first in a small and then in a large quantity) with intent to cause miscarriage—it not having *per se* any direct tendency to produce miscarriage, but even in a small quantity producing vomiting, and so having an indirect tendency if taken

in excess, to cause miscarriage by reason of violent vomiting or purging.

Held, that if there was an administration of such an excessive dose caused by the prisoner with the intent alleged, it would be a "noxious thing" within the act; and, *semble*, that as the statute does not require that the drug should have any tendency to produce miscarriage, it is enough if it is "noxious," and is given with the intent charged, if it is in itself hurtful. There being no other evidence but the woman's that the prisoner incited her to take the excessive doses except that her father accused him of giving his daughter such things "to produce abortion," and that he did not deny it.

2. *Held*, that this was some corroborative evidence, even assuming the woman to be in the position of an accomplice requiring corroboration. *Regina v. Cramp.* 616
3. *Abortion.* Supplying a noxious thing to a person with the intent that it shall be used by a certain woman to produce abortion is a misdemeanor within the 24 & 25 Vict. c. 100, s. 59, although the woman for whom it was intended by him was not pregnant. *Regina v. Tilley.* 645
4. *Amendment.* Where the case has not been inquired into before a magistrate but the bill has been merely found by the grand jury, the court will not go out of its way to assist the prosecution by amending the indictment and inserting certain names, on objection taken that the charges therein set out are not specified with sufficient particularity. *Regina v. O'Callaghan.* 641
5. On objection before plea to the first count of the indictment that the words "a certain woman" were too vague, and therefore that the count was bad, the judge allowed the prosecution to amend by inserting the words "a woman to the jurors unknown," instead of the words objected to. *Regina v. Tilley.* 645
6. *Arrest.* One who murders a police officer, who is attempting to arrest him without warrant, may be convicted of manslaughter. *Regina v. Carey.* 564
7. *Assault, Indecent.* On the trial of an indictment for an indecent assault upon

a little girl only seven years of age, the child was examined as a witness. The prisoner's counsel proposed to address the jury on the consent of the child to the assault. The chairman refused to allow him to do so, ruling that a child of seven years old might submit, but could not give consent to the assault. The prisoner was convicted.

Held, that the conviction must be quashed. *Regina v. Roadley.* 627

8. *Bankruptcy.* The 32 & 33 Vict. c. 62, s. 11, sub-sect. 1, enacts that a bankrupt or liquidating debtor shall be guilty of a misdemeanor "if he does not to the best of his knowledge and belief fully and truly discover to the trustee of his estate all his property, real and personal, and how and to whom, and for what consideration, and when he disposed of any part thereof, except such part as has been disposed of in the ordinary way of his trade (if any), or laid out in the ordinary expense of his family," &c.

Held, that the disclosure was not restricted to property in possession of the bankrupt at the commencement of his bankruptcy. *Regina v. Michell.* 634

9. *Conspiracy.* A. obtained goods on credit at B.'s suggestion, in order that A. might sell them to B. below their value, B. aiding A. as a referee, and giving him a character. The evidence was such that B. must have known that A. was getting the goods without any intention of paying for them:

Held, that B. was guilty of conspiring with A. to defraud. *Regina v. Orman.* 610

10. *Corpus.* Defendant was indicted for unlawfully, wilfully, and indecently digging open graves in a burial ground, and taking and removing parts of the bodies of persons buried therein, and interfering with and offering indignities to the remains of the said bodies.

The evidence showed that defendant employed persons to excavate for building operations, the burial ground attached to a Nonconformist place of worship, which had been disused as a burial ground for some time; and the jury found that, in the course of the excavations, bones that formed parts of human remains, and of the same human skeleton, were dug up, but that

they were not disturbed in an improper and indecent manner:

Held, that the defendant was guilty of a misdemeanor at common law. *Regina v. Jacobson.* 648, 656 note.

11. *Counts, Election.* Where an indictment contains two counts, the first charging the accused person as principal in a felony, the second charging him as accessory after the fact to the same felony, the prosecution must elect upon which count they will proceed. *Regina v. Brannon.* 620

12. *Dangerous thing.* Where one throws away an explosive machine with intent that another shall pick it up and be injured by its explosion, he is guilty of casting or throwing a dangerous thing, under the English statute. *Regina v. Saunders.* 562

13. *Dying declarations.* On a trial for murder, the death having been caused by cutting the throat, all the vessels and arteries having been severed, and death therefore certain to ensue, and in fact ensuing almost immediately afterwards, a declaration having been made by deceased in writing (he having no power to speak), about five minutes before death, when he was actually dying, it was held by Denman, J., after consulting Cockburn, C.J., that the declaration might be admissible, and that they were not prepared to hold that it was not so; but that with reference to some decisions, and especially *Reg. v. Cleary* (2 F. & F., 850), it would be proper, if it was admitted, to grant a case for the Court for Crown Cases Reserved. *Regina v. Morgan.* 583

On an indictment for murder, it appearing that the deceased, with her throat cut through, came suddenly out of a room, in which she left the prisoner, who also had his throat cut, and was speechless, and that she said something immediately after coming out of the room, and a few minutes before she died—the question being, murder or suicide.

Held, that her statement was not admissible, either as a dying declaration or as part of the *res gestæ*. *Sed quære*, whether in such a case the act is complete until death takes place, and whether, as to a dying declaration, it is not a question of fact, upon the surgical evidence, whether, from the na-

ture of the wound, the person must not have been conscious of almost immediate death. *Regina v. Boddingfield*. 587, 592 note.

14. *Embezzlement*. The prisoner was an agent employed to sell goods on commission, and as soon as he received moneys from customers he was to remit them to his employers. During the employment, the prosecutor wrote to the prisoner, "We will send H., B., and P. their bills at the end of the month, and the same day that you receive the money from the customers you must remit it to us. We will attend to your order, as our arrangements were to remit as soon as you received it, as you said they would not pay much before the 20th of each month."

Held, that this letter was not a direction in writing as to the application or disposition of moneys received by the prisoner within the meaning of sect. 75 of 24 & 25 Vict. c. 96. *Regina v. Brownlow*. 566

15. *Embezzlement: Larceny*. A game-keeper, not authorized to take or kill rabbits for his own use, took and killed some wild rabbits upon his master's land, and converted them dishonestly to his own use by selling them. The taking, killing, removing, and selling, were parts of one continuous action:

Held, that a conviction of such game-keeper for embezzlement of the rabbits could not be sustained. *Regina v. Read*. 123, 126 note.

16. *Embezzlement: Venue*. A clerk whose duty it was to remit at once to his employers in Middlesex all moneys collected by him as their clerk, collected at York, on the 18th of April, a sum of money as such clerk, but never remitted any portion of it. On the 19th and 20th of April he wrote and posted from places in Yorkshire to his employers in Middlesex letters making no mention of the money so collected, and on the 21st of April he wrote and posted at Doncaster in Yorkshire to his employers in Middlesex a letter which was intended to make them believe that he had not then in fact collected the money in question. These letters were duly received by the employers in Middlesex.

Held, by Kelly, C.B., Field, Lindley,

and Manisty, JJ., that the receipt of the letter of the 21st of April in Middlesex was sufficient to give jurisdiction to try the prisoner in Middlesex.

17. *Held*, by Huddleston, B., contra, that no part of the crime was committed in Middlesex, and that the prisoner was wrongly indicted in that county. *Regina v. Rogers*. 16, 27 note.

18. *Embezzlement: Venue*. It was the duty of the prisoner, a commercial traveller, to remit daily to his employers, who resided in London, the moneys which he collected, without reduction. The prisoner, on the 1st and 2d of March, 1878, collected at Newark two sums of money which he did not remit or account for till the first week in April, when one of his employers went to Grantham, where the prisoner resided, saw him, and taxed him with receiving moneys and not accounting for them. The prisoner then and there handed to his employer a list of moneys he had collected and not accounted for, including the above two sums. There was no evidence that the prisoner returned from Newark (which is within easy access of Grantham) to Grantham on either of the days or at what times of the days he received the two sums of money. He was indicted and convicted at the borough of Grantham Quarter Sessions for embezzling the above two sums of money:

Held, that the conviction was bad, as there was no evidence of any embezzlement within the borough of Grantham. *Regina v. Treadgold*. 570

19. *Evidence*. Indictment framed in two counts; in the second count one assignment was that the prisoner swore that she had not had connection with a "man." *Held*, by Manisty, J., that the evidence of only one man could be received; by Lindley, J., after consulting with Lord Justice Thesiger, that the evidence of several men, alleging that they had had connection with prisoner, was admissible. *Regina v. Adams*. 565

20. *False pretences*. By means of a false wage-sheet the prisoner obtained from his master a check for the amount stated in the sheet to pay the men's wages. The check was informally drawn, and payment was refused by

the bank. The prisoner returned it to his master, telling him of the cause of its non-payment, and the master tore it up and gave another, which the prisoner cashed and appropriated the difference between what was really due for wages and what was falsely stated to be due in the wage-sheet.

On an indictment charging prisoner with obtaining 8s. 6d., the actual sum appropriated by the prisoner, it was objected that the above evidence did not prove the charge, for that he had by it only obtained the first check, which was a valueless piece of paper.

Held, that the false pretence was a continuing one, that the second valuable check was obtained thereby equally with the first, and that the charge was proved. *Regina v. Grealhead*. 542

21. *False pretences*. The prisoner was convicted of attempting to obtain a sewing machine by false pretences. The indictment alleged that the prisoner did falsely pretend that a paper partly in print and partly in writing, produced by the prisoner to the prosecutor and purporting to be a bank note for the payment to the bearer of £5, was then a good, genuine, and available order for the payment of the sum of £5, and was then of the value of £5, &c.; by means of which false pretence the prisoner did unlawfully attempt to obtain a sewing machine. The evidence was that the prisoner bargained for the purchase of the sewing machine for 35s., and said that a friend had told her to get one and had sent her the money to pay for it, and at the same time gave a worthless bank note for £5, payable to the bearer, of the Devonshire Bank, which had stopped payment many years ago. The prisoner knew at the time that the bank had stopped payment and that the note was of no value.

Held, that the indictment, though artificially framed, sufficiently alleged that the prisoner falsely represented the note to be a good and genuine note of an existing bank, and of the value of £5, and that the evidence supported the conviction. *Regina v. Jarman*. 545

22. *False pretences*. An indictment charged one Gregory with having obtained £80 from prosecutor, Woodman, on the false pretence that he, the said 28 ENG. REP. 111

Gregory, then wanted the loan of £80 to enable him to take a public house at Melksham; by means of which said false pretence the said Gregory did then unlawfully and fraudulently obtain the said sum from the said Samuel Woodman with intent to defraud. Whereas the said Gregory was not then going to take a public house at Melksham . . . as he the said Gregory well knew. And whereas the said Gregory did not then want a loan of £80 or any money to enable him to take the said house:

Held, not a false pretence as to an existing fact. *Reg. v. Woodman*. 561

23. *False pretences*. The prisoner was charged with obtaining a prize in a certain swimming race by false pretences. He obtained his competitor's ticket for the race by representing himself to be member of a certain club, and by a letter purporting to be written by the secretary of that club. On the faith of these representations—which turned out to be false—he was allowed twenty seconds start in the race, and won the prize:

Held, by the Common Serjeant after consulting Stephen, J., that the false pretences were too remote, and that the count charging them could not be sustained. *Regina v. Larnier*. 639

24. *Forgery*. A genuine sovereign had been fraudulently filed at the edges to such an extent as to reduce the weight by one twenty-fourth part, and to remove the milling entirely, or almost entirely, and a new milling had been added in order to restore the appearance of the coin:

Held, by Lord Coleridge, C.J., Pollock and Huddleston, B.B. (Lush and Stephen, J.J., dissenting), that the coin was false and counterfeit, within 24 & 25 Vict. c. 99, s. 9. *Queen v. Hermann*. 762, 766 note.

25. *Highway: Nuisance*. Upon the trial of an indictment against the township of A. for the non-repair of a highway within it, it appeared that A. was one of seven townships forming the parish of D. The parish itself had never repaired any highway, nor levied highway rates, nor appointed surveyors; each township having appointed its own surveyors, and levied its own highway rates. With the exception

of the highway in question, and one other, each of the seven townships had from time immemorial repaired its own highways. The highway had always been repaired by the adjoining township of W., but there was no evidence of any consideration for such repair:

Held, that A. was liable, for it must be presumed that the repairs had been done by W. under some arrangement between the two townships, and such arrangement in the absence of sufficient consideration was not binding on W. *Queen v. Ardsley.* 238

26. *Indictment.* On an indictment for murder, the power of the jury to return a verdict of manslaughter for criminal negligence by the accused depends upon the circumstances of the particular case. *Regina v. French.* 582

27. *Indictment.* The statute 14 & 15 Vict. c. 19, s. 5, only applies where the indictment alleges a felonious cutting, stabbing, or wounding.

28. Upon an indictment charging a felonious shooting with intent to do grievous bodily harm, and doing grievous bodily harm with intent to do grievous bodily harm, it is not competent for the jury to convict of unlawfully wounding. *Regina v. Miller.* 603

29. *Indictment: Obscene literature.* In an indictment for publishing an obscene book, it is not sufficient to describe the book by its title only, for the words thereof alleged to be obscene must be set out; and if they are omitted, the defect will not be cured by a verdict of guilty, and the indictment will be bad either upon arrest of judgment or upon error. *Bradlaugh v. Queen.* 482, 515 note.

30. *Intent.* The belief, although erroneous, of prisoner in the existence of a right to do the act complained of excludes criminality. *Regina v. Twome.* 579, 580 note.

31. *Intoxication.* Drunkenness is no excuse, but delirium tremens caused by drinking, and differing from drunkenness, if it produces such a degree of madness, even for a time, as to render a person incapable of distinguishing

right from wrong, relieves him from criminal responsibility. *Regina v. Davis.* 657, 659 note.

32. *Larceny.* The prisoner was employed to trap wild rabbits, and it was his duty to take them, when trapped, to the head keeper. Contrary to his duty he trapped from time to time rabbits, and took them to another part of the land and placed them in a bag with intention of appropriating them to his own use, which another keeper observing, went and took some of the rabbits out of the bag during the prisoner's absence and nicked them and put them into the bag. His reason for nicking them was that he might know them again. The prisoner afterwards took away the bag and the rabbits:

Held, that the act of the keeper in nicking the rabbits was no reduction of them into the possession of the master, so as to make the prisoner guilty of stealing them. *Regina v. Peck.* 551

33. *Larceny.* A bag was left by the owner on a Saturday night near to a place where the prisoner and two other persons were at the time. The prisoner passed by the place on his way home, and shortly afterwards one of the other two persons followed in the same direction. That person and the prosecutor then met the prisoner coming back to his home from the opposite direction, and being questioned he denied all knowledge of the bag, and said that he had been in the neighboring wood for firewood. The wood, the prisoner's cottage, and some disused farm buildings near it were then searched, without success. On the Monday morning, the bag was found in a hay-loft in one of the disused farm buildings near to the highway. There was no door to it and passers-by had easy access to it. The prisoner was then taken into custody for stealing the bag, and said to the constable, after previously denying he had taken the bag, "I suppose I shall get a month for this," and made use of some other words of no more definite meaning.

The chairman left all the facts to the jury as evidence from which they might infer that the prisoner had had possession of the bag, and directed them, if they found so, to treat the case as one of recent possession:

Held, that the chairman's ruling was

wrong, and that he ought to have directed an acquittal. *Regina v. Hughes*, 578

34. *Larceny*. Trust money had been invested on mortgage. The mortgage was paid off, and the money left in the hands of the family solicitor, who wrote to the person beneficially interested: "R.'s money was paid on Saturday, the 6th day of April—£2,500 and interest. . . . Let me know how you would like to have the £2,500 invested, whether in the funds or on mortgage. I can get you 4 per cent. on a good security, but not more. More than 4 per cent. is not to be obtained upon such securities as trustees would be justified in investing." The answer was dated the 9th day of April: "Will consult G. at once about the money, and let you know. I do not wish it placed in the funds. I am very glad it is paid over, and hope it will be well secured this time." At or very near the date of these letters it was clear that the money had been fraudulently appropriated to his own use by the solicitor.

Held, that this was a fraudulent conversion to his own use of property entrusted to the solicitor for safe custody within sect. 76 of 24 & 25 Vict. c. 95.

35. *Quere*, whether the above letters amounted to a direction in writing to apply the money within sect. 75. *Regina v. Fullagar*, 605

36. *Larceny*. The prisoner, who was previously on familiar terms with prosecutor's wife, hired a cart, and told the owner to send it to the prosecutor's house to convey furniture for the woman whom he would find there to another address which he gave to the carter, and where the wife had previously engaged rooms without her husband's knowledge. The cart was sent as directed, and furniture loaded, the wife being present, and the husband absent, and the prisoner not being at the loading. The wife accompanied the cart to the lodgings. The prisoner did not appear at the lodgings until the next night, which he passed with her there, and then lived there in adultery with the wife for some days afterwards, using the furniture.

The jury having convicted the prisoner of stealing the furniture, this court affirmed the conviction. *Regina v. Flatman*, 622, 624 *note*.

37. *Libel*. At the trial of a criminal information against the defendants for a libel published in a newspaper of which they were proprietors, it appeared that each of them managed a different department of the newspaper, but that the duty of editing what was called the literary department was left by them entirely to an editor whom they had appointed named G. The libel in question was inserted in the paper by G. without the express authority, consent, or knowledge of the defendants. The judge having directed a verdict of guilty against the defendants.

Held, by Cockburn, C.J., and Lush, J., that there must be a new trial, for upon the true construction of 6 & 7 Vict. c. 96, s. 7, the libel was published without the defendants' authority, consent, or knowledge, and it was a question for the jury whether the publication arose from any want of due care and caution on their part.

38. By Mellor, J., dissenting, that the defendants, having for their own benefit employed an editor to manage a particular department of the newspaper, and given him full discretion as to the articles to be inserted in it, must be taken to have consented to the publication of the libel by him; that 6 & 7 Vict. c. 96, s. 7, had no application to the facts proved, and that the case was properly withdrawn from the jury. *Regina v. Holbrook*, 53, 64 *note*.

39. *Libel*. The 7th section of 6 & 7 Vict. c. 96, enacts that "whosoever upon the trial of any indictment or information for the publication of a libel, under the plea of not guilty, evidence shall have been given which shall establish a presumptive case of publication against the defendant by the act of any other person by his authority, it shall be competent to such defendant to prove that such publication was made without his authority, consent, or knowledge, and that the said publication did not arise from want of due care or caution on his part."

On the trial of a criminal information for libel against the proprietors of a newspaper it appeared that the defendants had appointed an editor with general authority to conduct the paper, and left it entirely to his discretion what should be inserted therein, and that such editor had inserted the libel in question without the knowledge or

express authority of the defendants. The jury found the defendants guilty. On a motion for a new trial on the ground that the verdict was against evidence, and of misdirection:

Held (by Cockburn, C.J., and Lush, J., Mellor, J., dissenting), that the general authority given to the editor was not *per se* evidence that the defendants had authorized or consented to the publication of the libel, within the meaning of 6 & 7 Vict. c. 96, s. 7; and that, as the learned judge at the trial had summed up in terms which might have led the jury to suppose that it was, and the jury had apparently given their verdict on that footing, there must be a new trial. *Queen v. Holbrook*. 681, 700 *note*.

40. *Lunatic*. The two prisoners, brothers of the lunatic, took a house, and their mother and a lunatic sister lived with them. They supported the household, but received no payment for or on account of any special charge of their lunatic sister. The ill treatment of the lunatic was fully proved.

Held, that the two prisoners were persons having the care, or charge, or concerned, or taking part in the custody, care, or treatment of a lunatic within the 16 & 17 Vict. c. 96, s. 9. *Regina v. Smith*. 624

41. *Murder*. On an indictment for murder, the death having been caused by shot from a gun in the hands of the prisoner, evidence of former threats by deceased of deadly violence, with words and circumstances on the occasion in question likely to provoke similar threats, received as evidence of danger to life, or serious violence or reasonable apprehension of it, on the occasion, such as might excuse or justify recourse to a loaded firearm in self-defence.
42. Prisoner's counsel allowed to make a statement on the part of the prisoner to show that the trigger of the gun was pulled without the intention of firing it.
43. The use of such a weapon, even against an unarmed man, may be excused or justified not only by necessity for defence against death or serious injury, but the reasonable apprehension of it.
44. But in the absence of such necessity, if it is resorted to, and is fired even accidentally, it is manslaughter; and

the jury having found that there was no such necessity, but that the gun, being levelled at the deceased with no intention of discharging it, went off by accident:

Held, that the prisoner was guilty of manslaughter. *Regina v. Weston*. 595

45. *Perjury*. An indictment for perjury alleged the offence to have been committed before J. U., then being and sitting as the duly qualified and appointed deputy judge of the county court of W. Proof was given that the perjury took place in the presence of J. U. at the county court, and a certified minute, under the seal of the court, of the proceedings, was put in evidence, intitled "Minute of judgments, orders, and other proceedings, at a court holden at, &c., before J. U., deputy judge of the said court."

Held, that there was sufficient proof of J. U. acting as deputy judge, and therefore *prima facie* evidence of his appointment as such.

46. *Held*, also, per Lord Coleridge, C.J., that by the County Court Act (9 & 10 Vict. c. 96, s. 111), the minute of the proceedings, being made evidence of the proceedings and of their regularity, was evidence of the regularity of J. U.'s appointment. *Reg. v. Roberts*. 536, 539 *note*.

47. *Prize fight*. Divers persons assembled in a room, entrance money being paid, to witness a fight between two persons. The combatants fought in a ring with gloves, each being attended by a second, who acted in the same way as a second at prize fights. The combatants fought for about forty minutes with great ferocity, and severely punished each other. The police interfered and arrested the defendants, who were among the spectators.

Upon the trial of an indictment against them for unlawfully assembling together for the purpose of a prize fight, the chairman directed the jury that, if it was a mere exhibition of skill in sparring, it was not illegal; but, if the parties met intending to fight till one gave in from exhaustion or injury received, it was a breach of the law and a prize fight, whether the combatants fought in gloves or not, and left it to the jury to say whether it was a prize fight or not:

Held, that the jury were properly directed. *Regina v. Orton*. 576

48. *Rape*. While a married woman was asleep in bed with her husband, the prisoner got into the bed and proceeded to have connection with her, she being then asleep. When she awoke, she at first thought he was her husband, but on hearing him speak, and seeing her husband at her side, she flung the prisoner off, and called out to her husband, when the prisoner ran away.

Held, the prisoner was guilty of the crime of rape. *Regina v. Young*. 548, 550 note.

49. *Receiving stolen goods*. In order to show guilty knowledge, under 34 & 35 Vict. c. 112, s. 19, it is not sufficient merely to prove that "other property stolen within the preceding period of twelve months" had at some time previously been dealt with by the prisoner;

It must be proved that such "other property" was found in the possession of the prisoner at the time when he is found in possession of the property which is the subject of the indictment.

50. Prisoner was indicted for receiving stolen goods. To show guilty knowledge evidence was tendered, under 34 & 35 Vict. c. 112, s. 19, to show that a short time previously the prisoner had sold for half its value and had otherwise disposed of other property stolen within the preceding period of twelve months.

Held, that words of the statute, 34 & 35 Vict. c. 112, s. 19, did not extend to such evidence, which was therefore inadmissible. *Reg. v. Drage*. 534

51. *Receiving stolen property*. A lad was detained on leaving his master's premises, and a policeman sent for, who searched him and took a stolen cigar, the property of his master, from him in the master's presence. In consequence of the lad's statement, the cigar was then returned to him with five others, which the lad took to the prisoner and gave to him:

Held, that the prisoner could not be convicted of feloniously receiving the cigars knowing them to be stolen, for that they were not stolen property at the time they were received, the master and the policeman having acted in concert in supplying the lad with the

six cigars, and instructing him what to do with them. *Regina v. Hancock*. 554

52. *Restitution, Property*. The Postmaster-General is not entitled to have restored to him moneys found on the prisoner part of the proceeds of the theft, the prisoner having pleaded guilty to an indictment for stealing a letter containing two bank notes the property of the Postmaster-General. *Regina v. Jones*. 656

See EVIDENCE, 356, 358 note, 578, 629, 633 note.

EXTRADITION, 29, 33 note.

CUSTOM.

See ADMIRALTY, 794.
DEMURRAGE, 766.

D.

DAMAGES.

1. In an action for injury to the plaintiff's land and buildings, by removal of lateral support through mining operations carried on by the defendant on his own land adjoining, it was found by a referee to whom the amount of damage was referred that, in addition to existing damage, there would be future damage to the extent of £150:

Held, by Mellor and Manisty, JJ. (Cockburn, C.J., dissenting), that such damage was recoverable in the action:

2. By Cockburn, C.J.: Inasmuch as, according to *Backhouse v. Bonomi* (9 H. L. C., 503), the damage was the gist of the action, only the damage actually accrued could be recovered in the action, and any further damage must be recovered when it actually occurred in a subsequent action. *Lamb v. Walker*. 332, 348 note.
3. The Telegraph Act, 1868 (31 & 32 Vict. c. 110), enables the Postmaster-General to purchase the undertakings of telegraph companies. By s. 8, sub. 7, every officer and clerk of any company, the undertaking of which may

be so purchased, who has been not less than five years in the service of the telegraph companies and in the receipt of a yearly salary, or who has been not less than seven years in the service of telegraph companies and is in receipt of remuneration at a rate of not less than £50 a year, shall, if he receives no offer of an appointment by the Postmaster-General in the telegraphic department, &c., receive during his life from the Postmaster-General by way of compensation for the loss of his office from the time at which the government takes possession of the company's telegraph, an annuity payable half yearly, equal, if he shall have been in the service of telegraph companies twenty years, to two-thirds of the annual emolument derived by him from his office on the 24th of June, 1868.

Mandamus to the Postmaster-General to assess compensation to S., an officer of a telegraph company, in respect of the expenses allowed him as a part of the emolument of his office. Return that it was the duty of S. from time to time, when required, to travel upon the company's business, and that the company had agreed with him upon rates of allowance, as an indemnity against the extra personal expenditure incurred, or assumed to be incurred, by him while travelling on the business of the company, beyond his ordinary expenditure, namely, 12s. 6d. for twenty-four hours' absence from headquarters, and 5s. for twelve hours' like absence, when such last mentioned absence did not oblige him to stop away from home, and that the allowances so made did not form any part of his yearly salary or remuneration, but were made for the purpose of indemnifying him against extra personal expenditure, and that the refusal to assess compensation was only so far as regarded these allowances. Plea, that the allowances were not made as an indemnity, but were made to the company's officers when travelling, whether extra expense was incurred by them or not, and were fixed payments; that the company's officers when travelling received the allowances, and saved a large part of the money which they would otherwise have expended at home for board and lodging, and that the allowances were part of the annual emoluments of the officers:

Held, on demurrer, affirming the judgment of the Queen's Bench Division, that anything which S.'s allowance enabled him to save from his ordinary expenses was an "emolument," and therefore a subject for compensation. *Queen v. Postmaster-General*. 359

4. When new trial granted on account of inadequate or excessive. *Phillips v. South Western, etc.* 844, 847 note.

See EMINENT DOMAIN, 817, 830 note.
INSURANCE, FIRE, 158, 161 note.

DANGEROUS THING.

See CRIMINAL LAW, 562.

DAY.

1. The 35 & 36 Vict. c. 65, a. 3, provides for an application for an order of affiliation by any single woman who may be delivered of a bastard child "after the passing of this act." The act, which came into immediate operation, received the royal assent on the 10th of August, 1872:

Held, that an order of affiliation might be made under the act in respect of a child born at any time of the day on the 10th of August, 1872, inasmuch as the act in contemplation of law for this purpose came into effect from the commencement of the day on which it received the royal assent. *Tomlinson v. Bullock*. 751, 754 note.

DEBTOR AND CREDITOR.

See FRAUDULENT CONVEYANCE, 669.

DEFAMATION.

1. In an action for libel where the occasion is privileged, it is for the plaintiff to establish that the statements complained of were made from an indi-

rect motive, such as anger, or with a knowledge that they were untrue, or without caring whether they were true or false, and not for the reason which would otherwise render them privileged; and if the defendant made the statements believing them to be true, he will not lose the protection arising from the privileged occasion, although he had no reasonable grounds for his belief. *Clark v. Molyneux.* 217

DEFAULT.

1. The plaintiff being unable to serve one of the defendants with the writ, obtained an order for substituted service against him under Order ix, Rule 2, and the action proceeded to judgment against all the defendants. The defendant, in respect of whom the order for substituted service had been made, applied to set aside the judgment as against him on affidavits alleging merits and that he had never had any knowledge of the action while it was pending:

Held, that the judgment signed was regular, even if the defendant had no knowledge of the proceedings, but that the court might in their discretion set the judgment aside, if it were shown that the defendant had no knowledge of the proceedings, and that he had merits. Thinking the defendants' affidavits not entirely free from doubt as to these points, they set aside the judgment on terms as to giving security for the amount of the judgment that remained unsatisfied, and for costs. *Watt v. Barnett.* 169, 172 *note*.

2. The plaintiff, being unable to serve one of the defendants with the writ, obtained an order for substituted service against him under Order ix, Rule 2, and the action proceeded to judgment against all the defendants. The defendant against whom the order for substituted service had been made applied to be let in to defend, on the ground that he had a defence on the merits, and that he had never had any notice of the action while pending:

Held, that as an order for substituted service had been properly made and service effected under it, the judgment was regular, and that the defendant

could not, *ex debito justitia*, claim to be let in to defend the action; but that the court, in the exercise of its discretion, could allow him to do so if it were shown that he had no knowledge of the proceedings and had a defence on the merits; and that, as the giving leave was discretionary, the court could impose terms. *Watt v. Barnett.* 818

DEFENCE.

See DEFAULT, 169, 172 *note*.

DEMURRAGE.

1. A cargo of wheat was shipped on board the plaintiff's ship under eight bills of lading which contained the following clause: "Three working days to discharge the whole cargo or £80 sterling per day demurrage." The defendants, the indorsees of one of the bills of lading, were prevented from completely unloading their portion of the cargo within the lay days, because it lay at the bottom of the hold under the portions of cargo belonging to the other consignees, and such other portions of the cargo were not unloaded in time to enable the defendants to clear the ship of their portion within the lay days. The master was ready and willing to discharge the defendants portion of the cargo as soon as it could be reached, and the defendants to receive the same, and the discharge of it in due time was only prevented by the before mentioned circumstances:

Held, that under the above mentioned stipulation of the bill of lading the consignee, as between himself and the shipowner, undertook to bear the risk of being prevented from discharging his portion of the cargo from the ship within the lay days by the default of his fellow consignees, and the defendants were therefore liable for demurrage.

In a second case the charterparty under which the ship was chartered stipulated that fourteen working days were to be allowed for loading and unloading at the port of discharge, and ten days on demurrage at £35 day by

day. The bills of lading, one of which, for a part of the cargo, had been indorsed to the defendants, contained the words, "paying freight for the same goods and all other conditions as per charterparty." In other respects the facts were precisely similar to those of the first case:

Held, that the defendants were liable for demurrage. *Straker v. Kidd*. 206

2. A charterparty contained the following clause: "Demurrage, if any, at the rate of 20s. per hour, except in case of any hands striking work, frosts or floods, revolution or wars, which may hinder the loading or discharge of the vessel. Dispatch money 10s. per hour on any time saved in loading or for discharging." Four days were saved in loading and five days in discharging cargo, making together nine days, which if calculated at twenty-four hours a day would make 216 hours, or at twelve hours a day 108 hours:

Held, by Baggallay, Bramwell, and Brett, L.JJ., reversing the judgment of the Queen's Bench Division, that "dispatch money" was payable under the charterparty at the rate of 10s. per hour per day of twenty-four hours. *Laing v. Halloway*. 372

8. A charterparty entered into between the plaintiffs and B. & Co. for the conveyance of grain from C. to L., stipulated that fourteen working days were to be allowed for loading and unloading at the port of discharge, and ten days on demurrage at £35 a day. The vessel having been loaded, one of the bills of lading was indorsed to the defendants. The defendants' grain was stowed at the bottom of the main hold, and that of the other shippers on the top of it. The bill of lading, indorsed to the defendants, contained the words "paying freight for the same goods and all other conditions as per charterparty." Owing to the consignees, whose grain was placed on the top of the defendants', having failed to take away their goods within the lay days, the defendants were unable to obtain delivery of their grain, and three days' demurrage was incurred:

Held, affirming the judgment of Lush, J., that the defendants were liable for the demurrage, although they were prevented from getting their goods by the delay of other consignees. *Porteus v. Watney*. 443

4. By a charterparty entered into between the plaintiff and G. it was agreed that the plaintiff's vessel should at the port of discharge be unloaded as fast as the custom of the port would allow. By the bill of lading, signed by the master, the cargo was stated to have been shipped by G. and was to be delivered to the defendant or his assigns, he or they paying freight for the goods as per charterparty. No time for the discharge of the cargo was mentioned in the bill of lading. At the port of discharge there was no custom as to unloading vessels, but a delay occurred in unloading the ship. The defendant never assigned the bill of lading, but before the arrival of the ship he sold the cargo, and the ultimate purchaser took delivery of it upon an order signed by the defendant:

Held, 1. That, as there was no custom of the port of discharge as to unloading vessels, the charterparty did not by its terms vary the implied contract contained in the bill of lading to deliver the cargo within a reasonable time; 2. That the defendant, although he had parted with the beneficial interest in the cargo, was when the delay occurred a "consignee" within the Bills of Lading Act, 1855. *Fowler v. Knoop*. 766

DEPOSITION.

See EVIDENCE, 356, 358 *note*, 578.
INTERROGATORIES, 527.

DISCOVERY.

1. Documents prepared in relation to an intended action, whether at the request of a solicitor or not, and whether ultimately laid before the solicitor or not, are privileged if prepared with a *bona fide* intention of being laid before him for the purpose of taking his advice; and an inspection of such documents cannot be enforced. *Southwark, etc., v. Quick*. 285
2. In an action by the plaintiffs against the defendants for not unloading at the port of discharge a cargo of rice purchased by the defendants from the

plaintiffs, whereby the plaintiffs, who had entered into a charterparty upon terms as to the discharge of the ship similar to those contained in the contract of sale, were sued by and had to pay damages to the shipowner:

Held, that the defendants were not entitled to inspection of the papers in the plaintiffs' possession relating to the action brought against them by the shipowner, including correspondence between them and their solicitor, and between their solicitor and other persons; for such papers would have been privileged from discovery in the former action, and the fact that such action had terminated did not deprive them of their privilege. *Bullock v. Corry*.

311

DISMISSAL.

See REMITTITUR.

DISQUALIFICATION.

See JUDGE, 784, 785 *note*.

DOMICIL.

See PAUPERS, 311, 388.
POOR LAW, 214.

DRUNKENNESS.

1. How far a defence to crime. *Regina v. Davis*. 657, 659 *note*.

DYING DECLARATIONS.

1. A declaration made under a belief of impending death was held admissible in evidence, even though the declarant at a later period of the day took a more cheerful view of her position, and thought that she should recover. *Regina v. Hubbard*. 662

See CRIMINAL LAW, 583, 587, 592 *note*.

28 ENG. REP.

112

E.

EASEMENT.

1. H., being the owner of certain land, and the mines thereunder, by indenture conveyed the surface to C.; but he excepted and reserved a "wagon or cart road" of the width of eighteen feet, to be at all times thereafter kept in repair at his own costs and charges:

Held, that these words would not enable H. to lay down a railroad or tramway for the carriage of coals raised from neighboring collieries belonging to him.

2. By a lease of mines the lessees were authorized to take and use "full and sufficient rail and other ways, paths and passages to and for the said lessees and their agents, servants, and workmen, or others," to carry away "all or any of the coal, cannel, slack, iron, and ironstone, the produce of the mines thereby demised, or any other mines":

Held, that the lessees, by virtue of this clause, might lay down a railway for the carriage of coals raised by them from the pits of adjoining collieries worked by them, and that they were not restricted to using the railway for the carriage of coals raised by or through the pits of the mines demised to them by the above mentioned lease. *Bidder v. North, etc.* 848, 867 *note*.

See LIGHT, 164.

SUPPORT, 80, 122, 706, 745 *note*.

ELECTION.

See CRIMINAL LAW, 620.

ELECTION, CORPORATE.

1. A company was registered under the Companies Act, 1862, with the following articles of association. Article 64: "Upon all questions at every meeting a show of hands shall in the first instance be taken, and unless before or immediately upon such show of hands a poll be duly demanded such ques-

tion shall be decided by such show of hands." Article 67: "If a poll is demanded by shareholders qualified to vote and holding in the aggregate 2,000 shares or more, it shall be taken in such manner as the chairman shall direct, and the result of such poll shall be deemed to be the resolution of the company in general meeting." Article 75: "Votes may be given either personally or by proxy." Article 79: "Any instrument appointing a proxy shall be in the following form: I — hereby appoint — to be my proxy at the — general meeting of the company and to vote for me and in my name upon all questions before such meeting." Two vacancies arose among the directors, and there were four candidates, of whom the prosecutor was one. At the meeting for election a show of hands was taken, when the prosecutor obtained the largest number of votes. A poll was then demanded by the deputy chairman, who was the holder of twenty shares only, but who held proxies for more than 2,000 shares. At the poll the prosecutor was not elected:

Held, that a mandamus must be granted to admit the prosecutor as having been elected director by the show of hands, for the poll was illegally demanded, as the holder of proxies was not a person holding shares within the meaning of article 67. *Queen v. Government, etc.* 377

purchased by the company pursuant to agreement, no notice to treat having been given, must be deemed to have been acquired under the "provisions" of the Special Act, and the Lands Clauses Consolidation Act, 1845, within the meaning of s. 127 of the latter act; and although for some years after the purchase no works are constructed upon the land, yet if at a subsequent time it becomes useful for the purposes of the railway, it cannot be deemed to have been purchased for extraordinary purposes.

Where lands have been taken by a railway company under the provisions of their Special Act, and retained by them, with the *bona fide* intention of using them for the purposes of the railway, and at the expiration of the period for the sale of superfluous lands, though they are not in actual use, there is a reasonable prospect of their being ultimately required and used for the purposes of the railway, such lands are not superfluous within the Lands Clauses Consolidation Act, 1845, s. 127.

By Bramwell and Brett, L.JJ.: Where lands which a railway company are authorized by their Special Act to take, have been conveyed to them, together with an express grant of the mines and minerals thereunder, although the surface may afterwards become superfluous by virtue of the Lands Clauses Consolidation Act, 1845, s. 127, yet the mines and minerals do not vest in the adjoining owners.

EMBEZZLEMENT.

See CRIMINAL LAW, 123, 126 *note*, 566, 570, 603.

EMINENT DOMAIN.

1. Where a railway company are authorized by their Special Act (with which the Lands Clauses Consolidation Act, 1845, and the Railways Clauses Consolidation Act, 1845, are incorporated) to acquire lands compulsorily and also for extraordinary purposes, land delineated in the parliamentary plans, and described in the books of reference, and

2. By Bramwell and Brett, L.JJ.: Where commonable lands have been inclosed under an award made pursuant to a local statute, passed subsequently to 41 Geo. 3, c. 109, and by the award the soil of the roads running between the allotments remains vested in the lord of the manor, if the land upon one side of a road becomes superfluous within the Lands Clauses Consolidation Act, 1845, s. 127, it will vest in the lord of the manor, for the right to the grass and herbage arising upon the road, under 41 Geo. 3, c. 109, s. 11, is insufficient to render the proprietor of the close upon the other side of the road an adjoining owner.

3. *Semble*, by Bramwell, L.J., where the natural drainage of land, belonging to a railway company and demised by

them for agricultural purposes, flows into a reservoir used by them for the supply of water to their engines, the land is not superfluous within the Lands Clauses Consolidation Act, 1845, s. 127. *Hooper v. Bourne.* 287

4. When land has been taken compulsorily by a local board under the powers of the Lands Clauses Consolidation Acts, incorporated by the Public Health Act, 1875, and an arbitration takes place to determine the amount of compensation to be paid to the owner of the land so taken, the procedure with regard to such arbitration and the right to costs are wholly governed by the provisions of the Lands Clauses Consolidation Acts, and not by those of the Public Health Act with regard to arbitrations under that act. *Matter of Rayner.* 380

5. By the Public Health Act, 1848 (11 & 12 Vict. c. 63), s. 68, streets being highways within the district of a local board shall vest in and be under the management of the board, and the board shall cause all such streets to be levelled, paved, flagged, channelled, altered, and repaired as occasion may require.

6. By the interpretation clause (s. 2): "The word 'street' shall apply to and include any highway (not being a turnpike road)." By s. 144 compensation shall be made to all persons sustaining any damage by reason of the exercise of the powers of the act; and in case of dispute as to amount, the same shall be settled by arbitration in the manner provided by the act.

7. The footpath of a street which was a highway and also a turnpike road within the district of a local board, was altered by them under an agreement with the turnpike trustees, so as to raise the level of the footpath in front of the house of the plaintiff and cause him damage:

Held, by Brett and Cotton, L.JJ., reversing the judgment of the Queen's Bench Division, Bramwell, L.J., dissenting, that a street which is also a turnpike road is not excluded by s. 2 from the operation of ss. 68 and 144, and that the plaintiff was therefore entitled to recover compensation from

the board in the manner prescribed by s. 144. *Nutter v. Accrington, etc.* 817, 880 note.

See APPEAL, 848.

COSTS, 1.

DAMAGES, 859.

INSURANCE, FIRE, 158, 161 note.

EMPLOYER AND EMPLOYEE.

See MASTER AND SERVANT, 390.

EQUITY.

See ISSUES, 7, 11 note.

EVIDENCE.

1. Pregnancy may create an "illness" within the meaning of 11 & 12 Vict. c. 42, s. 17, so as to give the presiding judge discretionary power to admit in evidence upon a criminal trial the deposition of a witness, duly taken, who owing to pregnancy is proved to be unable to travel. *Queen v. Wellings.* 356, 358 note.

2. Of several offences on different days when only one alleged. *Regina v. Adams.* 565

3. Pregnancy alone may be ground for the admission of a deposition. *Reg. v. Goodfellow.* 578

4. A letter written by a solicitor for a client making a claim for a lost parcel alleged to contain valuable articles, is not inadmissible on the ground of privilege in a criminal case.

5. In order to make a client criminally responsible for a letter written by his solicitor it must be shown that the letter was written in pursuance of the instructions of the client.

6. A letter by a solicitor written "in consequence" of an interview with his client is not equivalent to a letter written by the instructions of his client,

and is not admissible in a criminal case against the client. *Regina v. Downer*. 629, 633 note.

See CRIMINAL LAW, 583, 587, 592 note.
DEMURRAGE, 766.
DYING DECLARATIONS, 663.
INTERROGATORIES, 527.

EXCISE.

1. By the provisions of the statutes relating to licensing, certain licenses for the sale of intoxicating drinks not to be consumed on the premises are not to be refused, except on one or more of four grounds specified. Justices on refusing to grant such a license did not state any ground for such refusal. They were not, however, asked to state their ground for such refusal; and on an application for a mandamus against them to hear and determine the application for the license, the chairman of the justices made an affidavit that they had in fact acted on one of the grounds on which they were empowered to refuse the license:

Held, on the authority of *Reg. v. Sykes* (1 Q. B. D., 52), that the justices were bound to state their grounds at the time of refusing the application, and the mandamus therefore went. *Ex parte Smith*. 329, 330 note.

2. The power of granting a license at special sessions, under 9 Geo. 4, c. 61, s. 14, to a new tenant, where a person duly licensed under that act gives up possession of the house during the continuance of his license, extends only to the period for which the former tenant's license would have lasted.
3. F., duly licensed under 9 Geo. 4, c. 61, on the 8d of August, 1877, gave up possession of the licensed premises, and B. became tenant. The license expired on the 10th of October following. At the general annual licensing meeting, held on the 28th of August, 1877, B. applied for a transfer of the license to him, but the justices refused the application on the ground of his previous misconduct. On the 28th of September B. gave up his tenancy, and was succeeded by G., who on the 29th of November also gave up the tenancy, and was succeeded by T. After giving

the proper notices, T. applied at a special sessions, under s. 14 of 9 Geo. 4, c. 61, for a license in respect of the premises. The justices declined to entertain the application, on the ground that they had no jurisdiction:

Held, that, inasmuch as the application was made after the expiration of the period for which the previous license remained in force, the decision of the justices was right.

4. *Semble* (per Cockburn, C.J., and Manisty, J.), that the power to grant a license under s. 14 is not confined to the case of the tenant immediately succeeding the outgoing holder of the license. *Matter of Todd*. 348 note.
5. The appellants were convicted under 6 Geo. 4, c. 81, s. 2, for retailing spirits in Cheltenham without a retailer's excise license. They carried on business as wine and spirit merchants in Worcester, and held all the necessary licenses for dealing in and retailing spirits there. They did not hold a license to retail spirits at Cheltenham; but they caused premises at Cheltenham to be let to D., one of their travellers, for their own use, took out a license for the purpose of carrying on there the business of dealers in beer, and put up a board inscribed with their names as "Distillers, Wine Merchants, and Brewers, Worcester." D. took orders for spirits at these premises and transmitted them to Worcester, where the appellants executed them by sending spirits from Worcester:
Held, that the conviction must be affirmed, for the appellants must be taken to carry on business at Cheltenham as retailers of spirits, although the spirits they sold were kept in and delivered from a store in another town. *Stallard v. Marks*. 349

See GAMING, 385.

EXTRADITION.

1. By the Extradition Act, 1870 (33 & 34 Vict. c. 52), s. 2, where an arrangement has been made with any foreign state with respect to the surrender to such state of any fugitive criminals, Her Majesty may by Order in Council direct that this act shall apply in the

case of such foreign state, and may, by the same or any subsequent order, limit the operation of the order—and render the operation thereof subject to such conditions, exceptions, and qualifications, as may be deemed expedient.

By s. 6, where the act applies in the case of any foreign state, every fugitive criminal of that state who is in, or is suspected of being in, any part of Her Majesty's dominions,—shall be liable to be apprehended and surrendered in manner provided by this act.

A treaty having been made between this country and the Swiss government under the above act, which provided that no Swiss should be delivered up by Switzerland to the government of the United Kingdom, and no subject of the United Kingdom should be delivered up by the government thereof to Switzerland; and an Order in Council having been made, which directed that the act should apply in the case of the treaty:

Held, that the treaty must be taken to be incorporated with, and to limit the operation of, the act, and that no British subject in this country could be surrendered to the Swiss government.
Queen v. Wilson. 29, 33 *note*.

F.

FALSE PRETENCES.

See CRIMINAL LAW, 542, 545, 561, 639.

FEIGNED ISSUES.

See ISSUES, 7, 11 *note*.

FIXTURES.

See CRIMINAL LAW, 123, 126 *note*.
TAXATION, 278.

FOOD.

See ADULTERATION, 380, 384 *note*, 755.

FORGERY.

See BILLS OF EXCHANGE, 434, 442 *note*.
CRIMINAL LAW, 762, 766 *note*.

FORMER SUIT.

See DAMAGES, 332, 348 *note*.

FRACTIONS OF DAY.

See DAY, 751, 754 *note*.

FRANCHISE.

See CORPORATIONS, 2, 4 *note*, 178.

FRAUD.

1. By 24 & 25 Vict. c. 96, s. 100, if any person guilty (*inter alia*) of obtaining any chattel, money, or other property by false pretences "shall be indicted on behalf of the owner of the property and convicted, in such case the property shall be restored to the owner."

W. purchased and obtained delivery of certain sheep from the defendant by false pretences. The plaintiff purchased the sheep from W. and paid W. for them without knowledge of the fraud, the defendant having done nothing in the meantime to avoid the contract between himself and W. The defendant finding that the sheep were on the plaintiff's premises retook possession of them; W. having been convicted of obtaining the sheep by false pretences on the prosecution of the defendant:

Held, that the effect of 24 & 25 Vict. c. 96, s. 100, was not to revert the property in the sheep in the defendant as against the plaintiff, who had acquired a good title to them before the conviction, and consequently that the defendant was liable in an action by

the plaintiff for the value of the sheep.
Moyce v. Newington, 674, 678 *note*.

See ANIMALS, 142, 156 *note*.

CRIMINAL LAW, 610.

FRAUDULENT CONVEYANCE, 669.

FRAUDULENT CONVEYANCE.

1. A debtor in insolvent circumstances executed a deed by which he conveyed all his estate to trustees on trust to carry on his business, or get in and realize his estate in the manner they might deem expedient, and apportion the residue of the proceeds after payment of expenses, &c., according to an equal pound rate among his creditors. It was provided by the deed that a dividend should only be payable to a creditor on his executing or assenting to the deed; and that, if within a certain time any creditor did not execute or assent, his dividend should be paid by the trustees to the debtor. The deed also provided that the executing and assenting creditors should indemnify the trustees against any personal loss or risk they might sustain, otherwise than by their own wilful negligence or default, by reason of their proceedings under the deed:

Held, that the deed was fraudulent and void under 13 Eliz. c. 5, as tending to defeat or delay creditors. *Spencer v. Slater*. 669

FREIGHT.

See ADMIRALTY, 349.

INSURANCE, MARINE, 700.

G.

GAMING.

1. The appellant, a licensed person, suffered to be played on the licensed premises a game called puff and dart, the object in which is to hit a mark on a target with a small dart blown through a tube. The players each contributed 2d. as entrance money, the total sum

so contributed being applied to the purchase of a rabbit as a prize for the winner of the game:

Held (Cockburn, C.J., doubting), that the appellant was rightly convicted of suffering gaming on the licensed premises under 35 & 36 Vict. c. 94, s. 17, suba. 1. *Bew v. Harston*. 385

GAMBLING INSTRUMENTS.

See OBSCENE BOOKS, 419, 423 *note*.

GARNISHMENT.

See ATTACHMENT, 194, 196 *note*.

H.

HEALTH.

See ADULTERATION, 380, 384 *note*.

HIGHWAYS.

1. The local board of a district had let the pasturage of the strips of grass which formed the sides of a certain lane within such district, being a highway repairable by the inhabitants at large, to the plaintiff.

The defendant, without any right to do so, turned his cattle on to these strips of land to graze. The plaintiff having brought an action against the defendant for so doing, the latter denied the plaintiff's right to the pasturage:

Held, that the lane in question, being by virtue of s. 4 (the interpretation section) of the Public Health Act, 1875, a "street," vested in the local board under the provisions of s. 149; and that the "vesting," intended by that section was not merely of the use and control of the lane so far as might be necessary for highway purposes, but an actual vesting of the property in the lane, and consequently that the lease from the local board entitled the plaintiff to maintain the action. *Co-verdale v. Charlton*. 331

2. By an award made under an Inclosure Act, passed in 1766, two private roads, E. and H., were set out. About 1818, the road E. became a public highway. Down to 1863, the surveyors of highways for the parish of C., within which E. and H. were situate, had from time to time let the pasturage upon E. and H. to various persons. A local board was formed in 1863 for the parish of C., who in 1876 let the pasturage upon E. and H. to the plaintiff. He thereupon commenced to depasture the herbage with his cattle on the roads. The defendant interfered with the plaintiff's enjoyment of the pasturage.

By 38 & 39 Vict. c. 55, s. 4, a street includes any highway. By s. 144, every local board are within their districts surveyors of highways. By s. 149, all streets shall vest in and be under the control of the local board:

Held, affirming the judgment of the Queen's Bench Division, that by force of the above enactment the property in the soil of E., being a "street," so far vested in the local board that they could demise the right of pasturage thereon to the plaintiff, who was entitled to maintain an action:

3. *Held*, also, that the local board having no power to demise H., being a private way, the plaintiff had not sufficient exclusive possession as occupier to enable him to maintain an action. *Coverdale v. Charlton*, 705

4. A person, riding a bicycle on a highway at such a pace as to be dangerous to the passers-by, may be convicted of furiously driving a carriage, under 5 & 6 Wm. 4, c. 50, s. 78. *Taylor v. Goodwin*, 748, 749 note.

See CRIMINAL LAW, 238.

EMINENT DOMAIN, 817, 830 note.

NEGLIGENCE, 295, 307 note.

HOTEL KEEPERS.

See LIEN, 390, 400 note.

HUNTING.

See ANIMALS, 664, 667 note.

HUSBAND AND WIFE.

1. Where husband and wife separate by mutual consent, the wife making her own terms as to her income, and that income proves insufficient for her support, the wife has no authority to pledge her husband's credit.

2. Defendants, husband and wife, executed a deed of separation, by the terms of which the wife retained the income of property settled to her separate use on marriage. The husband covenanted to pay her £20 a year towards the maintenance of three of the children of the marriage, and the wife covenanted to maintain these children until they were twenty-one, and not to apply for further assistance to her husband. The husband had kept up the annual payments of £20 in accordance with the terms of the deed. Plaintiff sued defendants in the county court to recover the price of meat supplied to the wife after the separation, and the judge at the trial, on hearing the wife's evidence, found that her income was insufficient for her support, and ruled that she had authority to pledge her husband's credit for the price of the meat. On appeal:

Held, that this ruling was wrong, and that the wife, after the separation, had no implied authority to pledge her husband's credit. *Eastland v. Burchell*, 362, 367 note.

See CRIMINAL LAW, 622, 624 note.

I.

ILLEGAL AGREEMENT

1. The defendants contracted to pay the plaintiff a commission for superintending repairs to be executed by them on certain ships belonging to the Great Eastern Railway Company. The plaintiff at the time of such contract being made was in a position of trust in relation to the railway company, having been employed by them as an engineer to advise them as to the repairs, and the contract between defendants and plaintiff was made in part in consideration of a promise that the plaintiff would use his influence with the railway company to induce them to accept the de-

sendants' tender for the repair of the ships. The jury found that the contract, though calculated to bias the mind of the plaintiff, had not, in fact, done so, and that he had not in consequence thereof given less beneficial advice to the company as to the defendants' tender than he would otherwise have done:

Held that the plaintiff could not maintain an action for commission under the contract, on the ground that, even although the plaintiff had not been induced to act corruptly, the consideration for the contract was corrupt. *Harrington v. Victoria, etc.* 453

2. Where a secret gratuity is given to an agent with the intention of influencing his mind in favor of the giver of the gratuity, and the agent, on subsequently entering into a contract with such giver on behalf of his principal, is actually influenced by the gratuity in assenting to stipulations prejudicial to the interests of his principal, although the gratuity was not given directly with relation to such particular contract, the transaction is fraudulent as against the principal, and the contract is voidable at his option. *Smith v. Sorby.* 455, 458 note.

IMPRISONMENT.

See PENALTY, 452.

INDECENT ASSAULT.

See CRIMINAL LAW, 627.

INDICTMENT.

1. When amendment allowed and when not. *Regina v. O'Callaghan.* 641
Regina v. Tiley. 645

See CRIMINAL LAW, 233, 483, 515 note, 542, 603, 620.

INFANTS.

1. Under the Employers and Workmen Act, 1875 (38 & 39 Vict. c. 90), which

enables a dispute between an employer and workman to be heard and determined by a court of summary jurisdiction, an agreement, by which an infant undertakes to serve an iron shipbuilder and boiler maker as plater and riveter for a term of five years at weekly wages, with a proviso that—should the employers cease to carry on their business, or find it necessary to reduce the operations of their works, either temporarily or permanently, from their being unable to obtain materials, or in consequence of any accident, or in consequence of strikes or combinations of workmen, or from any cause over which they should not have any control—they shall have power to terminate the agreement, and discharge the infant upon giving him fourteen days' notice, is not void on the face of it so as to prevent it from being enforced against him according to the act; the question, whether the provision is or is not inequitable as regards the infant, depending upon whether it was at the time of the agreement common to labor contracts, or was in the then condition of trade such as the master was reasonably justified in imposing as protection to himself, and also upon whether the wages were a fair compensation for the services of the infant. *Leslie v. Fitzpatrick.* 211

See POOR LAW, 214.

INJURY.

See CRIMINAL LAW, 562.

INNKEEPERS.

See LIEN, 390, 400 note.

INNOCENT PERSONS.

1. Which of two innocent persons to suffer. *Babcock v. Lawson.* 831, 837 note.

INSANITY.

1. When produced by drunkenness, how far a defense to crime? *Regina v. Davis.* 657, 659 note.

INSURANCE, FIRE.

1. The plaintiff insured his premises in the defendants' office by a policy which provided that their capital should be liable to pay to the assured "any loss or damage by fire to the buildings" not exceeding £1,600. The premises were afterwards required by the Metropolitan Board of Works under their compulsory powers, in order that they might be pulled down for the improvement of a street, and the amount of purchase-money payable to the plaintiff was assessed by arbitration, according to the Lands Clauses Act. After the board had accepted the plaintiff's title, but before he had executed a conveyance, the premises were destroyed by fire:

Held, that the defendants were liable to pay the plaintiff £1,500, the full value of the buildings at the time of the fire, and not merely the damage done to the buildings considered as old materials, for the dealings between the board and the plaintiff did not affect the defendants' contract. *Collingridge v. Royal, etc.* 158, 161 note.

INSURANCE, MARINE.

1. In an action on a policy of insurance it was proved at the trial that the vessel put back from inability to proceed eleven days after she started on her voyage: the judge directed the jury that the time which elapsed between setting sail and putting back was sufficiently short to shift the onus of proof from the underwriters, and make it incumbent on the assured to prove that the unseaworthiness arose from causes occurring subsequently to setting sail:

Held, affirming the judgment of the Queen's Bench Division, a misdirection. *Pickup v. Thames, etc.* 471

2. The plaintiffs, shipowners, entered into a charterparty which provided for payment of freight at a specific rate, and that "If any portion of the cargo be delivered sea-damaged the freight on such sea-damaged portion to be two-thirds of the above rate." They effected an insurance with underwriters, "To cover only the one-third loss of freight in consequence of sea-dam-

28 ENG. REP.

113

age as per charterparty." Sea-damage happened, and one-third of the freight on the sea-damaged portion of the cargo was deducted by the charterers from the total amount of freight:

Held, that the subject-matter of insurance was "the one-third loss of freight in consequence of sea-damage," and that the plaintiffs were entitled to recover from each underwriter such proportion of the amount of the loss as the amount of his subscription bore to the total sum for which the underwriters subscribed the policy. *Griffiths v. Bramley-Moore.* 100

INTENT.

See CRIMINAL LAW, 53, 64 note, 562, 579, 580, note.

INTERNATIONAL LAW.

See BILLS OF EXCHANGE, 424.

INTERROGATORIES.

1. A party who applies to strike out interrogatories must, unless they are altogether an abuse of the practice of the court, specify those to which he objects.
2. Questions which go merely to the credit of the witness, and might be put in cross-examination, cannot be put as interrogatories to a party, and are as such irrelevant.
3. Where the answer to an interrogatory might tend to criminate the person interrogated, he may refuse to answer, but the interrogatory is not therefore objectionable. *Alhusen v. Labouchere.* 527

INTOXICATION.

1. When not a defense to crime. *Regina v. Davis.* 657, 659 note.

ISSUES.

1. Where an action attached to the Chancery Division has been tried by a jury before a judge of one of the common law divisions, application for a new trial must be made to a divisional court.
2. Where an action attached to the Chancery Division is to be tried by a jury, and, no place of trial being named in the statement of claim, the action is set down to be tried in the county of Middlesex, no special order of the judge of the Chancery Division, stating the reason why it should be so tried, is necessary. *Hunt v. London, etc.* 7, 11 note.

8. The court or a judge has no power under ss. 56, 57, to order an action to be referred to an official referee, for s. 56 only allows any question arising in a cause to be referred for inquiry and report, and the report may or may not be adopted by the court; and s. 57 only allows any question or issue of fact, or any question of account, to be tried before an official referee if the parties consent in any cause, and if they do not consent, in any cause requiring a prolonged examination of documents or accounts, or any scientific or local investigation.

An official referee has no power to order judgment to be entered on any question referred to him under ss. 56, 57 of the Judicature Act, 1873. *Pontifex v. Severn.* 277

J.

JUDGE.

1. Complaint having been made to the local government board of a nuisance upon premises belonging to B., in the borough of W., the board communicated with the town council of W., who were the urban sanitary authority under the Public Health Act, 1875, and required them to abate the nuisance. The council having made inquiries, passed a resolution that steps should be taken for the removal of the nuisance, and took out a summons against B. At the hearing an order for the abatement of the nuisance was made.

Two justices who were present were members of the town council when the resolution was passed:

Held, that the councillors who were justices had such an interest as might give them a bias in the matter, that consequently they ought not to have sat as justices upon the hearing of the summons, and that a rule for a certiorari to quash the order must be made absolute. *Regina v. Milledge.* 784, 785 note.

JURISDICTION.

1. The Public Worship Act, 1874 (37 & 38 Vict. c. 85), s. 7, makes provision for the appointment of a judge of the provincial courts of Canterbury and York. By s. 8 a representation under certain circumstances may be made to the bishop of illegal acts or omissions in the performance of the church services, by any incumbent within his diocese; and by s. 9 if the bishop is of opinion that proceedings should be taken on the representation, he shall, if the parties are unwilling to submit to his directions without appeal, transmit the representation to the archbishop of the province, and the archbishop "shall forthwith require the judge to hear the matter of the representation at any place within the diocese or province, or in London or Westminster."

A representation under the above act was forwarded to the Bishop of Rochester charging that T., the incumbent of a parish within the diocese, had been guilty of illegal practices in the conduct of divine service. The bishop transmitted the representation to the Archbishop of Canterbury, and the archbishop thereupon by instrument of requisition required the judge to hear and determine the matter of the representation "at any place in London or Westminster, or within the diocese of Rochester, as you may deem fit." Notice was given to T. that the case would be heard in Lambeth Palace, which, although within the province of Canterbury, is neither in London, Westminster, nor the diocese of Rochester.

In July, 1876, the case was heard at Lambeth Palace in his absence, and he

was adjudged to have been guilty of illegal practices, and a monition was made for him to abstain from them. On his non-compliance with the monition, he was pronounced guilty of contempt and imprisoned. From first to last he took no notice of the proceedings, and in no way acquiesced in them:

Held, that the whole proceeding was void, and a prohibition must be granted, for the word "London" in the requisition could only be construed in its strict sense as the city proper of London, and the judge had no power, under the act or otherwise, to sit in any place beyond the limits fixed by the archbishop. *Hudson v. Tooth.* 40,

52 *note*.

2. The Court of Appeal has no jurisdiction to entertain an appeal from a decision of the Queen's Bench Division upon a rule for quashing an order of Quarter Sessions as to the validity of a rate (By Cockburn, C.J., and Brett, L.J.; Bramwell and Cotten, L.JJ., dissenting). *Regina v. London, etc.* 887

See APPEAL, 848.
CRIMINAL LAW, 16, 27 *note*.
PENALTY, 452.
REMITTITUR.

L.

LARCENY.

See CRIMINAL LAW, 123, 126 *note*, 534, 551, 554, 566, 570, 579, 580 *note*, 605, 622, 624 *note*.

LEASES.

1. A lease contained a covenant by the lessees not to permit any house that might have been erected on the land demised to be used as a beer-shop, or public house, or any theatre, or public show, or exhibition.

The assignee of the lease carried on the business of a grocer and baker at a shop erected on the land demised. He obtained an excise retail beer license

for the sale of beer to be consumed off the premises, and sold beer in pursuance thereof in his shop:

Held, a breach of the covenant. *Bishop v. Battersby.* 814, 817 *note*.

LETTER.

See EVIDENCE, 629, 638 *note*.

LEX LOCI.

See BILLS OF EXCHANGE, 424.

LIBEL.

See CRIMINAL LAW, 53, 64 *note*, 681, 700 *note*.
DEFAMATION, 217.

LICENSE.

See EXCISE, 329, 330 *note*, 348 *note*, 349. GAMING, 385.

LIEN.

1. The lien of an innkeeper is general, and extends to all goods and chattels belonging to his guest, and therefore a chattel, although deposited with the innkeeper and placed by him apart from the personal goods of the guest, may be detained by him on account of money owing to him for the lodging, food, and entertainment of the guest.
2. The lien of an innkeeper over a chattel belonging to a guest is waived, if in order to reimburse himself he sells it, and this rule holds good even although the retention of the chattel is attended with expense. *Mulliner v. Florence.* 390, 400 *note*.

LIGHT.

1. In an action for the obstruction of ancient lights, the judge directed the jury that they were to consider whether there had been a sensible diminution of light, so as to make the plaintiff's premises less available for the purposes of occupation or business, to which they were then, or *might there-after*, be made applicable, and that the damages were to be estimated according to the diminution of value of the premises for such purposes:

Held, a right direction, on the ground that the purposes for which the premises had actually been used while the light had been enjoyed, were not the proper measure of the right. *Moore v. Hall*. 164

LIMITATIONS, STATUTE OF.

1. *Seem*, the time for renewing a writ of summons cannot be extended under Order LVII, Rule 6, where the plaintiff's claim would, in the absence of such renewal, be barred by the Statute of Limitations (21 Jac. I, c. 16). *Doyle v. Kaufman*. 307

See LIGHT, 164.

LUNATIC.

See CRIMINAL LAW, 624.

M.

MANDATE.

See REMITTITUR, 217.

MANDAMUS.

1. To compel allowance of particular kind of damages in case of eminent domain. *Queen v. Postmaster-General*. 359

See CORPORATIONS, 2, 4 *note*, 178.
ELECTION, CORPORATE, 377.
EXCISE, 329, 330 *note*.

MANSLAUGHTER.

See CRIMINAL LAW, 564, 582, 595.

MARRIED WOMEN.

See CRIMINAL LAW, 622, 624 *note*.
HUSBAND AND WIFE, 362, 367 *note*.

MASTER AND SERVANT.

1. By the Employers and Workmen Act (35 & 39 Vict. c. 90), s. 3, "In any proceeding before a county court in relation to any dispute between an employer and a workman arising out of or incidental to their relation as such, the court may . . . adjust and set off the one against the other, all such claims on the part either of the employer or of the workman, arising out of or incidental to the relation between them, as the court may find to be subsisting, whether such claims are liquidated or unliquidated and are for wages, damages, or otherwise." By s. 4, "A dispute under the act between an employer and a workman may be heard and determined by a court of summary jurisdiction, and such court for the purposes of this act shall be deemed to be a court of civil jurisdiction, and in a proceeding in relation to any such dispute the court may order payment of any sum which it may find to be due as wages or damages . . . provided that . . . the court shall not exercise jurisdiction when the amount exceeds £10."

The appellant was employed as a spinner by the respondents, and was discharged for neglecting his work, the respondents refusing to pay him wages in lieu of notice. He took proceedings against them in the county court. At the hearing no counterclaim or set-off was filed or set up, but evidence was produced to show that he had been guilty of negligence. A verdict for £3 10s. was given in his favor:

Held, that the respondents were not precluded from preferring a claim before justices against him for wrongfully and negligently damaging their materials, for the only matter decided by the county court was whether there

was such negligence on his part as would justify his dismissal without notice. *Hindley v. Halsam.* 390

See CRIMINAL LAW, 123, 126 note.
INFANTS, 211.

MOTIVE.

See CRIMINAL LAW, 53, 64 note, 562, 579, 580 note.

MUNICIPAL CORPORATION.

4. When liable and when not to abutting owner for change of grade of street or highway. *Nutter v. Accrington, etc.* 817, 830 note.

See ASSESSMENTS, 772.

MURDER.

See CRIMINAL LAW, 595.

N.

NEGLIGENCE.

1. The defendant, who was in the occupation of certain premises abutting on a private road consisting of a carriage and footway, which premises he used for the purposes of athletic sports, had erected a barrier across the road to prevent persons driving vehicles up to the fence surrounding his premises and overlooking the sports. In the middle of this barrier was a gap which was usually open for the passage of vehicles, but which, when the sports were going on, was closed by means of a pole let down across it. It was admitted that the defendant had no legal right to erect this barrier. Some person, without the defendant's authority, removed a part of the barrier armed with spikes, commonly called chevaux de frise, from the carriageway where the defendant

had placed it, and put it in an upright position across the footpath. The plaintiff, on a dark night, was lawfully passing along the road on his way from one of the houses to which it led. He felt his way through the opening in the middle of the barrier, and getting on to the footpath was proceeding along it when his eye came in contact with one of the spikes of the chevaux de frise and was injured. It was not suggested that the plaintiff was guilty of any negligence contributing to the accident, and the jury found that the use of the chevaux de frise in the road was dangerous to the safety of the persons using it:

Held, that the defendant, having unlawfully placed a dangerous instrument in the road, was liable in respect of injuries occasioned by it to the plaintiff, who was lawfully using the road, notwithstanding the fact that the immediate cause of the accident was the intervening act of a third party in removing the dangerous instrument from the carriageway, where defendant had placed it, to the footpath. *Clark v. Chambers.* 295, 307 note.

See HIGHWAYS, 748, 749 note.

NEW TRIAL.

1. The court will grant a new trial, in an action for personal injuries sustained through the defendants' negligence, on the ground of the inadequacy of the damages found by the jury, when it appears upon the facts proved that the jury must have omitted to take into consideration some of the elements of damage properly involved in the plaintiff's claim. *Phillips v. South Western, etc.,* 844, 847 note.

O.

OBSCENE BOOKS.

1. A section in an act of Parliament taking away the *certiorari* held not to apply in the case of a total absence of jurisdiction.

2. An order by a magistrate for the destruction of obscene books under 20 & 21 Vict. c. 83, s. 1, is bad if it merely states that the magistrate was satisfied that the books were obscene, but not that he was satisfied that the publication of them would be a misdemeanor, and proper to be prosecuted as such. *Matter of Bradlaugh*. 419, 423 note.

See CRIMINAL LAW, 482, 515 note.

OFFICER.

1. The court refused to grant a rule for a *quo warranto* information applied for by the former occupant of an office, on the ground that his dismissal from office had been illegal, when they were satisfied that if reinstated he might legally and would be dismissed again immediately.

Semble, that a resolution of a local board, dismissing an officer, was not a resolution rescinding the resolution by which he was appointed, within the meaning of a by-law with respect to the rescission of resolutions of the local board. *Matter of Richards*. 322,

325 note.

See CRIMINAL LAW, 564.

JUDGE, 784, 785 note.

PERJURY, 536, 539 note.

ONUS.

See INSURANCE, MARINE, 471.

ORDINANCES.

1. The Elementary Education Acts, 33 & 34 Vict. c. 75, s. 90, and 36 & 37 Vict. c. 86, second schedule, which impose a penalty for the offence of personating any one entitled to vote at the election of a school board, do not include the offence of personation at the voting for a resolution for application for a school board; and an Order in Council purporting to be made under the above acts, and imposing a penalty upon any one guilty of such offence, is invalid. *Queen v. Sankey*. 331

OWNER.

See ASSESSMENTS, 772.

CRIMINAL LAW, 656.

P.

PAROL EVIDENCE.

See DEMURRAGE, 766.

PARTNERSHIP.

1. The plaintiff and C. were partners, and the defendants, L. and F., carried on, in partnership, the business of ship-brokers. C. being in debt to the plaintiff and being pressed by him for payment, delivered to him two bills purporting to be accepted in the partnership name of the defendants; at the time of handing over the bills to the plaintiff, no drawer's name had been filled in, but C. stated to him that the consideration consisted of coals supplied. The plaintiff received the bills, believing that they had been lawfully accepted; but he afterwards began to suspect that there was something wrong. After his suspicions had been aroused, he filled in the names of his firm as drawers. It afterwards appeared that F. had accepted the bills without the authority of L.:

Held, that the plaintiff could not recover upon the bills against L. *Hogarth v. Latham*. 517

PASSENGERS.

See RAILWAY COMPANY, 263, 268 note, 792, 794 note.

PAUPERS.

1. Under the Divided Parishes Act (39 & 40 Vict. c. 61), s. 35, which enacts that—no person shall be deemed to have derived a settlement from any other

person, whether by parentage, estate, or otherwise, except in the case of a wife from her husband, and in the case of a child under the age of sixteen, which child shall take the settlement of its father or of its widowed mother, as the case may be, up to that age, and shall retain the settlement so taken until it shall acquire another—children under the age of sixteen gain no settlement by a second marriage of their widowed mother. *Guardians v. Guardians*. 311

2. Under 39 & 40 Vict. c. 61, s. 34, which enacts that "where any person shall have resided for the term of three years in any parish, in such manner and under such circumstances in each of such years as would in accordance with the several statutes in that behalf render him irremovable, he shall be deemed to be settled therein until he shall acquire a settlement in some other parish by a like residence or otherwise":

Held, that a person who had resided in a parish for a term of three years, and who continued to reside there until the passing of the act, but who, during the period subsequent to the three years, was in receipt of relief from the parish, acquired a settlement therein under the section. *Regina v. Brampton Union*. 388

See POOR, 277.

PENALTY.

1. The justices cannot order imprisonment in default of payment of a penalty under 35 & 36 Vict. c. 94, s. 51, subs. 2, unless there has first been an order for a distress. There is no jurisdiction to order imprisonment under that sub-section in the first instance without a distress warrant, when it appears that the defendant has no goods whereon to levy.
2. Per Cockburn, C.J.: The 2d sub-section of the 51st section of 35 & 36 Vict. c. 94, applies to cases where a pecuniary penalty only is attached by the act to an offence, not to cases where a period of imprisonment other than that given by the 51st section is given as an alternative punishment. *Matter of Brown*. 452

PERFORMANCE.

See PRINCIPAL AND SURETY, 402, 414 *note*.

PERJURY.

See CRIMINAL LAW, 536, 539 *note*.

"PERSON."

See STATUTE, 775, 783 *note*.

POOR.

1. An order for the removal of a pauper to the place of his birth settlement, confirmed by sessions subject to a case, was quashed on the ground that the facts showed a settlement which the pauper derived from his grandfather. Between the order at sessions and the decision upon the case, the act 39 & 40 Vict. c. 61, abolishing a derivative settlement, such as that above mentioned, became law, and a fresh order for the removal of the pauper to the place of his birth settlement was made:

Held, that such order must be quashed, for the quashing of the first order was a conclusive adjudication of a settlement of the pauper, inasmuch as the facts upon which it proceeded were unaltered, and its validity could not be affected by a subsequent change in the law, and further, because it must be taken to be an order "pending" at the date of the act, and therefore under s. 36 excluded from its operation. *Guardians, etc. v. Overseers*. 277

2. By 39 & 40 Vict. c. 61, s. 35, no person shall be deemed to have derived a settlement from any other person, whether by parentage, estate, or otherwise, except in the case of a wife from her husband, and in the case of a child under the age of sixteen, which child shall take the settlement of its father or of its widowed mother, as the case may be, up to that age, and shall retain the settlement so taken until it shall acquire another If any child in this section mentioned shall

not have acquired a settlement for itself, or being a female shall not have acquired a settlement from her husband, and it cannot be shown what settlement such child or female derived from the parent without inquiring into the derivative settlement of such parent, such child or female shall be deemed to be settled in the parish in which he or she was born :

Held, that the wife of a man who had, while under the age of sixteen and before the passing of the act, derived a settlement from his father, took this derivative settlement of her husband, and not his birth settlement; for the settlement which a son while under the age of sixteen derives from his father is excluded from the operation of the section so far as it abolishes derivative settlements. *Yarmouth v. London*.

214

See PAUPERS, 388.

POSSESSION.

See CRIMINAL LAW, 551, 573.

PRESCRIPTION.

See LIGHT, 164.
SUPPORT, 706, 745 *note*.

PRESUMPTION.

See INSURANCE, MARINE, 471.

PRINCIPAL AND AGENT.

1. Which of two innocent persons to suffer. *Babcock v. Lawson*. 831, 837 *note*.

See CRIMINAL LAW, 53, 64 *note*, 566, 570, 620.

HUSBAND AND WIFE, 362, 367 *note*.

ILLEGAL AGREEMENTS, 453, 455, 458 *note*.

PARTNERSHIP, 517.

PRINCIPAL AND SURETY.

1. The plaintiff having agreed to let to G. B., as yearly tenant, a farm, including certain hill pastures and a flock of 700 sheep, the defendant gave the plaintiff a bond to secure the re-delivery to him at the end of the tenancy of the flock in good order and condition. In November the plaintiff gave G. B. a notice to quit, which was ineffectual to determine the tenancy at the expiration of the then current year. G. B. objected to the insufficiency of the notice, and on the 8th of April entered into an agreement with the plaintiff that G. B. should surrender a field to the plaintiff, that G. B.'s rent should be reduced £10, and the notice to quit should be considered as withdrawn. G. B. then continued tenant of the farm, less the field, at the reduced rent. In October, 1876, the plaintiff gave G. B. notice to quit on the 10th of April, 1877. On giving up the farm it was ascertained that the flock was reduced in number and deteriorated in quality and value, and the plaintiff sued the defendant on his bond:

Held, by Brett, Cotton, and Thesiger, L.JJ., that neither the giving of the notice to quit and its withdrawal, nor the surrender of the field and the reduction of the rent, created a new tenancy.

2. *Held*, also, by Cotton and Thesiger, L.JJ., Brett, L.J., dissenting, that the contract of the surety was that the flock should be delivered up in good condition together with the farm as originally demised to the tenant; that the surety ought to have been asked to decide whether he would assent to the variation in the terms of the letting, and not having been asked to assent he was discharged from liability.

3. At the trial the judge left it to the jury to say whether the new agreement with the tenant had made any substantial or material difference in the relation between the parties, as regarded the tenant's capacity to fulfil the condition of the bond:

Held, by Cotton and Thesiger, L.JJ., Brett, L.J., dissenting, that the question was one which ought not to have been submitted to a jury; that the surety was the sole judge whether it was reasonable that he should remain

liable notwithstanding the new agreement. *Holme v. Brunskill*, 403, 414 note.

PRIVILEGED COMMUNICATION.

See EVIDENCE, 629, 683 note.

PRIZE FIGHT.

See CRIMINAL LAW, 576.

PROHIBITION.

See JURISDICTION, 40, 52 note.

PROPERTY, RESTITUTION OF
STOLEN.

See CRIMINAL LAW, 656.

PROTEST.

See BILLS OF EXCHANGE, 424.

PROXIES.

See ELECTION, CORPORATE, 377.

PUBLICATION.

See DEFAULT, 169, 172 note.

PUBLIC OFFICER.

See OFFICER.
28 ENG. REP. 114

PURCHASER.

1. Which of two innocent persons to suffer. *Babcock v. Lawson*. 831, 837 note.

Q.

QUO WARRANTO.

See OFFICER, 323, 325 note.

R.

RAILWAY COMPANY.

1. When compelled by mandamus to exercise franchise and to compel to erect a bridge. *Matter of Bristol, etc.* 2, 4 note.
2. By 8 Vict. c. 20, s. 108: "If any person, having paid his fare for a certain distance, knowingly and wilfully proceed in any such carriage beyond such distance, without previously paying the additional fare . . . and with intent to avoid payment thereof, he shall for every such offence forfeit 40s." By s. 108: "The company, subject to this and the special act, may make regulations for regulating the travelling upon or using and working the railway." By s. 109: "For better enforcing the allowance of all and any of such regulations, it shall be lawful for the company subject, &c., to make by-laws . . . provided that such by-laws be not repugnant to the laws of that part of the United Kingdom, where the same are to have effect, or to the provisions of this or the special act." By a by-law made under the above act "any person travelling without the special permission of some duly authorized servant to the company, or by a train of a superior class to that for which his ticket was issued, is hereby subject to a penalty not exceeding 40s., and shall in addition be liable to pay his fare according to the class of carriage in which he is travelling from the station where the train originally start-

ed, unless he shows that he had no intention to defraud."

The appellant was convicted in a penalty of 10s. under this by-law for travelling in a first-class carriage with only a second-class ticket; but it was found as a fact that he had no intention to defraud the company:

Held, that the conviction must be quashed, for without deciding whether the by-law did or did not make proof of the absence of fraudulent intention an exemption from the penalty as well as from the extra fare, it was, if it made the fraudulent intention immaterial in the case of the penalty, repugnant to 8 Vict. c. 20, s. 103, and *ultra vires* the company. *Bentham v. Hoyle*. 263, 268 *note*.

3. The respondent who was travelling on the G. W. Railway in a train going to N. produced the "forward half" of a tourist return ticket from L. to N. and back. This ticket had been originally issued to another person and was stated on the back thereof to be not transferable. The original taker had used the ticket as far as H. on the way from L. to N., but then proceeded on a different route and, consequently not having given up the forward half of the ticket, sold it to the respondent who was travelling with it between H. and N.:

Held, that the respondent was liable to be convicted under 8 & 9 Vict. c. 20, s. 103, for travelling without having previously paid his fare with intent to avoid payment thereof. *Langdon v. Howells*. 792, 794 *note*.

See CARRIERS.

EMINENT DOMAIN, 237.

RAPE.

See CRIMINAL LAW, 548, 550 *note*.

REAL ESTATE.

1. By a canal company's special act, it was provided that the lands of the company, whether covered with water or not, and also all dwelling houses, wharves, warehouses, lockhouses, and other houses of the company, should

be ratable; the lands according to their quantity and quality, and the dwelling houses, &c., according to the nature and respective uses, dimensions, and descriptions thereof; and should be charged and assessed in like manner as lands of a like quality and dwelling houses, &c., of alike and similar size, nature, dimension, or description in the respective parishes where the same should be situate, were, or should be assessed or charged. The lands adjoining the canal were all built upon, and the assessment committee sought to assess the canal and towing-path on the following principle. They assumed the area occupied thereby to be covered by buildings similar in ratable value to the buildings adjoining the canal, allowing for necessary roads, access, &c., and then took a proportionate part of such ratable value as representing the ratable value of the lands so covered as distinguished from the buildings:

Held, that, the canal ought to be rated in like manner as land of the like quality in the parish uncovered with buildings, the value of which might be increased from time to time by circumstances, and that the mode of assessment proposed by the assessment committee was therefore incorrect. *Regents' Canal v. St. Pancras, &c.* 69, 75 *note*.

See TAXATION.

RECEIVING STOLEN GOODS.

See CRIMINAL LAW, 534.

REMITTITUR.

1. An order was made under 30 & 31 Vict. c. 142, s. 10, remitting an action to the county court unless security was given for costs within a week. The plaintiff did not give security within the time limited, but after that time applied for and obtained an order extending the time for giving security: *Held*, that until the plaintiff had lodged the writ and order remitting the action with the registrar of the county court in accordance with the 10th section of 30 & 31 Vict. c. 142,

a. 10, the action remained in the superior court, and consequently there was jurisdiction to make the order extending the time for giving security. *Welply v. Buhl.* 76, 78 note.

2. An order was made under Order xxix, Rule 1, dismissing an action for want of prosecution, unless a statement of claim should be delivered within a week. The week having expired, and no statement of claim having been delivered:

Held, that the action was at an end, and there was no jurisdiction to make an order subsequently extending the time for delivery of the statement of claim. *Whisler v. Hancock.* 79

3. An order was made under 30 & 31 Vict. c. 142, s. 10, remitting an action to be tried in the county court, unless security should be given for costs within a week. The plaintiff failed to comply with the condition stated in the order, but did not lodge the writ and order with the registrar of the county court, pursuant to s. 10, and, after the time mentioned in the order had elapsed, obtained a second order extending the time for giving the security:

Held, affirming the judgment of the Queen's Bench Division, that until the plaintiff had lodged the writ and order remitting the action with the registrar of the county court the action remained in the superior court, and consequently there was jurisdiction to make the order extending the time for giving security. *Welply v. Buhl.* 231

RESIDENCE.

See POOR LAW, 214.

RESTITUTION OF STOLEN PROPERTY.

See CRIMINAL LAW, 656.

S.

SECURITY FOR COSTS.

1. A defendant who admits the cause of action sued upon and sets up a counter-

claim founded upon a distinct claim, is not entitled to security for costs from the plaintiff, a foreigner residing without the jurisdiction. *Winterfield v. Bradnum.* 298

SERVICE.

See DEFAULT, 169, 172 note, 318.

SETTLEMENT

See POOR LAW, 214.

SEVERAL OFFENCES.

See CRIMINAL LAW, 565.

SEWERS.

See ASSESSMENTS, 772.

SLANDER.

See DEFAMATION, 217.

SPARRING MATCH.

See CRIMINAL LAW, 576.

STAMPS.

1. A deed, purporting to appoint a new trustee, appeared when tendered in evidence to be sufficiently stamped according to the law in force on the day when it was dated, but it was proved to have been executed some years previously, and the stamp according to the law then in force was insufficient:

Held, on the construction of 33 & 34 Vict. c. 97, ss. 15, 16, 17, that the deed could not be admitted in evidence.
Clarke v. Roche. 157

STATUTE.

1. In sects. 1, 15, of the Pharmacy Act, 1868 (31 & 32 Vict. c. 121)—which prohibit under a penalty any person, not being a duly registered pharmaceutical chemist, &c., from keeping open shop for the sale of poisons or using the name of chemist or druggist . . . —the word "person" includes a corporation, and the penalty may be recovered from an incorporated company for keeping a chemist's shop as described in the act, although the business of such shop is managed by duly registered chemists as servants of the company. *Pharmaceutical, etc., v. London, etc.* 775, 788 note.

See DAY, 751, 754 note.

STREETS.

See ASSESSMENTS.
HIGHWAYS.
MUNICIPAL CORPORATIONS.
NEGLIGENCE.

SUFFER.

1. Which of two innocent persons to suffer. *Babcock v. Lawson*, 831, 837 note.

SUPPLEMENTARY PROCEEDINGS.

See ATTACHMENT, 194, 196 note.

SUPPORT.

1. In an action by the owners of a factory against the defendants for exca-

vating the soil of an adjoining house in such a manner as to leave the foundation of part of the factory without sufficient lateral support, and thereby causing it to fall, it appeared that the two buildings had apparently been erected at the same time, and were estimated to be upwards of 100 years old. Both had been occupied as dwelling houses until about twenty-seven years before the accident, but the plaintiffs' predecessor had then converted his house into a coach factory, removing the internal walls, and erecting a stack of brickwork which both served as a chimney stack, and supported the girders which had to be put up to sustain the floors. The defendants, in taking down the adjoining house and in digging cellars which had not previously existed, left a support for the chimney stack which proved insufficient, and it fell, drawing after it the entire factory:

Held, by the majority of the court (Cockburn, C.J., and Mellor, J.), that the defendants were entitled to judgment, for first, no grant of a right of lateral support for the factory by the adjacent land could be presumed from the enjoyment of such support by the plaintiff for twenty years, inasmuch as the owners of this land never had any power to oppose the conversion of the dwelling house into a factory, and had no reasonable means of resisting or preventing the enjoyment by such factory of lateral support from the adjoining soil, and for the same reason such support was not an easement which had been enjoyed for twenty years within the Prescription Act (3 & 4 Wm. 4, c. 71, s. 2), as it could not be said to have been enjoyed by a person claiming right thereto and without interruption.

2. By Lush, J., dissenting, that after twenty years' enjoyment without physical obstruction of such support for the land with the factory upon it, it must be presumed that it had been enjoyed by virtue of some grant or agreement; that the mere absence of assent on the part of the adjoining owner was immaterial, and that the plaintiff was entitled to judgment. *Angus v. Dalton*, 80, 122 note.

3. The right to the support of a building by the adjacent soil of an adjacent

owner is not a natural right of property; it is an easement which may be acquired by prescription from the time of legal memory, or by grant express or implied, but it is not an easement within the Prescription Act (2 & 3 Wm. 4, c. 71). It may also be acquired by the circumstance that the building has stood for twenty years, if during that period the owner of the adjacent soil knew or might have known that the building was thereby supported, and if he was capable of making a grant; and (by Cotton and Thesiger, L.J.J., as to this Brett, L.J., dissenting) after twenty years' enjoyment in point of fact of the support to the building the claim to it as matter of right will not be defeated by proof that no grant of the easement was ever made.

By Cotton and Thesiger, L.J.J., affirming *Bower v. Peate* (1 Q. B. D., 321), where a contractor has been employed to do work which in its nature is dangerous to a neighboring property and damage results from the work, the employer is liable to compensate the owner of the neighboring property, although the contractor is competent and he has been directed by the employer to take proper precautions in executing the work.

4. For more than twenty years before 1849 two dwelling houses of considerable age had stood side by side; in that year one of them was converted into a factory, the internal walls being removed, and the girders, which supported the upper floors of the factory, being let into a large chimney-stack, the foundations of which being in contact with the soil under the adjoining house the lateral pressure upon that soil was materially increased. The owner of the adjoining house did not assent to these alterations. The plaintiffs became possessed of the factory, and after it had stood for twenty-seven years the defendants C. contracted with the defendant D. to pull down the adjoining house and to excavate the soil forming its site. D. employed N. to do the excavations; in consequence of these excavations, which, however, were not done negligently, the foundations of the chimney-stack of the plaintiffs' factory, being deprived of the support of the adjacent soil, gave way. An action having been brought to recover damages for excavating without

leaving sufficient support to the chimney-stack, the foregoing facts were proved, but it did not appear that the owner of the house pulled down by the defendants had been aware of the precise nature of the alterations made when the building occupied by the plaintiffs had been converted into a factory, and it was admitted that since the conversion he had not by deed granted any easement of support in respect of the factory. At the close of the plaintiffs' case, the judge held that the defendants C. and D. were liable for the acts of N., and that as more than twenty years had elapsed since the conversion of the building occupied by the plaintiffs into a factory, it had acquired an absolute right to the support of the adjacent land, whether or not the owner of the house pulled down by the defendants had had notice of the alterations, and that the right of support did not depend upon the implication of a grant, and he directed the jury to find for the plaintiffs:

Held, by Cotton and Thesiger, L.J.J., overruling the judgment of the majority of the Queen's Bench Division, Brett, L.J., dissenting, that upon these facts the defendants were not entitled to judgment for the enjoyment during more than twenty years of the support in point of fact raised a presumption that the occupiers of the plaintiffs' factory were entitled thereto as matter of right, and the circumstance that no grant of the easement of support had been made was not material; but that the defendants were entitled to a new trial on the ground that they might rebut the presumption by evidence either that the owner of the house pulled down by the defendants did not know the nature of the alterations made when the building occupied by the plaintiffs was converted into a factory, or that he was incapable of making a grant.

5. By Brett, L.J., that as it had been admitted that no grant by deed of the right of support for the factory had ever been made, no easement had been acquired from the enjoyment in fact for twenty years of the support of the adjacent soil, and that the defendants were entitled to judgment. *Angus v. Dalton*. 706, 745 note.

SURETY.

See PRINCIPAL AND SURETY.

T.

TAXATION.

1. In assessing shipbuilding premises to the poor-rate, the value of machinery attached to the premises is to be taken into consideration in ascertaining their ratable value where such machinery, though some of it may be capable of being removed without injury to itself or the freehold, is essentially necessary to the shipbuilding business to which the premises are devoted, and intended to remain permanently attached to them so long as they are applied to their present purpose. *Laing v. Bishopscarmouth*. 278

2. By 4 Wm. & M. c. 1, s. 25, the sites of hospitals were rendered exempt from chargeability to land tax. In 38 Geo. 3, c. 5, s. 25 (rendered perpetual by 38 Geo. 3, c. 60, s. 1) this exemption was repeated. By 38 Geo. 3, c. 5, s. 29, all such lands "belonging to any hospital . . . as were assessed in the fourth year of the reign of King William and Queen Mary" were to be charged with the land tax: but no other lands "then belonging to any hospital" were to be assessed.

An hospital, erected and chartered before 4 Wm. & M. c. 1, was maintained until 1849, when, pursuant to a decree of the Court of Chancery, the almshouses of which it consisted were taken down and rebuilt upon another spot: the former site of the hospital was then let to the plaintiff:

Held, reversing the judgment of the Queen's Bench Division, that the exemption from chargeability for land tax continued after the site had been let to the plaintiff. *Rabbitts v. Cox*. 285

3. The Metropolis Management Amendment Act (25 & 26 Vict. c. 102), s. 53, enacts that, "where any sewer shall be constructed by any vestry or district board in a street in which previously to such construction there had been no sewer &c., but where sewers rates

have been levied previously to such construction, the expense of constructing such sewer and the works appertaining thereto shall be borne in part only by the owners of the houses situate in and of the land bounding and abutting on such street respectively, and the amount to be borne by such owners shall be determined by the vestry or district board in each particular case, and the residue of such expenses shall be defrayed out of the sewers rate," but there is no limitation of the time within which the amount payable by the owners of such land and houses is to be apportioned.

Where therefore a sewer had been constructed within the meaning of the section in 1868, and no apportionment of the amount of the cost of constructing it, to be borne by the owners of the houses in the street, was made until 1876:

Held, that the apportionment was valid. *Bradley v. Board*, &c. 331

See ASSESSMENTS, 772.
REAL ESTATE.

TERMS OF COURT.

1. By 9 & 10 Wm. 3, s. 2, an application to set aside an award must be made before the last day of the term after the arbitration.

By 36 & 37 Vict. c. 66, s. 26, "terms" are abolished, but they may continue to be referred to in all cases in which they were used as a measure for determining the time within which an act is required to be done.

An award was made on the 28th of March, 1877. An application to set it aside, under 9 & 10 Wm. 3, c. 15, s. 2, was made in the Easter sittings on a day after the 8th of May. Easter Term in 1877, under the former procedure, would have begun on the 15th of April and ended on the 8th of May:

Held, affirming the judgment of the Queen's Bench Division, that the application ought to have been made on a day before the 8th of May, for "terms" still exist as a measure for determining the time within which an award should be set aside under 9 & 10 Wm. 3, c. 15, s. 2. *Matter of Governors*, &c. 6

THREATS.

See CRIMINAL LAW, 595.

TIME.

See DAY, 751, 754 *note*.
TERMS OF COURT, 6.

TITLE.

See CRIMINAL LAW, 584, 559.
FRAUD, 674, 678 *note*.
HIGHWAYS, 331.

TITLE TO STOLEN PROPERTY.

See CRIMINAL LAW, 656.

TORTS.

1. The statement of claim alleged that the plaintiff, as vendor of goods, delivered them to the defendants, a railway company, as carriers for reward, the goods being consigned to the intending purchasers: that afterwards, and before the goods had been delivered to the consignees or claimed by them from the defendants, the plaintiff discovered that the consignees were insolvent, and, as unpaid vendor, gave notice to the defendants not to deliver the goods to the consignees, but to hold them to the plaintiff's order, and before the goods were delivered to the consignees the plaintiff required the defendants to re-deliver them to him: that the defendants refused to do so, and delivered them to the consignees, who absconded without paying for the goods. The plaintiff claimed their value, viz., £12 16s. 6d. as damages. The defendants paid that sum into court, and the plaintiff took it out in satisfaction:

Held, that the action was "founded on tort," and not "on contract" within s. 5 of the County Courts Act, 1867 (30 & 31 Vict. c. 142), and that the

plaintiff having recovered a sum exceeding £10 was not deprived of costs by that section. *Pontifax v. Midland, etc.* 11

TRESPASS.

See ANIMALS, 664, 667 *note*.

TRIALS.

See CRIMINAL LAW, 595.
ISSUES, 7, 11 *note*.

U.

UNDUE PREFERENCE.

See CARRIERS, 128, 141 *note*.

USAGE.

See ADMIRALTY, 794.
DEMURRAGE, 766.

V.

VARIANCE.

See AMENDMENT, 641, 645.

VENDOR AND VENDEE.

1. Which of two innocent persons to suffer. *Babcock v. Lawson*. 831, 837 *note*.
See INSURANCE, FIRE, 158, 161 *note*.

VENUE.

1. When no embezzlement in county where indictment found. *Regina v. Treadgold*. 570

See CRIMINAL LAW, 16, 27 *note*.

W.

WARRANTY.

See ANIMALS, 142, 156 *note*.

WAY.

See EASEMENT, 848, 867 *note*.
HIGHWAYS, 705.

WORDS.

"Bicycle" is a "carriage,"	748
"Consignee,"	766
"Contracts,"	11
"Dangerous thing,"	562
"Emolument,"	359
"Illness,"	356
"Noxious thing,"	616

"Person,"	775, 783 <i>note</i> .
"Street,"	817
"Torts,"	11

WOUNDING.

See CRIMINAL LAW, 603.

WRITING.

1. Whether letters amount to a direction in writing. *Queen v. Fallagar*. 605

See AGREEMENTS, 528, 533 *note*.

WRONGDOERS.

See NEGLIGENCE, 295, 307 *note*.

INDEX TO NOTES.

A.

Abatement, in Rhode Island, attachment bond extinguished by death of party and not affected by revivor, XXVIII, 419.

Abortion, how far dying declarations admissible on indictment for, XXVIII, 593.

Accessory. See *Accomplice—Evidence—Intent—Venue*.

Accident. See *Negligence*.

Accomplice, mere pleasure at beating without *act* to encourage, does not make, XXVIII, 561.

“ mere mental approval insufficient, XXVIII, 561.

“ two quarrelling, when another approached, what one of them does does not make other approve, XXVIII, 561.

“ one going with another to commit one crime, and another committed, XXVIII, 561.

“ one purchasing stolen property with money furnished by officer, XXVIII, 561.

“ merely receiving stolen property does not make accomplice in larceny, XXVIII, 561.

“ must be indicted as accessory and not as principal, XXVIII, 561.
See *Consent—Evidence*.

Admission. See *Evidence*.

Adulteration, cases bearing upon, XXVIII, 384.

Adulterer, when may be convicted of larceny, XXVIII, 624.

Advice. See *Motive*.

Age, how age of person ascertained and proved, XXVIII, 516.

Agreements, might suspend work, XXVIII, 205.

“ when may forfeit percentage retained, XXVIII, 205.

See *Carriers—Contracts—Illegal Agreements—Railway Companies—Writing*.

Alimony. See *Husband and Wife*.

Amotion. See *Benevolent Society*.

Animals, one left diseased cattle purchased with others after knew of disease, XXVIII, 156.

“ warranty of provisions, XXVIII, 157.

“ when *fera natura*, XXVIII, 667.

“ rights in doves, XXVIII, 667.

“ larceny of, XXVIII, 667.

“ in fox pursued, XXVIII, 667.

“ in animal wounded, XXVIII, 667.

“ in fish nearly surrounded by net, XXVIII, 667.

“ in bees found in tree which marks, XXVIII, 667.

“ in tree, to whom belong, and when may cut tree, XXVIII, 668.

Animals—continued.

- " property in tame buffalo, XXVIII, 668.
- " in wild geese, XXVIII, 668.
- " taking fish from small lake, XXVIII, 668.
- " taking fish from navigable river, XXVIII, 668.
- " rights in oysters planted, XXVIII, 668.
- " rule in England as to title to, in owner of land, XXVIII, 668.
- " license to kill animal in May does not authorize killing in September following, XXVIII, 668.

See *Larceny—Negligence.*

Appeal. See *Issues.***Appointment.** See *Officers.***Appurtenances.** See *Easements.***Arbitration,** if agrees to before suit, cannot sue without, XXVIII, 203.

- " agreement for, and if one party does not choose, other might do so after notice, cannot sue without giving notice and choosing both, XXVIII, 203.
- " notice of necessary, XXVIII, 203.
- " agreement to pay such sum as architect certifies to, XXVIII, 203.
- " cannot certify, subject to certain deductions, XXVIII, 203.
- " if certificate made, when conclusive, XXVIII, 303-4.
- " so certificate that no mechanic's liens, XXVIII, 204.
- " simple averment certificate incorrect does not overcome conclusiveness, XXVIII, 204.
- " if engineer, servant of one party, owes *duty* to other, XXVIII, 204.
- " what must show to show collusion with employer, XXVIII, 204.
- " extras ordered by engineer, XXVIII, 204.
- " damages for suspension, XXVIII, 204.
- " final certificate cures defect, extras not ordered in writing, XXVIII, 204.
- " when extras ordered verbally by owner, XXVIII, 205.
- " what not final certificate so as to entitle to balance retained, XXVIII, 204.
- " if to be measured in certain way must be measured in that, XXVIII, 205.
- " liability of employer for engineer withholding certificate, XXVIII, 205.
- " when engineer's conduct evidence of collusion, XXVIII, 205.
- " when employer, liable on contract if engineer refuse certificate, XXVIII, 205.
- " when engineer liable for refusing certificate, XXVIII, 205.
- " agreement work might be suspended, XXVIII, 205.
- " when may forfeit percentage retained, XXVIII, 205.
- " one agreed to be bound by decision of company's engineer, XXVIII, 789.

See *Architect.*

Architect, remedy if refuses to give certificate, XXVIII, 6.

- " one stipulated to be bound by decision of company's engineer, XXVIII, 789.

See *Arbitration.*

Arrest. See *Extradition.***Assault and Battery.** See *Pleadings.***Assessment,** when damages in eminent domain cannot be assessed on adjoining owners, XXVIII, 830.**Assignment,** unaccepted draft on general fund not, XXVIII, 328.

- " though *circumstances* may show to be, XXVIII, 328.
- " order on *particular* fund is, XXVIII, 328.
- " general draft, designation of fund for reimbursement, XXVIII, 328.

Assignment—continued.

- " *circumstances* may show to be paid thereout, XXVIII, 328.
- " order by contractor on financial officer city, XXVIII, 328.
- " portion of deposit in bank sold and check given, XXVIII, 328.
- " bill of exchange indorsed for collection gives indorsee no title, and proceeds belong to indorser, XXVIII, 328.
- " when agreement to pay assignee not valid, XXVIII, 470.
- " when check operates as, XXVIII, 470.
- " order and assignment of part of sum to become due under existing contract, XXVIII, 470.
- " of bond and mortgage gives no better title than seller has, XXVIII, 337.

See *Attachment*.

Attachment, salaries of public officers not liable to, XXVIII, 196.

- " see rule in *Kentucky*, XXVIII, 196.
- " assignment of future salary invalid, XXVIII, 196.
- " wages cannot be reached day before payable, XXVIII, 196.
- " tuition fees of teacher, XXVIII, 196.
- " wages more than necessary for family support, XXVIII, 196.
- " money in hands of public officer, XXVIII, 196.
- " due teacher from school officers, XXVIII, 196.
- " due juror from county, XXVIII, 196.
- " seaman on public vessel, XXVIII, 196.
- " awarded under eminent domain, XXVIII, 196.
- " work done, but architect's certificate not given, XXVIII, 196.
- " money due from municipal corporation, XXVIII, 196.
- " though liability denied, XXVIII, 196.
- " receiver may be appointed to collect it, XXVIII, 196.
- " money due from state, XXVIII, 197.
- " United States voucher, XXVIII, 197.
- " can money collected by sheriff, etc., be levied on by virtue of execution against first execution creditor? XXVIII, 197.
- " money collected by attorney, XXVIII, 197.
- " property attached before sold on prior execution, when execution on attachment surplus on sale, applicable to attachment execution, XXVIII, 197.
- " money due on decree in chancery, XXVIII, 197.
- " money deposited with clerk in lieu of undertaking, XXVIII, 197.
- " after one officer levied, another did so; second sold for more than enough to pay first; liable to him, XXVIII, 197.
- " surplus on sale may be *ordered* paid on subsequent execution, XXVIII, 197.
- " whether may *attach* surplus on sheriff's sale, XXVIII, 197.
- " whether moneys realized by sheriff may be attached as against plaintiff in execution, XXVIII, 197.
- " money in hands of receiver, XXVIII, 198.
- " money paid to officer of court in satisfaction of a judgment, XXVIII, 198.
- " money deposited by assignee in bankruptcy, on judgment against him, XXVIII, 198.
- " bank counted out deposit and sheriff levied on it, XXVIII, 198.
- " property in possession officer State court; marshal Federal cannot attach it, XXVIII, 198.
- " moneys deposited by assignee attached on process against assignor, XXVIII, 198.
- " money collected assigned, subsequent levy, XXVIII, 198.
- " attachment against two, and subsequent against one of them; how to levy, XXVIII, 198.

Attorneys. See *Attachment*.

B.

Bank, counted out deposit, and sheriff levied on it, XXVIII, 198.

See *Illegal Agreements*.

Bankruptcy, assignee has money on deposit; cannot be ordered paid on judgment against, XXVIII, 198.

See *Day*.

Bastardy. See *Disqualification*.

Bees. See *Animals*.

Belief. See *Motive*.

Benevolent Society, one joining does so subject to rules and by-laws, XXVIII, 825.

" " liability of members masonic lodge for debt incurred in name of lodge, XXVIII, 325.

" " not stockholders till transfer on books, XXVIII, 825.

" " cannot review removal on certiorari, XXVIII, 825.

" " Odd Fellows may determine who members and who not, XXVIII, 325.

Bills of Exchange, indorsed for collection, title of proceeds in indorser, XXVIII, 838.

See *Assignments—Forgery*.

Bill of Lading. See *Bona fide*.

Bill of Particulars, when ordered in criminal case, XXVIII, 515.

Blank, bond and mortgage with no payee, how far and when valid, XXVIII, 840.

See *Forgery*.

Boarding House Keepers. See *Lien*.

Bona fide, when accepting money on precedent debt, makes one, XXVIII, 679.

" purchaser of bond and mortgage can take no better title than seller, XXVIII, 837.

" owner only precluded from asserting title where has done some act to confer apparent title, XXVIII, 838.

" giving A. a bond and mortgage to be used for a loan, he sold it, XXVIII, 838.

" owner not estopped by any act of tortious taker, XXVIII, 838.

" one discounted note on bill of lading; seller obtained new and false bill of lading, and loan upon that, XXVIII, 838.

" when demanded small quantity of other property, but refusal put on ground entitled to none, XXVIII, 838.

" purchasing goods at half value, XXVIII, 838.

" having information to put on guard, XXVIII, 838.

" factor cannot pledge, XXVIII, 838.

" note with assignment in pledge delivered to payee for temporary purpose and he sold; assignment notice to purchaser, XXVIII, 838.

" failure to produce, raises presumption was still on it, XXVIII, 838.

" purchaser chargeable with notice though could not read, XXVIII, 838.

" if one of two innocent persons must suffer, one whose misplaced confidence has been cause of loss, not to throw it on other, XXVIII, 838, 840.

" whatever may be intent, if does act leading to believe consents, and so believing other party acts, XXVIII, 839.

" agent vested with apparent title, XXVIII, 839.

" owner conferred on another apparent title, XXVIII, 839.

" purchaser's title depends upon apparent title or authority, XXVIII, 839.

" owner of scrip intrusted to another with blank indorsement, XXVIII, 839.

Bona fide—continued.

- " owner chose in action gave to another with assignment, XXVIII, 839.
- " so if obtained from owner by fraud and sold to innocent purchaser, XXVIII, 839.
- " owner had scrip issued to another; latter assigned scrip to owner, but afterwards stole and sold it, XXVIII, 839.
- " purchaser left with seller without any evidence of sale, XXVIII, 839.
- " wife induced to give mortgage without reading it, on which another advanced money, XXVIII, 840.
- " giving one mortgage, payee blank, which he sold, XXVIII, 840.
- " bond and mortgage blank, how far and when valid, XXVIII, 840.
- " when ratification estops, XXVIII, 840.
- " pledgee allowed owner to put grain in elevator; according to course of business, warehouse receipt given to owner who, on receipt, obtained advances, XXVIII, 840.
- " if party making advances had other means of reimbursing, bound to use them, XXVIII, 840-1.
- " owner of scrip left with broker, with blank power of attorney, and broker pledged, XXVIII, 841.
- " scrip with blank power presumptive evidence of ownership, XXVIII, 841.
- " one executor pledged stock and gave power of attorney; pledgee sold or pledged; other executors estopped from claiming scrip without paying advance to second pledgee, XXVIII, 841.
- " mere fact of purchase from executor no notice he is acting improperly, XXVIII, 841.
- " mortgagor gave mortgagee a note to secure mortgage; latter assigned mortgage and sold note; both valid in hands of purchasers, XXVIII, 841.
- " purchaser not bound to inquire whether mortgagor had defence, XXVIII, 841.
- " corporation not liable to owner of scrip for transferring stock, on power of attorney, to one who *in fact* had no right to sell or transfer, XXVIII, 842.
- " though if power thirteen years old, corporation bound to inquire, XXVIII, 842.
- " married woman gave scrip to one with power of attorney who pledged, and pledgee got new scrip, XXVIII, 842.
- " renewal of note sufficient to make transferee valid owner, XXVIII, 842.
- " broker selling scrip indorsed by person to whom issued, not liable to him, XXVIII, 842.
- " peculiar case where one allowing agent control of bond, held must suffer loss, XXVIII, 842.
- " when one having scrip and power of attorney pledges *as agent*, purchase chargeable with notice not owner, and bound by *actual* authority, XXVIII, 842.
- " corporation executed bonds to be countersigned by trustee; stolen and trustee's name countersigned; purchasers took no title, XXVIII, 842.
- " corporation having got possession, not bound to restore such bonds, XXVIII, 842.
- " payee indorsed notes and gave to one to sell who pledged them, pledgee gets good title, XXVIII, 842.

See *Fraud—Title*.

Bona fide Holder. See *Forgery*.

Bridges. See *Mandamus*.

Broker, how far maker of note bound by representations by broker on sale, XXVIII, 679.

See *Bona fide*.

Burglary. See *Consent*.

By-laws. See *Railway Companies*.

C.

- Carriers,** not compelled by mandamus to carry goods, XXVIII, 6.
 “ must not give one customer undue preference over another, XXVIII, 141.
 “ cannot limit liability by notice, XXVIII, 191.
 “ may by agreement, XXVIII, 191.
 “ contra in U. S. courts, XXVIII, 191.
 “ though may as to value of articles, XXVIII, 191.
 “ clause of exemption must be clear and explicit, XXVIII, 191.
 “ such clause not binding on shipper unless knew of and assented to it, XXVIII, 191.
 “ and may show did not though accepted receipt, XXVIII, 191.
 “ though possession thereof *prima facie* evidence of assent, XXVIII, 191.
 “ otherwise in *Illinois* and *Vermont*, XXVIII, 191.
 “ receipt not given until subsequent to delivery, XXVIII, 191.
 “ receipt sent after goods had left shipper, repudiated, XXVIII, 191.
 “ whether shipper accepted, question of fact, XXVIII, 191.
 “ such receipt for baggage handed in dark car, XXVIII, 191.
 “ acceptance by shipper will not bind consignee, XXVIII, 192.
 “ shipper saw “O. R.,” owner’s risk, but did not understand them, XXVIII, 192.
 “ shipper executed contract, having restricted, XXVIII, 192.
 “ owner shipped to consignee, making restricted contract, XXVIII, 192.
 “ when bill of lading and not receipt to control, XXVIII, 192.
 “ connecting carrier not entitled to benefit of restricted contract by first, XXVIII, 192.
 “ first carrier cannot bind owner, XXVIII, 192.
 “ exemption of express company from fire does not, if fire originated by R. R. Co. to whom part duty confided, XXVIII, 192.
 “ from breaking of machinery, not if keeps on instead of putting in for repairs, XXVIII, 192.
 “ damage while *waiting* delivery, none for negligence in delivery, XXVIII, 192.
 “ from unsafe machinery used in loading, XXVIII, 192.
 “ liable until notifies connecting carrier, and reasonable time for delivery, XXVIII, 192.
 “ after delivery to connecting, not liable, XXVIII, 193.
 “ if stipulates to carry without change of cars, has no benefit of restriction if changes, XXVIII, 193.
 “ “Red line” run by several connecting, one not liable if has delivered to next, XXVIII, 193.
 “ whether liable for injury beyond own line? XXVIII, 193.
 “ company selling tickets mere agent for other lines, XXVIII, 193.
 “ general agent may bind to carry beyond own line, station agent not, XXVIII, 193.
 “ clause, not liable unless notified of injury to cattle before unloaded, XXVIII, 193.
 “ injury to live animals from delay, XXVIII, 193.
 “ amount of baggage for which liable, XXVIII, 193.
 “ when breaking wheel no evidence of negligence, XXVIII, 193.
 See *Bona fide—Railway Companies*.

Cattle. See *Animals*.

Certiorari, review of removal from office, XXVIII, 325.
 See *Extradition*.

Chancery. See *Issues*.

Check. See *Assignment*.

Children. See *Negligence*.

Club. See *Benevolent Societies*.

Coffin, is larceny to take, XXVIII, 656.

“ property may be laid in person furnishing, XXVIII, 656.

Common Council. See *Mandamus*.

Compromise, necessity for money not duress entitling to avoid, XXVIII, 459.

Conditions. See *Lease*.

Conductor. See *Railway Companies*.

Confession. See *Evidence*.

Consanguinity. See *Disqualification*.

Consent, thief left stamps with express company; then gave postmaster order and he got them; redeposited them directed to defendant: not guilty of receiving stolen property, XXVIII, 559.

“ one entered by owner's consent, took property and gave to another, XXVIII, 559.

“ one not guilty if accomplice merely pretended and not real, XXVIII, 559.

“ detectives assumed to be criminals and decoyed into bank, XXVIII, 559.

“ inducing one to give prohibited information in letter to fictitious address, XXVIII, 559.

“ decoying denounced, XXVIII, 559.

“ policeman leaving door unlocked so lawyer could get to and steal records, XXVIII, 559.

“ searching cross-examination as to former connections proper, XXVIII, 559.

“ sending another to buy to see if infringing injunction, XXVIII, 560.

“ without doing anything, directed servant to encourage, XXVIII, 560.

“ detective joined in criminal act, XXVIII, 560.

“ owner did nothing to further crime, XXVIII, 560.

“ consenting to information that at given time would be away from home, XXVIII, 560.

“ owner left door unlocked, XXVIII, 560.

“ one woman went with another for abortion, XXVIII, 560.

“ principal officer directed assistant to consort with criminals, XXVIII, 560.

See *Accomplice—Rape*.

Conspiracy, to commit burglary, one killed officer without others encouraging, XXVIII, 64.

“ one present at fight without assisting, XXVIII, 65.

“ in assault by two, one killed, XXVIII, 66.

“ because present at killing stolen cow, not guilty of previous larceny, XXVIII, 66.

Constable. See *Attachment*.

Constitutional Law, of statute punishing for larceny of property brought into state, XXVIII, 624.

See *Disqualification—Gambling Instruments—Obscene Literature*.

Contagious Diseases. See *Animals*.

Contract, remedy to compel officers to enter into with lowest bidder, XXVIII, 6.

“ remedy if architect refuses certificate, XXVIII, 6.

See *Agreements—Illegal Agreements*.

Contractor, agreement may suspend work, XXVIII, 205.

“ when percentage retained may be forfeited, XXVIII, 205.

See *Arbitration—Negligence*.

- Conversion**, paper delivered to one whose name forged to it; not liable for refusing to return it, XXVIII, 842.
- Conveyance**, when bounded by way taken under eminent domain, and not by location on after-purchase, XXVIII, 867.
- “ when uncertain, XXVIII, 867.
- See *Easements*.
- Corporations**, may be guilty of some crimes, XXVIII, 66.
- “ corporators not participating, not, XXVIII, 66.
- “ corporator has no individual property in corporation, XXVIII, 66.
- “ to bind must be act of trustees, and even all stockholders insufficient, XXVIII, 66.
- “ directors not liable for money converted, if money goes into funds of corporation, XXVIII, 66.
- “ what is position of directors, XXVIII, 67.
- “ not liable civilly for libel published by corporation, XXVIII, 67.
- “ stockholders not liable for tort of, XXVIII, 700.
- “ when included in word “person,” XXVIII, 783.
- “ liability for refusing to transfer stock, XXVIII, 842.
- See *Disqualification—Intent—Mandamus—Principal and Surety*.
- Counsel**. See *Motive*.
- County**. See *Mandamus*.
- County Judge**. See *Disqualification*.
- Courts**. See *Day—Disqualification—Jurisdiction*.
- Covenants**, to rebuild, not extinguished by once rebuilding, XXVIII, 348.
- See *Lease—Support*.
- Criminal Law**, jurisdiction, crime within 500 yards of county line, XXVIII, 52.
- “ when depositions may be read on account of illness, etc., of witness, XXVIII, 358.
- “ stockholder not liable for act of corporation, XXVIII, 700.
- See *Dying Declarations—Extradition—Intent—Motive—Obscene Literature—Venue*.

D.

- Damages**, one left cattle with those diseased, purchased of another, after knew of it, XXVIII, 156.
- “ crops lost from reaper breaking down, XXVIII, 157.
- “ from delay in delivery of reaper, XXVIII, 157.
- “ rule of in action against railway, XXVIII, 276.
- “ when continuing, and when can be no second recovery, XXVIII, 348.
- “ in suit for destroying gambling instruments, XXVIII, 424.
- “ for refusing to transfer stock, XXVIII, 842.
- “ when new trial granted on account of inadequate or excessive damages, XXVIII, 847.
- See *Municipal Corporations*.
- Day**, general rule, proceedings of court, statute, etc., take effect earliest moment of, XXVIII, 754.
- “ law does not usually regard fractions of, XXVIII, 754.
- “ party died at earlier hour than judgment, XXVIII, 754.
- “ notice appeal served earlier than perfection of judgment, XXVIII, 754.
- “ execution delivered earlier than judgment, XXVIII, 754.
- “ so service of writ earlier than filed, XXVIII, 754.
- “ levy made earlier than passage of statute affecting levies theretofore, XXVIII, 754.
- “ sale had before statute passed, but same day, XXVIII, 754.
- “ maxim law does not regard fractions of, how affects bankruptcy proceedings, XXVIII, 754.

Day—continued.

- " general rules subject to numerous exceptions, XXVIII, 754.
- " in determining which levy, docket, etc., has preference, law regards fractions, XXVIII, 754.
- " statute that may be done "after" certain number of days, XXVIII, 755.

Debtor and Creditor. See *Assignment*.

Deed. See *Conveyance—Easements*.

De facto. See *Officers*.

Default, power to open where service by publication and no actual notice, XXVIII, 172.

- " if misled by error in publication, XXVIII, 172.
- " right of third person to be let in, XXVIII, 172.
- " terms on which will be let in, XXVIII, 172.
- " does not apply where service on agent appointed under statute, XXVIII, 172.

Defence. See *Default*.

Demand, before suit when properly not entitled to small quantity, but refusal put on ground entitled to none, XXVIII, 838.

Depositions, when may be read on account of illness, etc., of witness. XXVIII, 358.

- " if judge disqualified, cannot take, XXVIII, 789.

Deputy. See *Officers*.

Destruction of Property. See *Gambling Instruments*.

Directors, when not liable for money going into funds of corporation, XXVIII, 66.

- " what is the position of directors, XXVIII, 67.
- " not liable civilly for libel published by corporation, XXVIII, 67, 700.

See *Principal and Surety*.

Discretion, mandamus will not lie to compel act where party has, XXVIII, 830.
See *Mandamus*.

Diseased Animals. See *Animals*.

Dismissal. See *Remittitur*.

Disorderly Person, wife as witness against husband, XXVIII, 867-8.

- " " what must show to make husband one, XXVIII, 871.

Disqualification, chancellor stockholder in a corporation, XXVIII, 785.

- " but vice-chancellor not, XXVIII, 785.
- " justice issued search warrant for his own property, XXVIII, 785.
- " if appeared on face of process, constable not protected, XXVIII, 786.
- " what county judge to do if disqualified, XXVIII, 786.
- " when judge takes part, though does not vote, XXVIII, 786.
- " managers of common, where penalty goes into general fund, XXVIII, 786.
- " so local board of health, XXVIII, 786.
- " circuit judge selling claim against bankrupt, may act, XXVIII, 786.
- " no other judge could act for long time, XXVIII, 786.
- " interest of judge at common law must be direct, and not remote, XXVIII, 786.
- " in proceedings to take land, officer presiding was stockholder in company, with whom executory agreement for amalgamation made, XXVIII, 786.
- " pecuniary interest, however small, disqualifies, XXVIII, 786.
- " mere possibility of bias insufficient, XXVIII, 786.
- " judge member of corporation which had lent money to party, and might be benefited by increase of funds, XXVIII, 786.

Disqualification—continued.

- " judge member of municipal corporation to whom forfeited liquors would go, XXVIII, 787.
- " legislature may constitutionally provide such interest shall not disqualify, XXVIII, 787.
- " when judge not disqualified, and when may sit if only judge who can decide, XXVIII, 787.
- " though disqualified, another statute making only judge who can sit, may override it, XXVIII, 787.
- " county judge appointing commissioners, where he owned lands to be affected, XXVIII, 787.
- " judge owned land to be benefited by abating nuisance, on suit brought by city, XXVIII, 787.
- " no one ought to be judge in own cause, XXVIII, 787.
- " statute disqualifying should be liberally and not technically construed, XXVIII, 787.
- " immediate rights of litigants not only subject to be considered, XXVIII, 787.
- " but public policy in preserving tribunal from discredit, XXVIII, 787-8.
- " father-in-law of probate judge creditor of estate, but not party to proceeding, XXVIII, 788.
- " nor that father-in-law one of executors, XXVIII, 788.
- " judge one of body of officers having interest in fine, XXVIII, 788.
- " judges inaugurated proceeding in name of another officer, XXVIII, 788.
- " three of several judges members of church which was a party, XXVIII, 788.
- " commissioners to allow claims against estate, allowed one in favor of judge, XXVIII, 788.
- " guardian *ad litem* not party, XXVIII, 788.
- " statute prohibiting judges, only applies to judges *eo nomine*, XXVIII, 788.
- " not to commissioner of highways, XXVIII, 788.
- " one of several disqualified not *void*, but must be set aside, XXVIII, 788.
- " governor of a colony may approve statute in which he is interested, XXVIII, 788.
- " stockholder of turnpike in suit against toll gatherer for penalty, XXVIII, 788.
- " remedy, if part only of judges disqualified, XXVIII, 789.
- " statutory provision that if disqualified, proceedings valid unless appealed from, not void and cannot be so treated, XXVIII, 789.
- " and if another judge called in, his proceedings void, XXVIII, 789.
- " one stipulated to be bound by decision of company's engineer, XXVIII, 789.
- " damages to be determined by two justices; party knowing justice interested consented he should act on first order; may do so on second and final one, XXVIII, 789.
- " if disqualified, cannot take deposition, XXVIII, 789.
- " cannot commit witness for contempt, XXVIII, 789.
- " one fence-viewer related to party, XXVIII, 789.
- " mother of bastard party in bastardy proceedings, XXVIII, 789.
- " relative of, disqualified, XXVIII, 789.
- " judge must be related to party, and not merely to one interested, XXVIII, 789.
- " judge related to stockholder, XXVIII, 790.
- " consanguinity not disqualification at common law, XXVIII, 790.

Disqualification—*continued.*

- " must be two adverse parties, XXVIII, 790.
- " judge appointing receiver of corporation related to stockholder, XXVIII, 790.
- " judge related to one party appointed referees, XXVIII, 790.
- " relationship by marriage not dissolved by death without issue, XXVIII, 790.
- " judge half-uncle to party's wife, XXXIII, 790.
- " relationship must be so near as to afford, of itself, evidence of partiality, XXVIII, 790.
- " party married sister-in-law of judge's wife, XXVIII, 790.
- " one of jury related, XXVIII, 790.
- " whenever and however judge notified of disqualification, should at once refuse to sit, XXVIII, 790.
- " statute forbade judge from calling in another judge and acting as counsel; cannot do so, though has sent in resignation, XXVIII, 790-1.
- " and if does, defendant entitled to reversal, XXVIII, 791.
- " surrogate who had obtained judgment paid, and proceedings to sell land instituted before him, XXVIII, 791.
- " representing receiver as counsel, does not prevent sitting in suit by third party on independent equities, XXVIII, 791.
- " counsel afterwards raised to bench, XXVIII, 791.
- " how far acts of judge, who has been counsel, void or voidable, XXVIII, 791.
- " magistrate drew lease and notice, XXVIII, 791.
- " judge sat in court below, XXVIII, 792.

Divorce. See *Husband and Wife.*

Dower, when not barred by agreement for settlement, XXVIII, 369.

Draft. See *Assignment.*

Drunkenness. See *Insanity.*

Duress, only near blood relative can plead, XXVIII, 459.

" necessity for money, not, XXVIII, 459.

Dying Declarations, list of authorities on, XXVIII, 592.

- " " what necessary to render competent, when admissible, when not, XXVIII, 592-3.
- " " if expects to die when made, hope subsequently entertained does not render incompetent, XXVIII, 593.
- " " apparently desired to say more, XXVIII, 593.
- " " deceased refused to answer questions, XXVIII, 593.
- " " when admissible in abortion, XXVIII, 593.
- " " when in forgery, XXVIII, 593.
- " " for murder of A., whether B.'s admissible where both poisoned at same time, XXVIII, 593.
- " " so where two killed by beating at same time, XXVIII, 593.
- " " state of deceased's mind determined from circumstances, XXVIII, 593.
- " " length of time before death immaterial, XXVIII, 594.
- " " must be of *facts* and not of opinions or conclusions, XXVIII, 594.
- " " only of facts living witness could testify to, XXVIII, 594.
- " " as to past events, inadmissible, XXVIII, 594.
- " " must be restricted to *res gestæ* attending injury, XXVIII, 594.
- " " what is, and what not, such, XXVIII, 594.
- " " principles on which admitted, XXVIII, 594.
- " " not if disinterested witnesses present, XXVIII, 594.

Dying Declarations—*continued.*

- " " though admissible written statement of third person not, XXVIII, 594.
- " " though may be used to refresh recollection, XXVIII, 594.
- " " competent if read to and subscribed by deceased, XXVIII, 594.
- " " made by signs and writing, XXVIII, 595.
- " " after written out day or two, deceased said intended for dying declarations, XXVIII, 595.
- " " degree of weight to be given to for jury, XXVIII, 595.
- " " if admitted, statement at another time not admissible to impeach, XXVIII, 595.
- " " cannot be rejected on account of religious belief, XXVIII, 595.
- " " evidence of prevailing religious belief in neighborhood of deceased incompetent, XXVIII, 595.
- " " proof deceased materialist, competent on credibility, XXVIII, 595.
- " " so may show condition of mind and recklessness of deceased, XXVIII, 595.
- " " so was profane, XXVIII, 595.
- " " if impeached can State show had previously made similar statements, XXVIII, 595.

E.

Easements, in every grant is reservation of easements of necessity, XXVIII, 867.

- " how right of way originates, XXVIII, 867.
- " right of way is mere easement, XXVIII, 867.
- " when deed bounded by way took under eminent domain, and not by location in after-purchase, XXVIII, 867.
- " extent of use which may make, XXVIII, 867.
- " amount of water which may use, XXVIII, 867.
- " purpose for which may be used, XXVIII, 867.
- " right to open raceway, XXVIII, 867.
- " when one having right of way may go over adjoining lands, XXVIII 867

See Support.

Election; judgment against principal debtor and two successive sureties; last surety paid judgment and had it assigned to third person for his benefit; first surety's land sold and bid in by second; principal debtor paid judgment to second surety, who satisfied it; second surety redeemed his land: held, he could not recover of principal debtor balance paid on such redemption after suing second surety and collecting part of him, XXVIII, 680.

See Fraud.

Embezzlement, when agent to collect, guilty of, XXVIII, 29.

- " when servant of corporation is not of a "person," XXVIII, 783.

See Larceny—Venue.

Eminent Domain. *See Municipal Corporations.*

Equity, when one lending wife money to pay for necessities, may recover, XXVIII, 371.

See Issues.

Estoppel, how far bill of goods conclusive, XXVIII, 414.

See Bona fide—Former Suit.

Evidence, suit for ejecting from car cannot prove bruises fortnight afterward, XXVIII, 276.

" when depositions may be read on account of illness, etc., of witness, XXVIII, 858.

" how far bill of goods conclusive, XXVIII, 414.

" of age of accused, XXVIII, 516.

" may court examine prisoner? XXVIII, 516.

" appearance of person as evidence of age, XXVIII, 516.

" mere naked opinion as to age, from appearance, XXVIII, 516.

" accompanied by facts on which based, XXVIII, 516.

" size, etc., inadmissible if direct proof attainable, XXVIII, 516.

" entry of physician as to time of birth, XXVIII, 516.

" entry of lawyer in register, XXVIII, 516.

" family reputation to prove age, XXVIII, 516.

" one charged with larceny may prove arrangement with third person to return property, XXVIII, 581.

" letter of one accomplice in smuggling, XXVIII, 683.

" letter by husband to wife, XXVIII, 684.

" confessions when intoxicated, XXVIII, 684.

" defendant directed to certain persons: when what they said inadmissible, XXVIII, 684.

" that one had been adjudged a lunatic is competent, XXVIII, 663.

See *Dying Declarations—Gambling Instruments*.

Exception, not necessary to negative in indictment, XXVIII, 656.

See *Easements*.

Excise, license, personal trust and cannot be assigned, XXVIII, 348.

" contract to assign illegal, XXVIII, 348.

" not in New Jersey, XXVIII, 348.

" may carry on business by agent, XXVIII, 348.

" mandamus will not lie to compel granting *license*, XXVIII, 380.

Execution. See *Attachment*.

Executive. See *Extradition*.

Executors and Administrators, one pledged stock and gave power of attorney; pledgee sold or pledged: other executors estopped from claiming scrip without paying advance by second pledgee, XXVIII, 841.

" " mere purchase from, no notice he is acting or has acted improperly, XXVIII, 841.

See *Insurance, Fire*.

Exemplary Damages, when proper and when not, against railway company, XXVIII, 276.

Exempt Property, subject to boarding house keeper's lien, XXVIII, 400.

Express Companies. See *Carriers*.

Extradition, law of from Canada to United States, XXVIII, 33.

" must comply strictly with forms, etc., XXVIII, 33.

" what not offence within statute, XXVIII, 33.

" surrender sufficient evidence *corpus de licti*, XXVIII, 33.

" indictment insufficient, XXVIII, 33.

" warrant necessary, XXVIII, 33.

" copies or original depositions admissible, XXVIII, 84.

" treaties with different countries, XXVIII, 84.

" when treaty does not apply, *ex post facto*, XXVIII, 84.

" commissioner sole judge sufficiency of evidence, XXVIII, 84.

" not to consider whether foreign government authorizes, XXVIII, 84.

" evidence such as authorized in country of demand, XXVIII, 84.

" whether accused competent, XXVIII, 84.

Extradition—continued.

- " extradited for one crime, can prisoner be tried for different one?
XXVIII, 84.
- " when may be arrested in civil case, XXVIII, 84.
- " even by party extraditing, if no bad faith, XXVIII, 84.
- " without treaty, no extradition, XXVIII, 84.
- " act as to from one state to another, constitutional, XXVIII, 84.
- " executive of state demanding and of that where person found
stand equal, XXVIII, 85.
- " each to exercise for protection of own citizens, XXVIII, 85.
- " if held in one state by its laws, cannot be extradited to another,
XXVIII, 85.
- " even though held under civil arrest, XXVIII, 85.
- " can governor of territory make requisition? XXVIII, 85.
- " may be extradited to District of Columbia, XXVIII, 85.
- " "misdemeanor" a "crime" within statute, XXVIII, 85.
- " embraces every criminal offence, XXVIII, 85.
- " recitals in warrant of surrender *prima facie*, XXVIII, 35.
- " meaning of "flee from justice," XXVIII, 35.
- " never in fact in state, only constructively so, XXVIII, 35.
- " proof that "fled" from state necessary, XXVIII, 35.
- " though not necessary should flee secretly, sufficient that has de-
parted, XXVIII, 85.
- " fact of indictment *prima facie* evidence committed offence in state
and fled, XXVIII, 36.
- " giving up, discretionary, XXVIII, 36.
- " but should only inquire whether crime substantially charged,
XXVIII, 36.
- " if shown to be within statute, no discretion, XXVIII, 36.
- " right to is a legal right, XXVIII, 36.
- " governor may revoke own or predecessor's warrant, XXVIII, 36.
- " if done, cannot reach by *habeas corpus*, XXVIII, 36.
- " cannot be discharged for formal defects in indictment, XXVIII,
36.
- " question of guilt or innocence immaterial, XXVIII, 36.
- " if papers on which surrender granted defective, court may dis-
charge on *habeas corpus*, XXVIII, 36.
- " on *habeas corpus*, notice to attorney-general unnecessary, XXVIII,
37.
- " Federal courts may grant *habeas corpus*, XXVIII, 37.
- " though state courts cannot, if issued by Secretary of State of
United States, XXVIII, 37.
- " governor cannot surrender without judicial proceedings in other
state, XXVIII, 37.
- " nor without demand from other, XXVIII, 37.
- " indictment shows is offence in other state, XXVIII, 37.
- " printed statutes may be read to show, is, XXVIII, 37-39.
- " how fact charged with crime proved, XXVIII, 37.
- " how records to be authenticated, XXVIII, 37.
- " what warrant of executive required to state, XXVIII, 37.
- " how far warrant conclusive, XXVIII, 37.
- " in *Massachusetts*, *prima facie* at least of all legal requisites,
XXVIII, 37.
- " so in *New York*, XXVIII, 37.
- " whether it is conclusive? XXVIII, 37.
- " not discharged because warrant for surrender contains no warrant
for arrest, XXVIII, 37.
- " what sufficient allegation "charged" with offence, XXVIII, 38.
- " "theft" synonymous with larceny, XXVIII, 38.
- " not necessary copy evidence to be attached to warrant, XXVIII,
38.

Extradition—continued.

- " return to *habeas corpus*, setting out warrant *prima facie* valid, warrant for surrender sufficient without papers on which it was issued, XXVIII, 38.
- " duty of court where papers on which was issued produced, XXVIII, 38.
- " what warrant of surrender required to show, XXVIII, 38.
- " what affidavit required to show, XXVIII, 38, 39.
- " when affidavits insufficient for certain offences enumerated, XXVIII, 38.
- " prisoner cannot read petition for *habeas corpus* in evidence, XXVIII, 38.
- " courts cannot compel governor, by certiorari, to return papers on which granted warrant of surrender, XXVIII, 39.
- " duty of governor discussed, XXVIII, 39.
- " question of identity of accused always open, XXVIII, 39.
- " one arresting not liable though governor's warrant void, XXVIII, 40.
- " how far previous adjudication *res adjudicata*, XXVIII, 40.
- " on second warrant, adjudication on first is not, XXVIII, 40.
- " statute authorizing arrest and detention for reasonable time to enable requisition to be made, XXVIII, 40.

F.

Factor, when may not pledge, XXVIII, 338.

See *Bona fide*.

False Imprisonment, one arresting for extradition on void warrant by governor, XXVIII, 40.

Felony. See *Title*.

Fish. See *Larceny*.

Food, cases bearing upon adulteration, XXVIII, 384.

Forgery, when filling blanks is, XXVIII, 442.

- " writing instrument over name, XXVIII, 442.
- " boys wrote for amusement, and defendant found and passed apparent instrument, XXVIII, 442.
- " when delivering instrument with blanks gives implied authority to fill, XXVIII, 442.
- " having unfinished instruments in possession, XXVIII, 443.
- " dying declarations in, XXVIII, 593.
- " not to alter indorsement of payment on a bond, note, etc., XXVIII, 766.
- " paper delivered to one whose name forged to it; not liable for refusing to return it, XXVIII, 842.
- " corporation bonds stolen before countersigned by trustee and his name countersigned, XXVIII, 843.
- " corporation having got bonds, not bound to restore them, XXVIII, 843.

Former Suit, when damages continuing, and when no second recovery can be had, XXVIII, 348.

" " ouster not evidence against one not party, XXVIII, 540.

" " when contractor bound by suit against city, XXVIII, 747.

Fractions of a Day. See *Day*.

Fraud, no defence to financial officer that statute fraudulently passed, XXVIII, 5.

" judgment against principal debtor and two successive sureties; last surety paid judgment and had assigned to third person for his benefit;

Fraud—*continued.*

first surety's land sold and bid in by second ; principal debtor paid judgment to second surety who satisfied it ; second surety redeemed his land : held, he could not recover of principal debtor balance paid on such redemption after suing second surety and collecting part of him, XXVIII, 680.

" by agent within scope of authority, XXVIII, 680.

" when party defrauded must use other means of indemnity he possesses, XXVIII, 840-1.

See *Animals—Bona fide—Rape—Title.*

Funds, pledgee through fraud, if has other means of indemnity, must use them, XXVIII, 840.

G.

Gambling Instruments, right of officers to take and detain, XXVIII, 423.

" " right to destroy liquors, XXVIII, 423.

" " right to destroy gambling instruments, XXVIII, 423.

" " game-cocks not implements of gaming, XXVIII, 423.

" " measure of damages for destroying, XXVIII, 424.

Game. See *Larceny.*

Garnishment. See *Attachment.*

Governor. See *Extradition.*

Grant. See *Conveyance—Easements—Support.*

Guardian ad litem, not a party to suit, XXVIII, 788.

H.

Habeas Corpus. See *Extradition.*

Health, cases bearing upon adulteration of food, XXVIII, 384.

Hearsay, when what was said and done by third persons to whom defendant directed, are, XXVIII, 634.

Heirs. See *Insurance, Fire.*

Highways, when municipal corporations not liable for closing, XXVIII, 831.

See *Disqualification—Mandamus—Negligence.*

Homicide. See *Intent.*

Hotel Keepers. See *Lien.*

Hunting. See *Animals.*

Husband and Wife, in suit against assumed husband for necessities, cannot deny marriage, XXVIII, 367.

" " husband's liability based on default, XXVIII, 367.

" " if does not provide necessities cannot, by notice, prevent selling to wife, XXVIII, 367.

" " even though compels wife to leave him, only liable for necessities suitable to condition, XXVIII, 367.

" " must be necessities relative to condition, XXVIII, 367.

" " income and capacity to earn both, considered, XXVIII, 367.

" " if not wholly ornamental, question of fact whether necessary, XXVIII, 367.

" " gold watch, etc., XXVIII, 367.

" " evidence style of associates, etc., proper, XXVIII, 367.

Husband and Wife—continued.

- " " what trader must show who sues husband who has forbidden, XXVIII, 367.
- " " rule same where live apart, XXVIII, 367.
- " " evidence other women wore same, XXVIII, 367.
- " " evidence husband wore diamonds, etc., XXVIII, 367.
- " " so had paid for silk dresses, XXVIII, 367.
- " " wife's declarations inadmissible, XXVIII, 367.
- " " so evidence other purchases by wife, XXVIII, 367.
- " " wife competent to prove cause for leaving, XXVIII, 367.
- " " but see in proceeding as disorderly person, XXVIII, 368.
- " " evidence amount tax husband pays, XXVIII, 368.
- " " mere marital relation does not create agency for article not proper to station, XXVIII, 368.
- " " husband only liable under special circumstances, XXVIII, 368.
- " " complaint must allege sale to husband, or facts showing right of wife to bind, XXVIII, 368.
- " " wife, after separation, bought of one had dealt with, XXVIII, 368.
- " " of one had not, XXVIII, 368.
- " " if live together, wife presumptively husband's agent, XXVIII, 368.
- " " but presumption which may be rebutted, XXVIII, 368.
- " " if has forbidden, cannot purchase though seller not notified, XXVIII, 368.
- " " husband may show wife properly supplied, XXVIII, 368.
- " " if husband makes allowance, rebuts presumption of wife's agency, XXVIII, 368.
- " " though trader not notified has forbidden, XXVIII, 368.
- " " husband did not pay allowance in full, XXVIII, 369.
- " " husband knowing of purchase on credit, allowed wife to use without objection, XXVIII, 369.
- " " though has made allowance which not paid, if does not forbid credit, XXVIII, 369.
- " " if alimony fixed and paid, wife cannot bind, XXVIII, 369.
- " " divorce suit and reference as to alimony pending, but alimony not fixed, XXVIII, 369.
- " " offer by husband to supply, on conditions wife not bound to accept, XXVIII, 369.
- " " previous provision withheld on separation, XXVIII, 369.
- " " if husband guilty of adultery, wife may live elsewhere, XXVIII, 369.
- " " though he forbid trusting her, XXVIII, 369.
- " " husband agreed to pay wife's father, liable though paid wife alimony, XXVIII, 369.
- " " so, though forbade all persons trusting her, XXVIII, 369.
- " " and she once went back to him, XXVIII, 369.
- " " so, though offered to provide for, if returned to father, XXVIII, 369.
- " " if agrees to settle on contemplated wife if would relinquish dower, she not barred if settlement not made, XXVIII, 369.
- " " if husband settles through trustee, latter may recover in ejectment though wife guilty of adultery, XXVIII, 370.
- " " if wife leaves without just cause, husband not liable, XXVIII, 370.
- " " if ready and willing to support, and gives no just cause for leaving, only bound to support wife at own house, XXVIII, 370.
- " " though wife insane, XXVIII, 370.
- " " onus to show left for his misconduct, XXVIII, 370.

Husband and Wife—continued.

- " " occasional quarrels and conflicts not sufficient, XXVIII, 370.
- " " unless husband offending party, XXVIII, 370.
- " " if separate by *consent*, husband liable, XXVIII, 370.
- " " unless husband adequately provides for her, XXVIII, 370.
- " " so may pledge credit for children's support, XXVIII, 370.
- " " if separate and allowance not paid, XXVIII, 370.
- " " husband must *pay*, wife not bound to *demand*, XXVIII, 370.
- " " when husband liable for physician for wife, XXVIII, 370.
- " " female servant continued to work for wife, XXVIII, 370.
- " " if husband turns or drives wife away, she may pledge his credit, XXVIII, 370.
- " " and so of child which wife takes with her, XXVIII, 371.
- " " not discharged by wife's *subsequent* return, XXVIII, 371.
- " " if facts entitling to pledge credit exist, one not knowing thereof may recover, XXVIII, 371.
- " " husband had previously used violence, but wife did not leave from present fear of, XXVIII, 371.
- " " if wife leaves without cause, husband liable if she offer to return and he refuses to receive her, XXVIII, 371.
- " " nor if leaves for cause and he offer to take back, and she refuse because will not live with his parents, XXVIII, 371.
- " " what necessary to show to make him disorderly person, XXVIII, 371.
- " " at common law, if husband refuse, remedy action at law by person supplying, XXVIII, 371.
- " " wife seeking to recover of husband, and to restrain his spending property she conveyed to him, XXVIII, 371.
- " " remedy of wife if supports self, XXVIII, 371.
- " " one advanced money to wife to purchase necessities, XXVIII, 371.
- " " cannot furnish articles not necessities and recover part value, on theory supplied want of other necessities, XXVIII, 372.
- " " if credit given to wife, husband not liable, XXVIII, 372.
- " " if wife contracts, she and not husband liable, unless he expressly contracts to pay, XXVIII, 372.
- " " one supported children, and wife left for cause from design for carnal intercourse, XXVIII, 372.
- " " liability of parent for necessities furnished child, XXVIII, 372.
- " " when adulterer may be convicted of larceny, XXVIII, 624.
See Evidence.

I.

Illegal Agreements, contract to assign license to sell liquor, XXVIII, 348.

- " " not to carry on by agent, XXVIII, 348.
- " " courts bound to refuse relief, although invalidity not pleaded, XXVIII, 458.
- " " consul to be paid commission on contract with his government, XXVIII, 458.
- " " agreement private messages of railroad company to be telegraphed free, XXVIII, 458.
- " " mortgage given to avoid taxes, XXVIII, 458.
- " " if unexecuted, may money be recovered back? XXVIII, 458.

Illegal Agreements—continued.

- " " savings bank loaned on personal obligations only, XXVIII, 458.
- " " more than one-tenth of capital stock to one person, XXVIII, 458.
- " " mortgage to national bank for present and not past loan, XXVIII, 458.
- " " national bank may deal in government securities, XXVIII, 459.
- " " duress must be near relative, XXVIII, 459.
- " " duress, necessity for money not, XXVIII, 459.

Impeachment, of pretended accomplice, XXVIII, 559.

See *Dying Declarations*.

Indictment, not necessary to negative exceptions, XXVIII, 656.

- " property in coffin may be laid in person furnishing, XXVIII, 656.

See *Obscene Literature—Venue*.

Indorsement, not to alter of payment on bond, note, etc., XXVIII, 766.

Indorser, of bill for collection, indorsement special and entitled to proceeds, XXVIII, 328.

Infant, liable for torts or negligence, XXVIII, 749.

Injunctions, against building part railroad, XXVIII, 5.

- " so to restrain taking up track, XXVIII, 5.
- " by wife to restrain husband spending property she conveyed to him, XXVIII, 371.

Innkeepers. See *Lien*.

Innocent Persons. See *Bona fide*.

Insanity, mere voluntary intoxication no defence to crime, XXVIII, 659.

- " voting twice when drunk, XXVIII, 660.
- " assault and battery when drunk, XXVIII, 660.
- " so shooting with intent to kill, XXVIII, 660.
- " evidence of intoxication admissible on question of intent, XXVIII, 660.
- " larceny when drunk, XXVIII, 661.
- " so perjury, XXVIII, 661.
- " insanity caused by previous intemperance, and not resulting from immediate influence of intoxicating liquors, is defence, XXVIII, 661.
- " though temporary insanity, produced immediately by intoxication, not, XXVIII, 661.
- " which party has onus in cases where insanity interposed, XXVIII, 661-2.
- " evidence that had been previously adjudged a lunatic, competent, XXVIII, 662.

Insurance, when provision in policy that consent must be in writing waived, XXVIII, 533.

See *Arbitration*.

Insurance, Fire, to "estate of A." of heirs, and also of personal representatives, XXVIII, 161.

- " " to be invalid if incumbered, applies only to voluntary incumbrances, XXVIII, 161.
- " " does not cover mechanic's lien, XXVIII, 162.
- " " to become invalid in case of sale, is so though husband transfers to wife instead of by will, XXVIII, 162.
- " " when invalid from transfer, by reason of death of owner XXVIII, 162.
- " " renewal in name of party after his death, XXVIII, 162.
- " " executory contract to sell, not change of title, XXVIII, 162.
- " " purchaser to be tenant, and was in possession at time of fire, XXVIII, 162.

Insurance, Fire—continued.

- " " sale on mortgage foreclosure, without confirmation, XXVIII, 162.
- " " sale and confirmation, XXVIII, 162.
- " " clause as to foreclosure does not cover a creditor's bill, XXVIII, 162.
- " " firm property ; appointment of receiver *pendente lite*, XXVIII, 163.
- " " new partner admitted, and one old one sold out to others, XXVIII, 163.
- " " transfer in bankruptcy, XXVIII, 163.
- " " though loss payable to mortgagee, XXVIII, 163.
- " " consent after sale and transfer, valid, XXVIII, 163.
- " " notice of mortgage, not of deed, executed as part of same transaction, XXVIII, 163.

Intent, essential to crime, XXVIII, 64.

- " action and criminal intent, XXVIII, 64.
- " distinction between civil and criminal cases, XXVIII, 64.
- " several committed burglary, police officer came up and one shot him, XXVIII, 64.
- " one present at fight without assisting, XXVIII, 65.
- " in assault by two, one killed, XXVIII, 66.
- " because assisted in killing stolen cow, not guilty of previous larceny, XXVIII, 66.
- " corporation may be guilty of some crimes, XXVIII, 66.
- " though corporators not participating, not guilty, XXVIII, 66-8.
- " municipal corporation indictable for not keeping street in repair, XXVIII, 68.
- " but not individual corporator, XXVIII, 68.
- " act done as agent, state must show were such, probability not sufficient, XXVIII, 68.
- " master cannot be for *negligence* of servant, XXVIII, 68.
- " so for affirmative act, unless directed it, XXVIII, 68.
- " servant selling liquor, XXVIII, 68.
- " master may rebut *prima facie* evidence of agency to commit crime, XXVIII, 68.
- " agent sold to common drunkard, XXVIII, 68-9.
- " so from publication of libel, XXVIII, 68-9.
- " when master liable, *civilly*, for acts of agent, XXVIII, 69.

See *Insanity—Motive*.

International Law, taking chattel mortgage property to Canada, and selling according to law of that province, XXVIII, 679.

- " " law of Canada in such case, XXVIII, 679.

See *Extradition—Venue*.

Intoxication, confessions when in state of, XXVIII, 634.

See *Insanity*.

Issues, remedy on review of verdict upon issues in equity action, XXVIII, 11.

- " verdict not binding upon court, but merely advisory, XXVIII, 11.

J.

Joint Debtors, attachment against two, and subsequent attachment against one, XXVIII, 198.**Judge. See Disqualification.****Judgment. See Day.****Jurisdiction, crime within 500 yards of county line, XXVIII, 52.**

Jurisdiction—*continued.*

- " can court of local jurisdiction appoint referee to sit outside of locality? XXVIII, 52.
- " court cannot adjourn elsewhere than at court house, XXVIII, 52.
- " referee sat without locality, XXVIII, 52.
- " effect of objection to adjournment elsewhere, XXVIII, 52.
- " effect of not objecting, XXVIII, 52.
- " effect of no appearance, XXVIII, 52.
- " must appear affirmatively, decision not made within the locality, XXVIII, 52.

See *Disqualification—Officers—Remittitur—Venus.*

Justification. See *Disqualification—Officers.*

L.

Landlord and Tenant, effect on surety, of landlord failing to perform independent agreement, XXVIII, 419.

- " " remedy of tenant, XXVIII, 419.
- " " effect of landlord cutting off water, XXVIII, 416.

Larceny, when one guilty of larceny or embezzlement of carcasses of, animals, XXVIII, 126.

- " "Coon" *fera natura* not subject of larceny, XXVIII, 126.
- " oysters, fish, etc., XXVIII, 127.
- " ungathered seaweed, XXVIII, 127.
- " trespass for entering and taking, XXVIII, 127.
- " taking part of realty, as ore, XXVIII, 127.
- " interval between separation and taking, XXVIII, 127.
- " copper pipes annexed to realty, XXVIII, 127.
- " lead of gutters, XXVIII, 127.
- " after severance left on ground, thief returned and took, XXVIII, 127.
- " doors of unoccupied house, XXVIII, 127.
- " chandeliers, XXVIII, 127.
- " what is obtaining sufficient possession to constitute larceny, and what not, XXVIII, 127.
- " when adulterer may be convicted of larceny, XXVIII, 624.
- " on high sea, XXVIII, 624.
- " bringing property from another state, XXVIII, 624.
- " is to steal coffin, XXVIII, 656.
- " property may be laid in person furnishing, XXVIII, 656.
- " when drunk, XXVIII, 661.

See *Bona fide—Consent—Fraud—Motive—Venus.*

Lease, on condition should keep buildings in good repair, XXVIII, 317.

- " what not breach condition, not to carry on business of retailer or common brewer, XXVIII, 318.

Letter. See *Evidence.*

Levy. See *Attachment—Day.*

Lex Loc. See *International Law.*

Lien, of boarding house keepers by N. Y. statute, XXVIII, 400.

- " method of foreclosure thereof, XXVIII, 400.
- " as to liability of boarding house keepers, XXVIII, 400.
- " who not boarding house keeper, XXVIII, 400.
- " gives same lien as innkeeper had at common law, XXVIII, 400.
- " so in Wisconsin, XXVIII, 400.
- " exempt property subject to lien, XXVIII, 400.
- " only for board actually due; does not extend to damages for breach contract, XXVIII, 400.

Lien—*continued.*

- " only claims actually *due*, XXVIII, 400.
- " though does to current week, XXVIII, 400.
- " lien on property of third person, XXVIII, 400.
- " none on wife's property and wearing apparel, XXVIII, 401.
- " mortgagor cannot give for keep, XXVIII, 401.
- " waiver by acceptance of draft, XXVIII, 401.
- " notice of sale, when unnecessary, XXVIII, 401.

See *Day*.

Liquor. See *Excise—Gambling Instruments—Minors*.

Lunatic. See *Insanity*.

M.

Mails. See *Obscene Literature*.

- Mandamus,** to compel railway company to build bridge, etc., XXVIII, 4.
- " not granted if fruitless or impossible to perform, XXVIII, 4.
 - " nor to appoint officer if term expired, XXVIII, 4.
 - " to compel comptroller to draw warrant where no funds, XXVIII, 5.
 - " to compel treasurer municipal corporation no funds, XXVIII, 5.
 - " to compel attorney-general to give certificate, entitling to payment, XXVIII, 5.
 - " officers cannot appoint on condition will take less than legal salary, XXVIII, 5.
 - " if do, compelled to give requisition for full salary, XXVIII, 5.
 - " how body put in motion in such case, XXVIII, 5.
 - " in *Michigan*, none to board state auditors, XXVIII, 5.
 - " no defence, statute fraudulently obtained, XXVIII, 5.
 - " treasurer compelled to pay audited claims if funds applicable to, XXVIII, 5.
 - " officers compelled to levy tax, XXVIII, 5.
 - " railway company bound to exercise franchise, XXVIII, 5.
 - " cannot abandon or refuse to run part road, XXVIII, 5.
 - " may be restrained from building part of road, XXVIII, 5.
 - " so from taking up part of track, XXVIII, 6.
 - " mandamus lies to compel operation of road, XXVIII, 6.
 - " remedy against county to compel repair of bridge, XXVIII, 6.
 - " to compel officers to enter into contract with lowest bidder, XXVIII, 6.
 - " to compel engineer to give certificate, XXVIII, 6.
 - " to compel carrier to transport goods, XXVIII, 6.
 - " if officer puts out of power to perform, punished for contempt, XXVIII, 6.
 - " will not lie to compel granting excise license, XXVIII, 330.

Mandate. See *Remittitur*.

Masonic Lodge. See *Benevolent Societies*.

Master and Servant. See *Intent—Negligence*.

Memoranda, of lawyer, physician, etc., XXVIII, 516.

- " of dying declarations used to refresh recollection, XXVIII, 594.
- " when admissible, XXVIII, 594.

Mines. See *Support*.

Minors, selling liquor to, XXVIII, 581.

Mistake, effect of railway conductor handing back too much fare, XXVIII, 269.

Money. See *Title*.

Money Had and Received, when may be recovered back on illegal agreement, XXVIII, 458.

Money Lent, to wife to pay for necessities, XXVIII, 371.

Money Paid, recovery for money lent wife to pay for necessities, XXVIII, 371.
See *Principal and Surety*.

Mortgage, mortgagor in possession owner within statute as eminent domain, XXVIII, 830.

" assignment of bond and mortgage gives no better title than seller has, XXVIII, 837.

See *Illegal Agreement*.

Motion. See *Stay*.

Motive, one believing has right to take property, not guilty of larceny, XXVIII, 580.

" not if merely taken to retaliate and not to convert, XXVIII, 580.

" taking money to apply on debt, XXVIII, 580.

" not robbery in such case, XXVIII, 580.

" keeping umbrella because repairs not paid, XXVIII, 580.

" tearing down bawdy houses under supposed right to do so, XXVIII, 580.

" merely taking horse to ride and turning it loose, XXVIII, 581.

" may prove arranged with third person to return horse, XXVIII, 581.

" pledging property, intending to redeem, XXVIII, 581.

" selling absolutely, intending to repurchase, XXVIII, 581.

" paymaster overstated amount due, intending to appropriate excess, XXVIII, 581.

" taking property openly, XXVIII, 581.

" if special intent necessary beyond act, must be proved, XXVIII, 581.

" when ignorance of law or advice of counsel, no defence, XXVIII, 581.

" when is on perjury, XXVIII, 582.

" selling liquor to minor, supposed had parents' leave, XXVIII, 581.

" one obstructing highway had been allowed by former officers to do so, XXVIII, 582.

See *Insanity—Intent*.

Municipal Corporation, remedy against, if engineer refuses to give certificate, XXVIII, 6.

" " can recover over against one for whose negligence compelled to pay, XXVIII, 747.

" " when liable, and when not, for changing grade of street, XXVIII, 830.

" " officer making must plead facts, suit not stayed on motion, XXVIII, 830.

" " mortgagor in possession proper party to assess damages to, XXVIII, 830.

" " damages assessed for street, when cannot be assessed on adjoining owners, XXVIII, 830.

" " damages not recoverable for change of grade ordered but not made, XXVIII, 830.

" " abutting owner not entitled to damages, unless cutting or filling necessary to use, XXVIII, 830.

" " may close street without damages, XXVIII, 831.

" " when change of control from city to park commissioners does not entitle to damages, XXVIII, 831.

" " if city authorized to grant to park commissioners, may do so on any condition pleases, XXVIII, 831.

See *Intent—Mandamus—Negligence*.

Murder. See *Intent*.

N.

National Banks. See *Illegal Agreements*.

Necessaries. See *Husband and Wife*.

- Negligence**, when breaking of car wheel no evidence of, XXVIII, 193.
- " one doing illegal and mischievous act liable for consequence, XXVIII, 307.
 - " chasing boy who knocks out spigot, XXVIII, 307.
 - " dangerous machinery left where children may be injured by, XXVIII, 307.
 - " child strayed on railroad ground, where injured by turn table, XXVIII, 307.
 - " one left cart in street and child injured, XXVIII, 307.
 - " by contractor, XXVIII, 745.
 - " test to determine whether servant or contractor, XXVIII, 745.
 - " what independent employment, XXVIII, 745.
 - " one not liable for negligence of contractor or servant, XXVIII, 745.
 - " may be contractor though paid by day, XXVIII, 745.
 - " slater is, XXVIII, 745.
 - " one putting in supports to roof when not liable, because according to plan of architect, XXVIII, 745.
 - " cart and driver let by day, XXVIII, 745.
 - " one employed to drive logs in river, XXVIII, 745.
 - " when question of fact whether stevedore a contractor, or not, XXVIII, 745.
 - " one building railway, running trains, XXVIII, 746.
 - " one employing contractor, not liable if work legal, XXVIII, 746.
 - " city employed contractor to build sewer; one fell into excavation, XXVIII, 746.
 - " builder left excavation in sidewalk, XXVIII, 746.
 - " statute requiring notice of excavation, or to shore adjoining building, owner cannot shift responsibility to contractor, XXVIII, 747.
 - " so city or corporation cannot shift for act required to do itself, XXVIII, 747.
 - " employing to do work intrinsically dangerous, XXVIII, 747.
 - " contractor left rubbish in street, XXVIII, 747.
 - " city can recover over against contractor, XXVIII, 747.
 - " owner allowed to erect hoarding, liable absolutely, XXVIII, 747.
 - " building burned, owner left walls standing, and they fell, XXVIII, 747.
 - " city for blasting, causing horses to be frightened, XXVIII, 747.
 - " railroad company directed contractor to enter and build railway, XXVIII, 747.
 - " care must be commensurate with danger, XXVIII, 749, 750.
 - " negligence, but injury accidental, XXVIII, 749.
 - " whistle of engine blown so as to frighten horses, XXVIII, 749.
 - " horses frightened by engine running below grade of highway, XXVIII, 749.
 - " one injured by fireworks let off by boy, XXVIII, 750.
 - " one transporting machinery calculated to frighten horses, XXVIII, 750.
 - " turnpike company left pile of stones which frightened horses, XXVIII, 750.
 - " carcass of animal in street frightened horse, XXVIII, 750.
 - " city not liable for fall of market house from unprecedented wind, XXVIII, 750.
 - " from fall of wooden awning covering sidewalk, XXVIII, 750.
 - " injury from fall of overhanging mass of snow, XXVIII, 750.
 - " owner liable for injury from building falling into street, XXVIII, 750.

See *Railway Companies*.

New Trial, when granted on account of inadequate or excessive damages, XXVIII, 847.

See *Issues*.

- Notice**, when of mortgage, not of deed executed as part of same transaction, XXVIII, 168.
- " when purchases property at under value, is of want of authority in seller, XXVIII, 838.
 - " purchase from or through executor, no notice he is selling or had sold improperly, XXVIII, 841.
 - " fact power of attorney thirteen years old puts on inquiry, XXVIII, 842.
 - " sufficient to put on inquiry, is of everything which inquiry would have revealed, XXVIII, 842.
 - " fact, acts as agent, is that agent does not own property, XXVIII, 848.
- See *Arbitration—Bona fide—Carriers.*
- Nuisance.** See *Gambling Instruments—Venue.*

O.

- Obscene Literature**, validity of order for destroying, XXVIII, 515.
- " " depositing in United States mails, XXVIII, 515.
 - " " constitutionality of statute, XXVIII, 515.
 - " " requisites of indictment in such case, XXVIII, 515.
 - " " when bill of particulars ordered, XXVIII, 515.
 - " " when pamphlet a "book," XXVIII, 515.
 - " " must be general description of paper, etc., XXVIII, 515.
 - " " how obscenity to be alleged, XXVIII, 515.
 - " " excuse for not alleging words, XXVIII, 516.
 - " " how age of accused ascertained, XXVIII, 516.
- Odd Fellows.** See *Benevolent Societies.*
- Officers**, cannot appoint on condition will take less than legal salary, XXVIII, 5.
- " when punished for contempt, XXVIII, 6.
 - " when punished for contempt, if puts it out of power to perform, XXVIII, 6.
 - " when may be removed, XXVIII, 325.
 - " what office and what employment, XXVIII, 539.
 - " what new office, and not new duties added to old one, XXVIII, 539.
 - " one acting as *presumed* to be one, XXVIII, 539.
 - " even in own favor or against him, XXVIII, 539.
 - " *special* deputy not officer, XXVIII, 540.
 - " *general* deputy is, XXVIII, 540.
 - " governor's commission *prima facie* evidence of recitals, XXVIII, 540.
 - " ouster not evidence against one not party, XXVIII, 540.
 - " proceedings unconstitutional court, XXVIII, 540.
 - " may be *de facto*, though no *de jure* officers, XXVIII, 540.
 - " court not continued by vote, but was in fact, XXVIII, 540.
 - " office abolished, though supposed not to be, XXVIII, 540.
 - " if *de facto* with color, title cannot be attacked collaterally, XXVIII, 540.
 - " who is *de facto* and who not, XXVIII, 540.
 - " must be under *color* of office, whose duty should have been discharged by person filling it, XXVIII, 540.
 - " must have possession or reasonable color of title, with actual use, XXVIII, 540.
 - " if appointing power has *no* authority, can confer none, XXVIII, 540.
 - " though not necessary should have competent power to invest with good title, XXVIII, 540.
 - " sufficient should have colorable power to appoint, XXVIII, 540.
 - " one asserting title, or justifying, must be *de jure* as well as *de facto*, XXVIII, 541.
 - " is *de facto*, though appointment informal, if by proper authority, XXVIII, 541.

Officers—*continued.*

- " if required to be in writing, cannot be oral, XXVIII, 541.
- " inserting name in tax list, XXVIII, 541.
- " when governor's appointee not entitled, because no vacancy, XXVIII, 541.
- " how determined, where two exercising duties office, XXVIII, 541.
- " if but one office, can be but one *de jure*, XXVIII, 541.
- " distinction between *de jure* and *de facto* explained, XXVIII, 541.
- " officer deriving from appointment of officers *de facto* is *de jure*, XXVIII, 541.
- " effect of failure to take oath or give bond, XXVIII, 542.
- " accepting office not inconsistent, XXVIII, 542.
- " one who accepts inconsistent, continuing to act, XXVIII, 542.
- " presumption did duty does not prove independent and substantive facts, XXVIII, 542.
- " when must defend on the facts, and not entitled to stay on motion, XXVIII, 830.

See *Accomplice—Attachment—Consent—Disqualification—
Gambling Instruments—Mandamus—Obscene Literature.*

Onus, as to proof passenger knew regulations of railway company, XXVIII, 269.

- " on trader who has sold to wife, XXVIII, 367, 370.
- " which party has, where insanity interposed as a defence, XXVIII, 662.

Opinion, as to age of person, XXVIII, 516.

Order. See *Assignments.*

Owner, when mortgagor in possession to be treated as, XXVIII, 830.

See *Negligence.*

Oysters. See *Animals—Larceny.*

P.

Parent and Child, liability of parent for necessaries furnished child, XXVIII, 372.

See *Husband and Wife.*

Park, change of control street from city to park commissioners does not entitle owner to damages, XXVIII, 831.

- " if city authorized to grant, may do so on any condition pleases, XXVIII, 831.

Partnership. See *Principal and Surety.*

Party. See *Disqualification.*

Passengers. See *Railway Companies.*

Payment, not forgery to alter indorsement of on bond, note, etc., XXVIII, 766.

See *Title.*

Performance, must be strict and literal; on contract butter from certain number, some cows ceased to give milk, XXVIII, 414.

Perjury, when drunk, XXVIII, 661.

See *Motive.*

"Person," when corporation included in word "person," XXVIII, 783.

Pleadings, conductor sued for assault and battery must plead facts giving right to eject, XXVIII, 276.

- " if contract illegal courts bound to refuse relief, though invalidity not pleaded, XXVIII, 458.

Preference, carrier giving one customer over another, XXVIII, 141.

Presumption, that officer has done duty does not prove independent substantive facts, XXVIII, 542.

" that endorsement still remained on note, XXVIII, 838.

" scrip with blank power of attorney raises presumption of ownership, XXVIII, 841.

See *Husband and Wife—Officers—Onus*.

Principal and Accessory. See *Intent—Venus*.

Principal and Agent, may carry on business of selling liquor under license, by agent, XXVIII, 848.

" " A. sold goods to B., supposed selling to C. by B. as agent. No remedy against C. if he buys of B., XXVIII, 679.

" " agent authorized to sell, authorized to make any representation incident to, XXVIII, 679.

" " one gave usurious note to brokers, bound by their representations on sale, XXVIII, 679.

" " agent to sell presumptively has no authority to warrant, XXVIII, 680.

" " receipt of proceeds, without knowledge of unauthorized warranty, no ratification, XXVIII, 680.

" " otherwise if does so with knowledge, XXVIII, 680.

" " so if agent perpetrates fraud within scope of authority, XXVIII, 680.

" " receipt of proceeds of own property no ratification of unauthorized, unknown collateral contract, XXVIII, 680.

" " stockholder not liable for tort of corporation, XXVIII, 67, 700.

" " agent to sell, not to pledge, XXVIII, 838.

See *Bona fide—Forgery—Husband and Wife—Intent—Railway Companies*.

Principal and Surety, contract for butter from milk of 20 cows, must be full performance, or surety not liable, XXVIII, 414.

" " unless conditions strictly complied with, surety not liable, XXVIII, 414.

" " guaranty on credit 6 months, part sold on 4 and part on 6, seller waited 6, XXVIII, 414.

" " how far bill of goods conclusive, XXVIII, 414.

" " so though purchaser averaged, XXVIII, 414.

" " guaranty for steam engine, different one supplied, XXVIII, 414.

" " of cargo nuts, those on deck not delivered, XXVIII, 415.

" " of canal 20 feet, government accepted one 18 feet, XXVIII, 415.

" " particular kind flour, different kind delivered, XXVIII, 415.

" " of paper payable at particular bank, not so payable but left there, XXVIII, 415.

" " of floating debt, not liable for note credited all at once, XXVIII, 415.

" " for loan, part turned on old debt, XXVIII, 415.

" " such agreement made before note made, fraud of principal on surety, XXVIII, 415.

" " question of benefit or prejudice, nothing to do with surety's liability, XXVIII, 415.

" " interest reduced from 7 to 6 per cent., XXVIII, 416.

" " landlord did not furnish Croton water, XXVIII, 416.

" " after surety guarantied lease, landlord and tenant agreed for repair of building, XXVIII, 416.

Principal and Surety—continued.

- " " court changed amount alimony secured, XXVIII, 416.
- " " that buildings should be kept insured; mortgagee in possession changed situation, XXVIII, 416.
- " " for rent and return of piano, owner sold it and took bill on London, XXVIII, 416.
- " " creditor waived insurance, XXVIII, 416.
- " " surety for gas used by A., who moved out and gas supplied to B., company not notified of A.'s removal, XXVIII, 417.
- " " two partners, one retired and remaining sold, XXVIII, 417.
- " " to individual not liable to firm of which he is one, XXVIII, 417.
- " " surety for one as agent; he taken in as partner, XXVIII, 417.
- " " surety for one as agent, he and partners acted, XXVIII, 417.
- " " surety for two trustees one died, XXVIII, 417.
- " " for two guardians, one discharged by court, XXVIII, 417.
- " " for drafts at 60 days not liable for at 90, XXVIII, 417.
- " " surety for the making of improvements; obligee advised principal not to make them, XXVIII, 417.
- " " if contract provides for alterations, surety not discharged thereby, XXVIII, 417.
- " " that officer shall obey by-laws, not discharged by acts *ultra vires*, XXVIII, 418.
- " " one indorsed notes on condition proceeds to be used in purchasing property to be sold by creditors and proceeds applied on notes, XXVIII, 418.
- " " creditor included three years' insurance and then failed to keep insured, XXVIII, 418.
- " " creditor secured by chattel mortgage, which allowed principal to sell, XXVIII, 418.
- " " creditor sold debtor's property under agreement to apply on secured debt, XXVIII, 418.
- " " one surety received mortgage security which omitted to record and lost, XXVIII, 418.
- " " holder omitted to charge solvent prior indorser, XXVIII, 418.
- " " creditor sold collateral without proper notice to principal, how far discharges, XXVIII, 418.
- " " effect non-performance by landlord of independent agreement, XXVIII, 419.
- " " remedy of tenant, XXVIII, 419.
- " " mere agreement to accept less will not discharge surety, XXVIII, 419.
- " " change not affecting surety's position, XXVIII, 419.
- " " landlord agreed to let premises for tenant and apply rent on lease, surety not discharged, XXVIII, 419.
- " " creditor reserving remedy against sureties, XXVIII, 419.
- " " in Rhode Island, attachment bond extinguished by death of party, XXVIII, 419.
- " " judgment against principal debtor and two successive sureties; last surety paid judgment and had assigned to third person for his benefit; first surety's land sold and bid in by second; principal debtor paid judgment to second surety who satisfied it; second surety redeemed his land: held, he could not recover

Principal and Surety—continued.

of principal debtor balance paid on such redemption after suing second surety and collecting part of him, XXVIII, 680.

Privileged Communication. See *Evidence*.

Process. See *Disqualification*.

Property, in coffin may be laid in person furnishing, XXVIII, 656.

See *Gambling Instruments—Obscene Literature*.

Prosecutor. See *Consent*.

Publication. See *Default*.

Public Officer, when and how may be removed, XXVIII, 825.

See *Attachment—Officers*.

R.

Railway Companies, mandamus to compel exercise of franchise, to build bridge, etc., XXVIII, 4.

“ “ may make reasonable rules and regulations, XXVIII, 268.

“ “ as to setting aside car for ladies, XXVIII, 268.

“ “ right to sit in drawing room car, no other seats, XXVIII, 268.

“ “ may make reasonable rules, XXVIII, 794.

“ “ purchaser ticket must inform himself as to transit and conduct of trains, XXVIII, 268.

“ “ onus not on company to show passenger knew, XXVIII, 269.

“ “ conductor may eject disorderly passenger, though not done at moment of disorder, XXVIII, 269.

“ “ one advising passengers not to pay, is, XXVIII, 269.

“ “ but must tender back proportion of fare, XXVIII, 269.

“ “ can't eject for not entering particular door, XXVIII, 269.

“ “ when may be ejected though offers fare, XXVIII, 269.

“ “ putting off for not paying extra on train instead of buying ticket, XXVIII, 269.

“ “ where may be put off, XXVIII, 269.

“ “ refused to pay, saying hadn't determined how far would go, XXVIII, 269.

“ “ tendered \$20 gold piece, conductor couldn't change, XXVIII, 269.

“ “ conductor handed back too much, can only ride distance conductor in fact retained for, XXVIII, 269.

“ “ if passenger tenders invalid ticket, cannot be ejected till fare demanded, and if declines, asked to leave, XXVIII, 269.

“ “ remedy of passenger carried by station where train ought to have stopped, XXVIII, 270.

“ “ must allege train was one which ought to have stopped, XXVIII, 270.

“ “ got on train which ought not to stop, but conductor took up ticket and agreed to do so, XXVIII, 270.

“ “ such agreement cannot be inferred from conductor taking ticket, XXVIII, 270; *Id.*, 270.

“ “ if does not stop, passenger must pay to first station does stop, or may be ejected, XXVIII, 270.

“ “ even though train occasionally stops, XXVIII, 270.

“ “ only right to be carried according to custom of road, and must ascertain whether train stops, XXVIII, 270.

Railway Companies—continued.

- “ “ passenger in wrong, and cannot insist on being put off at station called for by ticket, XXVIII, 270.
- “ “ conductor cannot expel while car in motion, XXVIII, 271, 276.
- “ “ or if attempts, passenger may resist, XXVIII, 271, 276.
- “ “ not expelling remote from station, if reasonable, XXVIII, 271.
- “ “ when provision that may be expelled at stopping place not mandatory, XXVIII, 271.
- “ “ passenger paid part fare, XXVIII, 271.
- “ “ must offer to return money *before*, and not after ejecting, XXVIII, 271.
- “ “ refused to pay after reaching station called for by ticket, on ground fare same from starting to another station further on, XXVIII, 271.
- “ “ rode part way on freight train, got off and on to another train, XXVIII, 271.
- “ “ passenger having ticket may be ejected if refuses to show it, XXVIII, 271.
- “ “ so if have lost ticket, XXVIII, 271.
- “ “ surrendered to one conductor, and called for by another, XXVIII, 271.
- “ “ paid for ticket to B., given one to A. only, XXVIII, 271.
- “ “ commutation ticket governed by rules of company, XXVIII, 272.
- “ “ duty to show it, XXVIII, 272.
- “ “ commutation ticket left at home by mistake, XXVIII, 272.
- “ “ had it about person, but couldn't find it, XXVIII, 272.
- “ “ another allowed to ride on it, subsequently taken up by conductor, XXVIII, 272.
- “ “ right of passenger to particular seat, XXVIII, 272.
- “ “ holder cannot stop over and ride residue of distance on another train, XXVIII, 272.
- “ “ though allowed to do so by another conductor, XXVIII, 272.
- “ “ where journey interrupted by accident, XXVIII, 273.
- “ “ if over two roads, at *terminus* of one may stop over, XXVIII, 273.
- “ “ such tickets coupons of each road, XXVIII, 273.
- “ “ if one who stops over refuses to pay fare and is ejected, conductor must not keep ticket, XXVIII, 273.
- “ “ ticket limited as to *time*, XXVIII, 273.
- “ “ stop over, indorsement don't change as to *time*, XXVIII, 273.
- “ “ for Saturday undertook to ride on another day, XXVIII, 273.
- “ “ though so told by station agent, XXVIII, 273.
- “ “ told by station agent could ride on any train though ticket stated only on excursion trains, XXVIII, 273.
- “ “ “not good” if detached from stub, XXVIII, 273.
- “ “ from A. to B. cannot ride from B. to A., XXVIII, 274.
- “ “ company bound by contracts of *general agents*, XXVIII, 274.
- “ “ how far station agent may bind, XXVIII, 274.
- “ “ station agent of another road told could stop off, XXVIII, 274.
- “ “ conductor agreeing to put off at station, did not stop, XXVIII, 274.
- “ “ conductor agreed to slack up, XXVIII, 274.

Railway Companies—continued.

- " " conductor told could get off and take another train, XXVIII, 274.
- " " passenger got off on conductor's check without being told so, XXVIII, 275.
- " " conductor's check no evidence of right to ride on another train, XXVIII, 275.
- " " started on slow train and conductor told passenger his check good on faster one, XXVIII, 275.
- " " station agent told passenger at time of purchase particular train stopped, XXVIII, 275.
- " " after portion of way two branches, must take shortest, though got beyond divergence, if offered ride back to that, XXVIII, 275.
- " " only entitled to ride on most direct route, XXVIII, 275.
- " " if takes other, must pay additional fare, XXVIII, 275.
- " " if gets on wrong train must pay to first stopping place, XXVIII, 275.
- " " if put off at any other, must be reasonably done, XXVIII, 276.
- " " if has right to ride, may resist attempt to put off, XXVIII, 276.
- " " if refuses to pay and car stopped, cannot then tender, XXVIII, 276.
- " " unless at regular station, XXVIII, 276.
- " " conductor sued for assault and battery, must plead facts giving right to eject, XXVIII, 276.
- " " cannot show bruises fortnight after ejection, XXVIII, 276.
- " " passenger injured while riding in baggage car, XXVIII, 794.
- " " effect of temporary visit to, XXVIII, 794.
- " " rule intended for safety of passenger, company relieved if injured in consequence of violation of, XXVIII, 794.
- " " conductor cannot give leave to violate rule to company's prejudice, XXVIII, 794.
- " " effect of neglect of conductor to enforce rule, XXVIII, 794.

See Carriers—Mandamus—Negligence.

Rape, woman must not consent during any part connection, XXVIII, 550.

- " must have made all resistance capable of, XXVIII, 550.
- " utmost physical resistance capable of, XXVIII, 550.
- " if submits through fear, XXVIII, 550.
- " difference between consent and submission, XXVIII, 550.
- " on young girl consent not defence, XXVIII, 550.
- " fraud on feeble minded woman, XXVIII, 550.
- " by deception inducing to believe husband, XXVIII, 550.
- " on imbecile woman, XXVIII, 550.

- Ratification; judgment against principal debtor and two successive sureties; last surety paid judgment and had it assigned to third person for his benefit; first surety's land sold and bid in by second; principal debtor paid judgment to second surety who satisfied it; second surety redeemed his land: held, he could not recover of principal debtor balance paid on such redemption after suing second surety and collecting part of him, XXVIII, 680.**
- " receipt of proceeds without knowledge of unauthorized warranty not ratification, XXVIII, 680.
 - " otherwise with knowledge, XXVIII, 680.
 - " so if agent perpetrates fraud within scope of authority, XXVIII, 680.

Ratification—continued.

" receipt of own property no ratification of unauthorized, unknown, collateral contract, XXVIII, 680.
See *Fraud*.

Real Estate, when railway tracks, telegraph poles, etc., in public streets are, XXVIII, 75.

See *Insurance, Fire—Larceny*.

Receiver, whether money in hands of may be attached, and when, XXVIII, 198.

Recitals. See *Officers*.

Reference. See *Jurisdiction*.

Refusal. See *Demand*.

Regulations. See *Railway Companies*.

Remittitur, case remanded unless party gave security, failed to give, court may relieve, XXVIII, 78.

" in New York, rule as to sending down, intended to prevent surprise, XXVIII, 78.

" if regularly sent down, ordinarily party not relieved, XXVIII, 78.

" otherwise if irregularly sent, XXVIII, 78.

" when court loses by sending down, XXVIII, 78.

" court below requested to return, XXVIII, 78.

" from Supreme Court of United States, XXVIII, 78-9.

Res adjudicata, decision on *habeas corpus*, how far is, XXVIII, 40.

Rescission, holder of forged bonds gave them to maker for new obligation ; maker not bound to return, XXVIII, 842.

Reservation. See *Easements*.

Res gestæ. See *Dying Declarations*.

Revivor. See *Abatement*.

Riot, tearing down bawdy houses under supposed right to do so, XXVIII, 580.

S.

Sale. See *Principal and Agent*.

Sea. See *Larceny*.

Seaweed, entering another's land and taking, XXVIII, 127.

Service. See *Default*.

Set-off, when party defrauded must use other means of indemnity he possesses, XXVIII, 840-1.

Settlement. See *Compromise*.

Sheriff. See *Attachment—Officers*.

Ships. See *Venus*.

Statute, no defence to financial officer that statute fraudulently passed, XXVIII, 5.

" when printed, of another state, may be read, XXVIII, 37, 39.

" as to larceny of property in another state, constitutional, XXVIII, 624.

" when corporation included in word " person," XXVIII, 783.

See *Day—Disqualification*.

Stay, when not entitled to on motion, but must plead facts in justification, XXVIII, 830.

Stockholders, not till transfer on books, XXVIII, 325.

" not liable for tort of corporation, XXVIII, 67, 700.

" liability of corporation for refusing to transfer stock, XXVIII, 842.

Stockholders—*continued*.

" rule of damages, XXVIII, 842.
See *Bona fide—Disqualification*.

Streets, when municipal corporation not liable for closing, XXVIII, 831.
See *Municipal Corporations*.

Subrogation, when party defrauded must use other means of indemnity he possesses, XXVIII, 840-1.
See *Principal and Surety*.

Suffer. See *Bona fide*.

Support, without contract or privity, vendor stands same as does to others, XXVIII, 122.

" if surface or crop injured by mining, heat, or smoke, may recover, XXVIII, 122.

" must remove carefully, leaving support, etc., XXVIII, 122.

" grantee of minerals bound to leave proper support, XXVIII, 122.

" though only for land in natural state without buildings, XXVIII, 122.

" though if buildings, may recover if would have happened without them, XXVIII, 122.

" removing all support, *prima facie*, would have happened without buildings, XXVIII, 122.

" prescribing pillars in certain distance does not excuse others, if necessary, XXVIII, 122.

" surface sold to one, minerals to another, owner minerals to get them on paying surface damages, if any : owner surface put on buildings : is owner minerals liable for injury to them? XXVIII, 122.

Surety. See *Principal and Surety*.

T.

Taxation, when railway tracks, etc., in public streets taxed as real estate, XXVIII, 75.

" when damages in eminent domain cannot be assessed on adjoining owners, XXVIII, 830.

Time. See *Day*.

Title, to proceeds of bill of exchange indorsed for collection, XXVIII, 838.

" of coffin, may be laid in person furnishing, XXVIII, 666.

" to money fraudulently obtained received in payment of precedent debt, XXVIII, 678.

" which had fraudulently misappropriated, XXVIII, 678.

" which had obtained by forgery, XXVIII, 678.

" taking chattel mortgage property to Canada, and selling according to law of that province, XXVIII, 679.

" rule in Lower Canada, XXVIII, 679.

" A. sells to B., supposes selling to B. as C.'s agent, no remedy against C. if he buys of B., XXVIII, 679.

See *Animals—Bona fide—Consent—Fraud—Larceny*.

Tort, stockholder not liable for, of corporation, XXVIII, 67, 700.

Town. See *Mandamus*.

Treaty. See *Extradition*.

Trespass, entering and taking seaweed, XXVIII, 127.

See *Animals—Disqualification—Negligence—Officers*.

Trial. See *Jurisdiction—Issues*.

Trover, paper delivered to one whose name forged to it ; not liable for refusing to return it, XXVIII, 842.

See *Officers*.

U.

Ultra Vires. See *Illegal Agreements—Principal and Surety.*

Uncertainty. See *Conveyance.*

Undue Preference, carrier giving one customer over another, XXVIII, 141.

V.

Vacancy. See *Officers.*

Vendor and Vendee. See *Bona fide—Larceny.*

Venue, where offence to be punished, XXVIII, 27.

“ where principal and where accessory to be indicted, XXVIII, 27.

“ larceny on ship-board, XXVIII, 28.

“ two acts done in different counties, XXVIII, 28.

“ dam in one, nuisance in another, XXVIII, 28.

“ servant receives money in one county, demanded in another, XXVIII, 28.

“ when no defence, converted in another, XXVIII, 28.

“ one sent forged bonds into another county for issue, XXVIII, 28.

“ advising offence in another county, XXVIII, 28.

“ signal in one for offence in another, XXVIII, 28.

“ sending stolen bonds into another state for sale, XXVIII, 28.

“ forging deed in one state, sending into another, XXVIII, 28.

“ larceny in one, property taken to another, XXVIII, 29.

“ agent to collect, guilty of embezzlement, XXVIII, 29.

See *Jurisdiction.*

Verdict. See *Issues.*

Vessels. See *Venus.*

Voter. See *Insanity.*

W.

Waiver, when provision in policy that consent must be in writing, waived, XXVIII, 538.

“ how far conductor may waive rule to prejudice of railway company, XXVIII, 794.

See *Demand.*

Warranty, on sale of provisions “with all faults” not sale by sample, XXVIII, 157.

“ on sale of reaper, not delivered till late, and then broke down, XXVIII, 157.

“ when and how far agent may warrant, XXVIII, 680.

See *Animals.*

Water and Watercourses, amount of water which may be used, XXVIII, 867.

“ “ purpose for which may be used, XXVIII, 867.

“ “ right to an open raceway, XXVIII, 867.

Way, when reserved of necessity, XXVIII, 867.

“ how right of originates, XXVIII, 867.

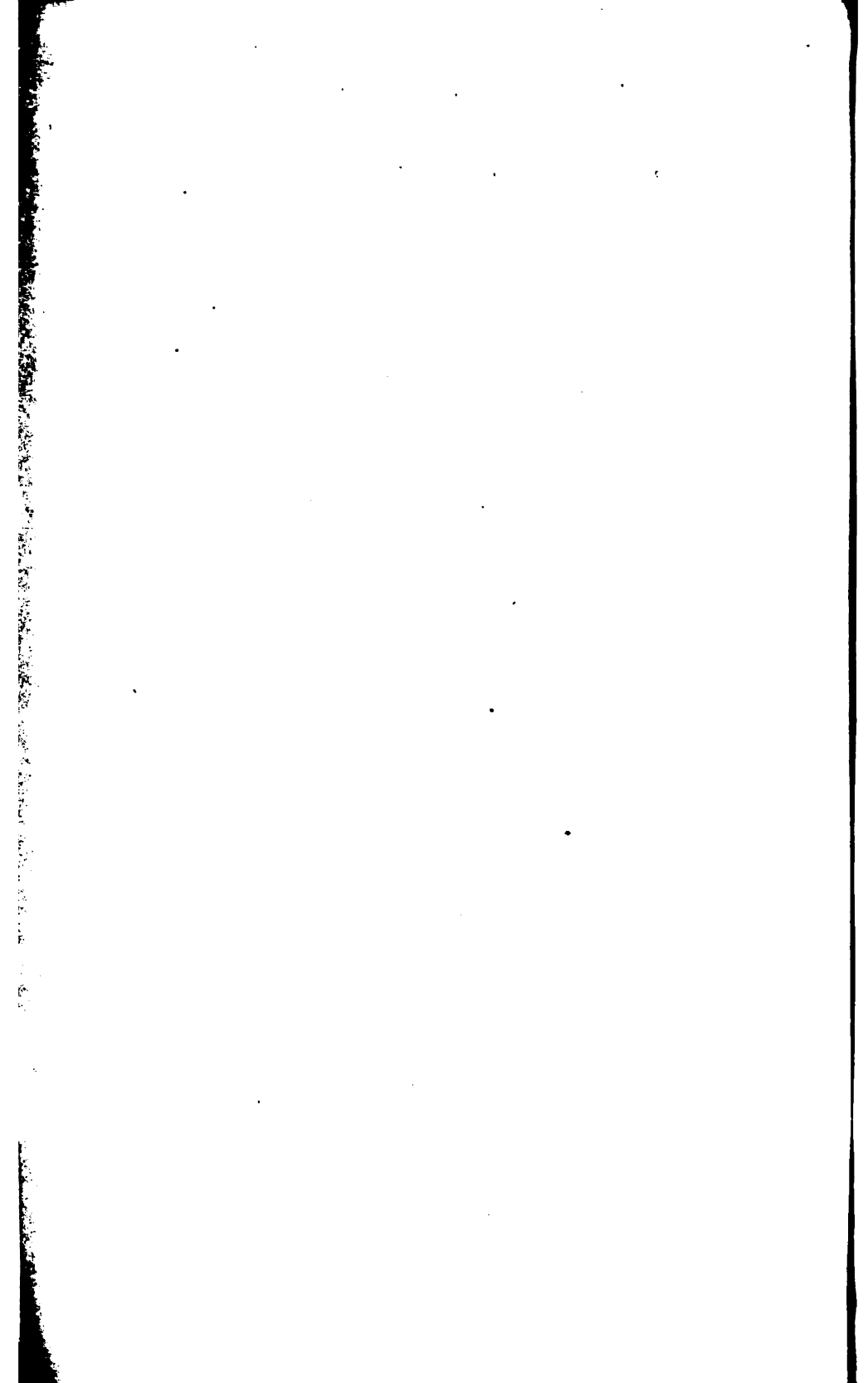
“ is mere easement, XXVIII, 867.

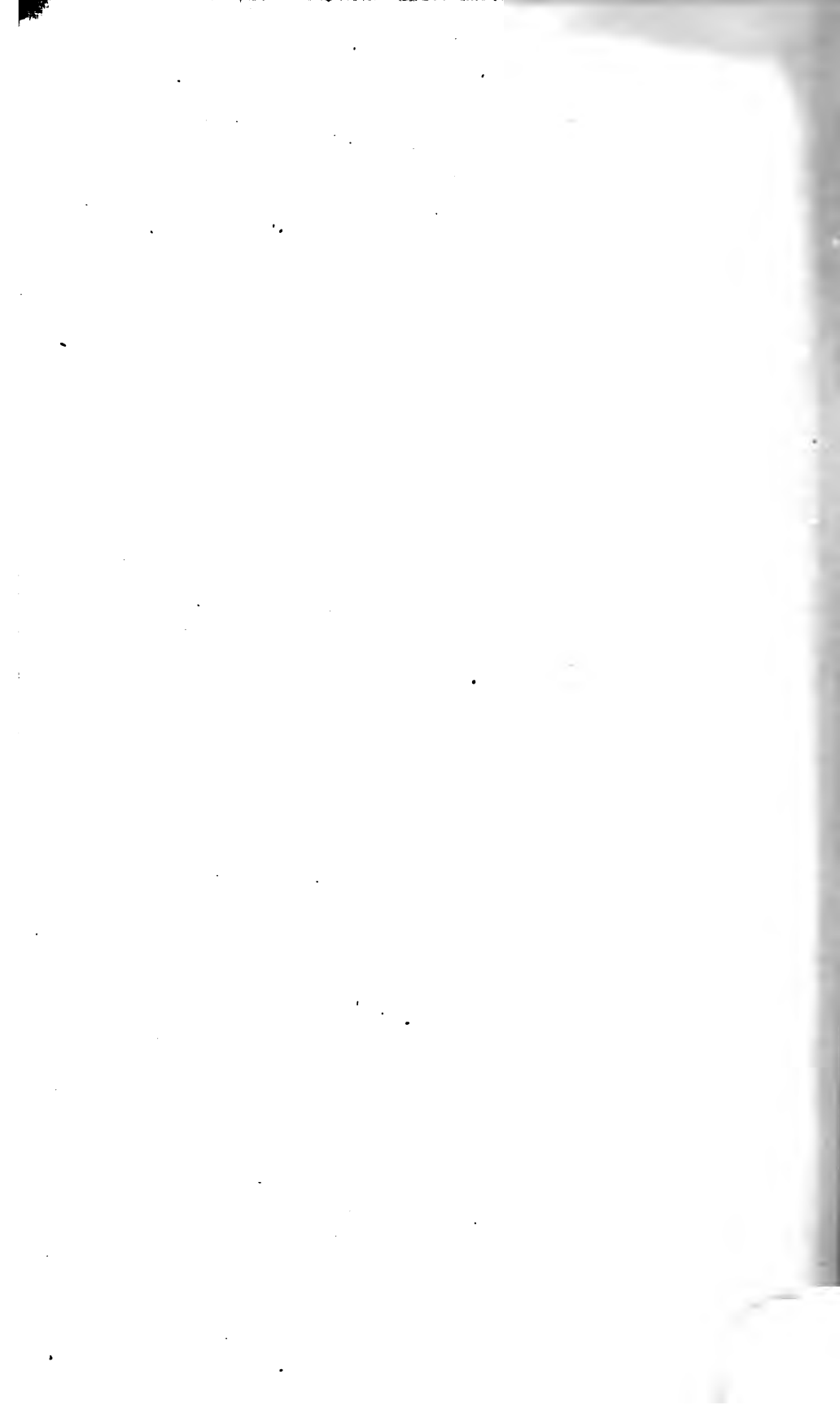
“ boundary of deed by that taken by eminent domain, and not location after subsequent purchase, XXVIII, 867.

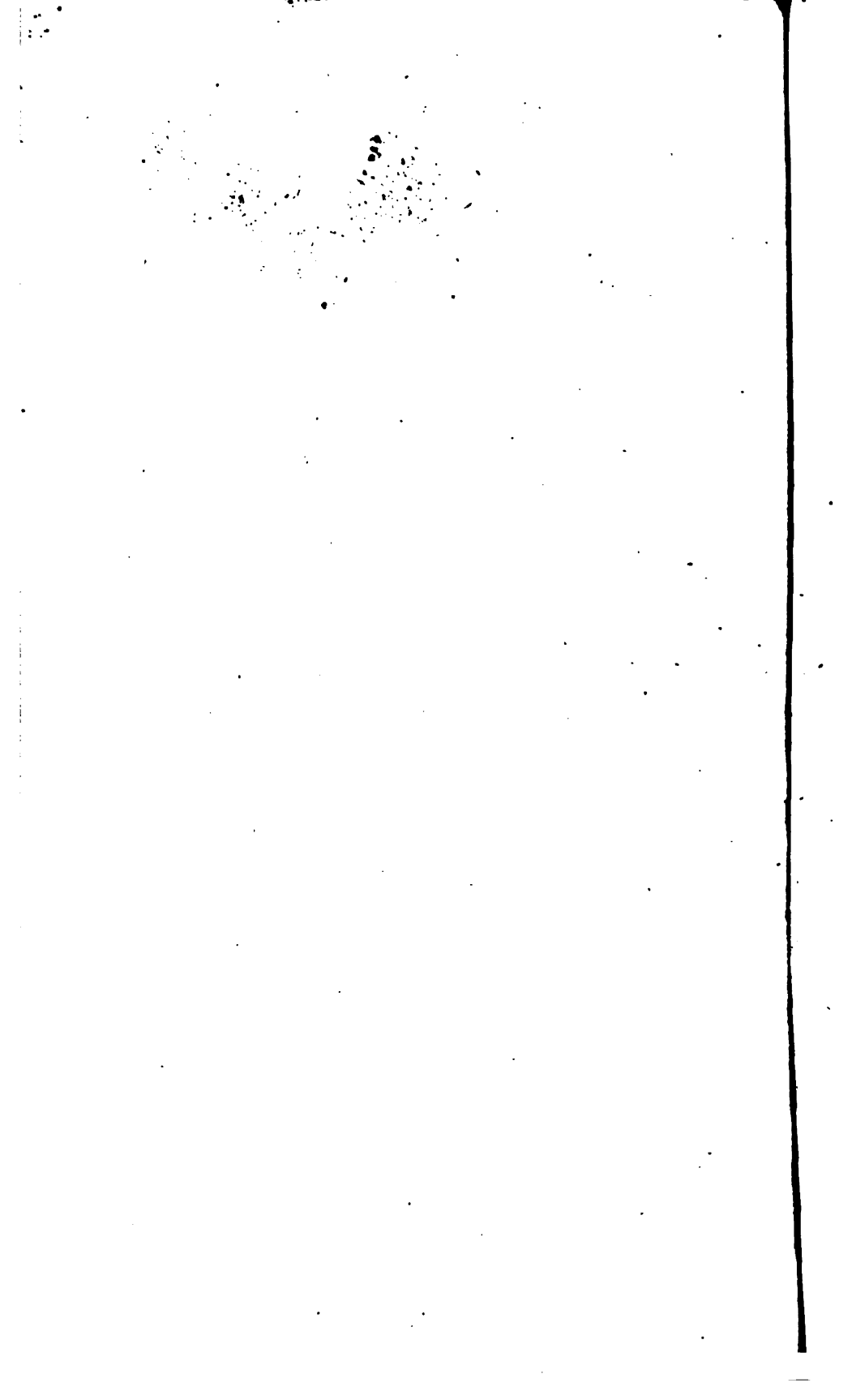
“ extent of use which may make, XXVIII, 867.

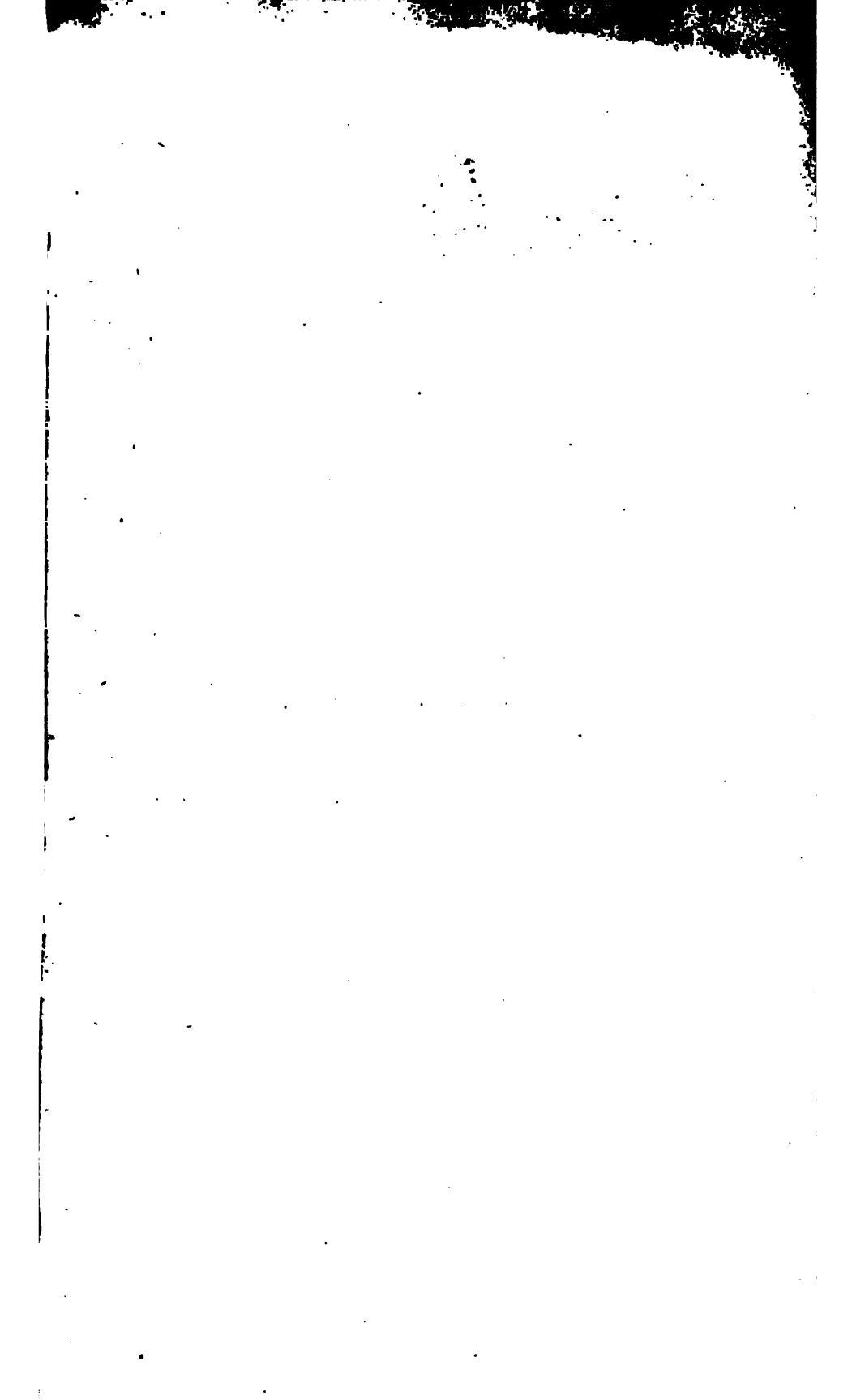
“ when one having, may go over adjoining lands if foundeours, XXVIII, 867.

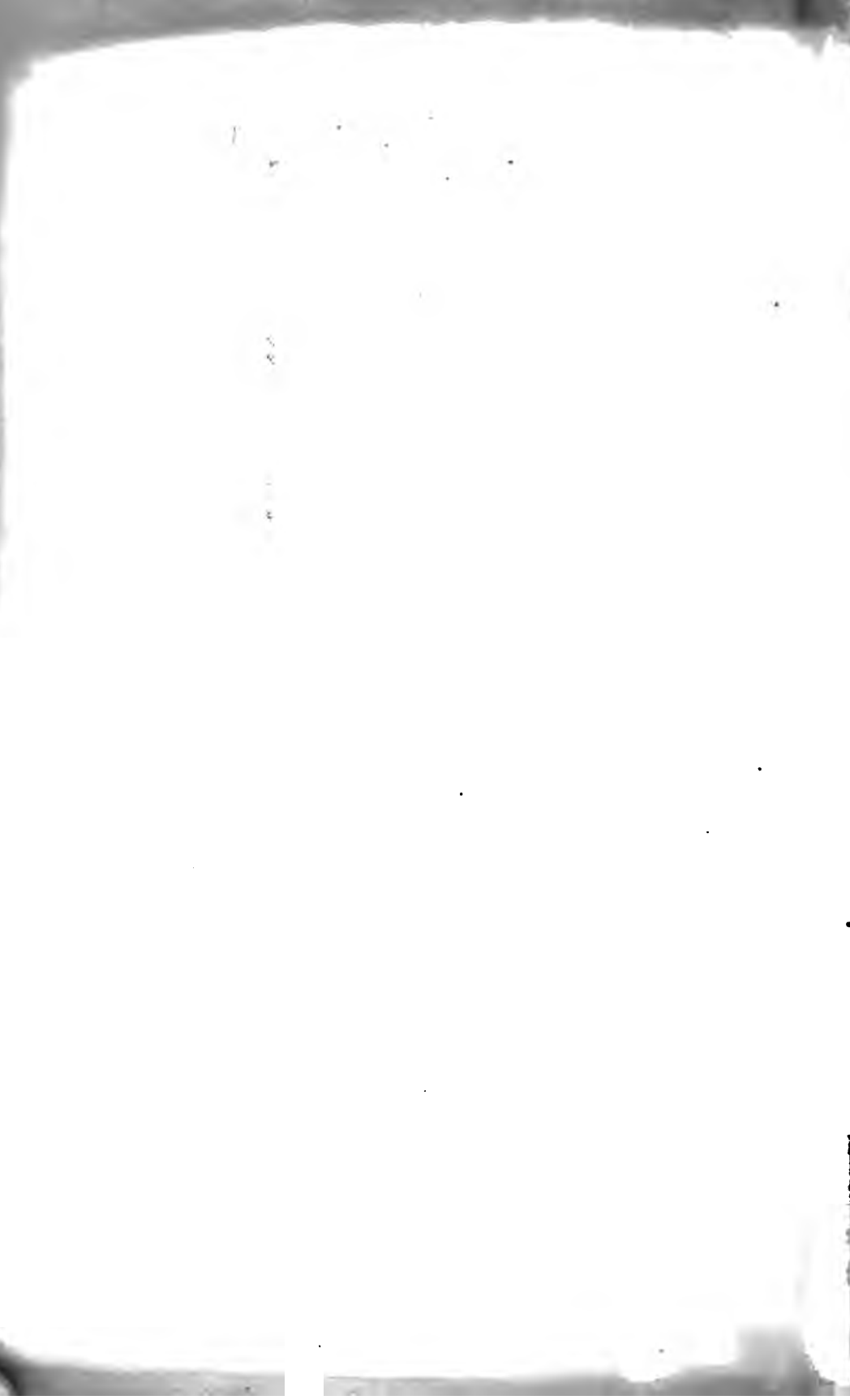
- Witness**, wife against husband, XXVIII, 867-8.
 " statute requiring accused to be confronted with, only applies to those in state, XXVIII, 624.
 See Dying Declarations—Impeachment.
- Words**, when corporation included in word "person," XXVIII, 783.
- Writing**, when extras may be recovered, though not so ordered, XXVIII, 204.
 " when ordered by owner of building, XXVIII, 205.
 " when provision in policy that consent must be in writing, waived, XXVIII, 523.
 " when appointment of officer required to be in writing, and what is such appointment, XXVIII, 541.
- Wrongdoers**, stockholder not liable for tort of corporation, XXVIII, 67, 700.
 " one directing act, XXVIII, 747.
 See Negligence.











Stanford Law Library



3 6105 063 532 480